Does the Prior Conviction Exception Apply to a Criminal Defendant's Supervised Release Status?

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INTRODUCTION

By the end of 2007, 5.1 million people were serving probation, parole, or supervised release in the United States.[1] This number represents one in every forty-five adults and continues to increase every year.[2] Moreover, many individuals commit new crimes while they are on some form of supervised release. A federal study in 1991 demonstrated that 45 percent of state prison inmates were under conditions of parole or probation at the time they committed their offense.[3] Upon finding the fact that defendants committed crimes while on supervised release for an earlier crime, judges have routinely imposed enhanced sentences.

The Supreme Court's decision in *Apprendi v New Jersey*[4] disturbed this practice of judge-imposed enhancements governing recidivists. The *Apprendi* Court held that all facts other than a prior conviction must be

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1 See Lauren E. Glaze and Thomas P. Bonczar, Bureau of Justice Statistics, *Probation and Parole in the United States, 2007: Statistical Tables*, table 1 (Dec 2008), online at http://www.ojp.usdoj.gov/bjs/pub/pdf/ppus07st.pdf (visited Sept 1, 2009) (reporting 5,117,500 persons under "community supervision" in 2007). Parole is a form of supervision granted by a parole board to criminals before they serve out their prison terms. State governors usually appoint state parole boards, and parole laws vary from state to state. Probation is supervision imposed by a court as an alternative to a criminal's incarceration. Congress abolished federal parole in 1984 but retained federal probation under limited circumstances. Comprehensive Crime Control Act of 1984 § 218(a)(5), Pub L No 98-473, 98 Stat 1837, 2027 (overhauling the federal sentencing system and revising bail and forfeiture procedures), repealing 18 USCA § 4201 et seq. Sixteen states have also abolished discretionary parole, including California and Illinois. Bureau of Justice Statistics, *Reentry Trends in the US: Release from State Prison*, online at http://www.ojp.usdoj.gov/bjs/reentry/releases.htm (visited Sept 1, 2009). As an alternative, a federal court can impose a term of supervised release after the criminal has served out his prison term. 18 USC § 3583. Because differences between parole, probation, and federal supervised release are not relevant to the analysis provided in this Comment, I will use the term "supervised release" throughout to refer to all three, unless a court opinion specifically refers to one particular type of supervised release.

2 See Bureau of Justice Statistics, *Probation and Parole Statistics: Summary Findings*, online at http://www.ojp.usdoj.gov/bjs/pandp.htm (visited Sept 1, 2009); Glaze and Bonczar, *Probation and Parole* (cited in note 1).

3 Robyn L. Cohen, Bureau of Justice Statistics, *Probation and Parole Violators in State Prison, 1991* (Aug 1995), online at http://www.ojp.usdoj.gov/bjs/pub/pdf/ppvsp91.pdf (visited Sept 1, 2009).

4 530 US 466 (2000).

found by a jury beyond a reasonable doubt in order to enhance a criminal defendant's sentence beyond the statutory maximum.[5] After *Apprendi*, the question arose whether, under the Sixth Amendment, a jury must find the fact of a criminal defendant's supervised release status when he commits the new crime. A majority of state and federal courts have ruled that a person's supervised release status falls under the "prior conviction exception" carved out in *Apprendi*'s bright-line rule, and thus a judge may find such facts. The Ninth Circuit and a minority of state courts have held otherwise.

This Comment concludes that a judge cannot find the fact that the defendant committed the crime while on supervised release. Part I traces the development and application of the prior conviction exception. Part II describes the current split over whether the exception covers the fact of a person's supervised release status at the time of the crime. Part III proposes that a judge may only find facts previously found by a jury or admitted to in a guilty plea in a prior proceeding resulting in conviction. A defendant's supervised release is not such a fact. This approach is more consistent with Sixth Amendment case law than the current positions of courts on both sides of the split. Both the majority and minority views fail because they allow judges to find facts that were not previously found by a jury.

I. BACKGROUND LAW

Under the Sixth Amendment, a criminal defendant has a right to a trial by jury.[6] The Supreme Court has held that this right is guaranteed to federal and state defendants.[7] Further, the Court has held that the Due Process Clause of the Fifth and Fourteenth Amendments requires that federal and state defendants can only be convicted upon "proof beyond a reasonable doubt of every fact necessary to constitute the crime with which [they are] charged."[8]

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5 Id at 490.

6 The Sixth Amendment reads,

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

US Const Amend VI.

7 *Duncan v Louisiana*, 391 US 145, 149–50 (1968).

8 *In re Winship*, 397 US 358, 364 (1970).

In *McMillan v Pennsylvania*,[9] the Court drew a distinction between elements of a crime and sentencing factors, where a judge found the latter by a preponderance of the evidence in order to enhance a defendant's sentence.[10] The Court in *Almendarez-Torres v United States*[11] then held that the fact of a defendant's prior aggravated felony was a sentencing factor because it was a fact related to recidivism.[12]

Two years later, the Court in *Apprendi* replaced the element-factor distinction with a bright-line rule. The Court held that any fact that increased a defendant's sentence beyond the statutory maximum must be pled in an indictment and found by a jury beyond a reasonable doubt.[13] Applying *Apprendi*'s holding, the Court subsequently overturned several state statutes[14] as well as the Federal Sentencing Guidelines.[15] The Court did not overrule *Almendarez-Torres*, whose holding came to be known as the prior conviction exception,[16] but the scope of the exception remained unclear, namely whether it covered all facts of recidivism or just the fact of a prior conviction.

Part I.A discusses the Court's earlier approach of distinguishing elements from sentencing factors. Part I.B presents the current approach toward jury factfinding first announced in *Apprendi* and then solidified in *Blakely v Washington*.[17] Part I.C traces the evolution of the prior conviction exception first developed by *Almendarez-Torres*, explains how the current approach affirms the exception, and finally describes the Court's most recent clarification of the exception in *Shepard v United States*.[18]

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9 477 US 79 (1986).

10 Id at 81–84.

11 523 US 224 (1998).

12 Id at 226–30.

13 *Apprendi*, 530 US at 490.

14 See, for example, *Cunningham v California*, 549 US 270, 274–75 (2007) (striking down California's determinate sentencing law, which permitted a judge to impose an "upper term" sentence when the jury verdict only authorized a "middle term" sentence); *Blakely v Washington*, 542 US 296, 305 (2004) (deeming unconstitutional Washington's sentencing regime, which authorized judges to find facts, other than prior convictions, that would enhance the defendant's sentence beyond the statutory maximum); *Ring v Arizona*, 536 US 584, 588–89 (2002) (striking down a death penalty provision of Arizona's sentencing statute, which only allowed the judge-found fact of an aggravating circumstance to enhance a defendant's sentence from life imprisonment to death).

15 The Court held unconstitutional the Federal Sentencing Guidelines, which required federal judges to enhance sentences beyond what a jury verdict authorized upon finding aggravating facts. *Booker v United States*, 543 US 220, 222 (2005). The remedial portion of the opinion rendered the Guidelines advisory, not mandatory, to cure the Sixth Amendment deficiency. Id at 258–67.

16 See, for example, *United States v Steed*, 548 F3d 961, 979 (11th Cir 2008) ("The prior-conviction exception derived from the Supreme Court's earlier decision in *Almendarez-Torres*.").

17 542 US 296 (2004).

18 544 US 13 (2005).

A. The Earlier Approach: Elements or Sentencing Factors

In *McMillan*, the Court drew a distinction between "elements" of a crime that are necessary for conviction and "sentencing factors" that are used to increase or decrease a criminal defendant's punishment.[19] The Court held that an element must be found by a jury beyond a reasonable doubt, whereas a sentencing factor could be found by a judge by a preponderance of the evidence.[20] Following this distinction, the Court ruled that a judge was permitted to find by a preponderance of the evidence that the defendant "visibly possessed a firearm" during his crime.[21] The Pennsylvania statute had defined such a fact as a sentencing factor and not an element of the crime. As a result of the judge's finding, the defendant was sentenced to a mandatory minimum under the statute. Under the *McMillan* approach, the "state legislature's definition of the elements of the offense is usually dispositive."[22] But even so, the Court cautioned that states could not define elements and sentencing factors however they wanted.[23]

Nevertheless, the Court in *McMillan* asserted that the Pennsylvania statute did not transgress "constitutional limits," and thus visible possession need not be treated as an element.[24] The Court distinguished *McMillan* from an earlier decision, *Mullaney v Wilbur*.[25] There, the Court rejected a Maine murder statute, which provided that the element of malice would be presumed upon proof of intent to kill resulting in death.[26] Under the statute, the prosecution did not need to prove malice beyond a reasonable doubt, even though such a fact differentiated murder from manslaughter.[27] Upholding the Maine statute "would leave the State substantially free to manipulate its way out" of proving every fact necessary to a crime beyond a reasonable doubt.[28] According to the *McMillan* Court, however, none of the burden-

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19 477 US at 85–86.

20 Id at 91.

21 Id.

22 Id at 85.

23 *McMillan*, 477 US at 85 (asserting that there are "constitutional limits" on states' discretion to define elements and sentencing factors but failing to precisely define those limits). See also *Patterson v New York*, 432 US 197, 202 (1977) (ruling that state criminal procedures are usually dispositive, unless they offend "some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental") (citation omitted).

24 477 US at 88 (claiming that the statute was not "tailored to permit the visible possession finding to be a tail which wags the dog of the substantive offense").

25 *Mullaney v Wilbur*, 421 US 684 (1975).

26 Id at 686 & n 3.

27 Id.

28 *Jones v United States*, 526 US 227, 240–41 (1999) (characterizing the statute at issue in *Mullaney*).

shifting problems in *Mullaney* pertained to the judicial factfinding at issue in *McMillan*.[29]

For the next fourteen years until *Apprendi*, courts relied on legislatively drawn distinctions between elements and sentencing factors.[30] Yet, the difficulty of drawing a clear distinction between elements and sentencing factors and the continuing dangers of legislative manipulation eventually led the Court to adopt a starkly different approach.

B. The Current Approach: The *Apprendi* Rule

The Court addressed this problem in *Apprendi*, where it held, "Other than the fact of a prior conviction, 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."[31] The defendant in *Apprendi* fired multiple shots into the house of an African-American family that had moved recently into an all-white neighborhood. The statute at issue allowed the judge to increase the maximum penalty from an offense range of five to ten years to a range of ten to twenty years upon a judicial finding by a preponderance of the evidence that the defendant acted with a "racially biased purpose."[32] The Court struck down the New Jersey statute, holding that a jury must find such a fact beyond a reasonable doubt.[33] The Court provided a survey of English common law in order to emphasize the importance of the jury and the limited discretion judges exercised in sentencing.[34]

In fashioning such a bright-line rule, the Court criticized the *McMillan* distinction between elements and sentencing factors as

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29 *McMillan*, 477 US at 87–88.

30 See, for example, *United States v Stone*, 139 F3d 822, 834 n 12 (11th Cir 1998).

31 530 US at 490. The Supreme Court in a recent decision ruled that a judge could make factual findings other than prior convictions in order to impose consecutive sentences for multiple offenses, even though the jury verdict only authorized concurrent sentences. *Oregon v Ice*, 129 S Ct 711, 714–15 (2009). Although this opinion is in tension with (and perhaps contradicts) *Apprendi* and later cases upholding it, the Court drew a distinction between *Ice* and *Apprendi*. The Court in *Ice* explained, "All of [the *Apprendi*] decisions involved sentencing for a discrete crime, not—as here—for multiple offenses different in character or committed at different times." Id at 717. Because this Comment deals with sentencing for a "discrete crime" and not consecutive sentencing, *Ice* does not affect the analysis here, even though it may signal future changes to Sixth Amendment jurisprudence.

32 *Apprendi*, 530 US at 490.

33 Id at 474.

34 Id at 478–80 ("[W]ith respect to the criminal law of felonious conduct, the English trial judge of the later eighteenth century had very little explicit discretion in sentencing."). For a critique of the *Apprendi* Court's analysis of history and the tradition of sentencing, see Stephanos Bibas, *Judicial Factfinding and Sentence Enhancements in a World of Guilty Pleas*, 110 Yale L J 1097, 1123–32 (2001) (arguing that *Apprendi* undermines the procedural safeguards it purports to uphold).

"elusive" and "constitutionally novel."[35] However, the Court did not overrule *McMillan*. Rather, it distinguished the case on the grounds that *McMillan* did not deal with an imposition of a sentence beyond the statutory maximum but involved a mandatory minimum within a statutory range, where the judge already had authorization based on the conviction alone to impose a sentence within that range.[36]

The Court applied and clarified the *Apprendi* rule in *Blakely*.[37] There, the Court struck down Washington's sentencing regime, which allowed a judge to find that the defendant acted with "deliberate cruelty" to enhance his sentence from fifty-three months to ninety months.[38] Such an enhancement exceeded the statutory maximum because the judge could impose only the fifty-three month sentence based on the jury verdict. The Court held that the "statutory maximum for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of facts reflected in the jury verdict or admitted by the defendant*."[39] After *Blakely*, courts could no longer interpret the "statutory maximum" to include a sentence increment based on a judge-found fact, even though the statute defines the maximum punishment in that way.

C. The Prior Conviction Exception

Part I.C traces how the prior conviction exception has evolved by first pointing out its inception in *Almendarez-Torres* and analyzing the Court's affirmation and subsequent clarification of the exception.

1. Evolution of the prior conviction exception.

Before *Apprendi* cast doubt on the element versus sentencing factor distinction, the Court in *Almendarez-Torres* held that a judge could evaluate a defendant's recidivism as a sentencing factor, rather than an element of the offense, without violating the Sixth Amendment.[40] The Court was interpreting an illegal alien statute,[41] in which the first provision punished reentry into the United States by a pre-

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35 *Apprendi*, 530 US at 494.

36 Id at 487 n 13 ("We do not overrule *McMillan*. We limit its holding to cases that do not involve the imposition of a sentence more severe than the statutory maximum for the offense established by the jury's verdict—a limitation identified in the *McMillan* opinion itself.").

37 See *Blakely*, 542 US at 301–02.

38 Id at 298.

39 Id at 303 (citation omitted).

40 *Almendarez-Torres*, 523 US at 226–27.

41 Id at 226, citing 8 USC § 1326 (governing "Reentry of Removed Aliens").

viously deported alien by imposing a prison term of up to, but no more than, two years.[42] A second provision punished reentry if the alien previously was deported due to an aggravated felony conviction by imposing a prison term of up to twenty years.[43] The Court read the statute's second provision as a sentence enhancement and not as a separate crime, upholding the district court judge's imposition of an eighty-five month prison sentence based on his finding that the defendant previously committed an aggravated felony.[44]

As justification, the Court stated that recidivism "is a traditional, if not the most traditional, basis" for increasing an offender's sentence.[45] Distinguishing recidivism-related facts from all other facts, the Court reasoned that recidivism is not a fact related to the commission of the offense.[46] Moreover, the Court pointed out that Congress has never made recidivism an element of an offense, except in situations where the conduct itself is already unlawful.[47] Apart from the argument based on tradition, the Court also noted the risk of prejudice if courts required juries to find the fact of a prior conviction.[48]

Interpreting a statute similarly structured to the one at issue in *Almendarez-Torres*, the Court in *Jones v United States*[49] came to a different conclusion without overruling recent precedent.[50] Two provisions of the federal carjacking statute authorized imposition of higher penalties if the offense resulted in "serious bodily injury" or death.[51] Unlike *Almendarez-Torres*, the *Jones* Court held that such provisions defined distinct offenses and not sentencing factors.[52] Thus, a jury would need to find beyond a reasonable doubt that the carjacking offense resulted in serious bodily injury or death in order to impose the additional sentence.

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42 See 8 USC § 1326(a).

43 See 8 USC § 1326(b).

44 *Almendarez-Torres*, 523 US at 226–27.

45 Id at 243.

46 Id at 244.

47 Id.

48 *Almendarez-Torres*, 523 US at 235 ("As this Court has long recognized, the introduction of evidence of a defendant's prior crimes risks significant prejudice."). But see *Apprendi*, 530 US at 521 n 10 (Thomas concurring) (pointing out that the defendant may stipulate his prior conviction, or the trial may be bifurcated to prevent the risk of prejudice).

49 526 US 227 (1999).

50 See id at 235–36.

51 18 USC § 2119 (providing a twenty-five-year sentence for inflicting "serious bodily injury" and a life sentence for causing death).

52 *Jones*, 526 US at 229.

In arriving at its conclusion, the Court applied the doctrine of constitutional avoidance, a canon of statutory interpretation that allows the Court to choose one interpretation over another if the latter raises "grave and doubtful constitutional questions" and the former does not.[53] The Court reasoned that treating the two provisions in *Jones* as sentencing factors might violate the Sixth Amendment, and thus such an interpretation should be avoided in favor of a less problematic interpretation. Under the canon, the provisions were treated as setting forth elements of separate crimes to be proven by a jury.[54]

The *Jones* Court reconciled its holding with *Almendarez-Torres* by ruling that *Almendarez-Torres* only applied to facts related to recidivism.[55] In other words, a jury would not need to find facts related to recidivism even if such facts produced an increase in punishment beyond what would otherwise have been imposed. In addition to pointing out that the *Almendarez-Torres* holding "rested in substantial part on the tradition of regarding recidivism as a sentencing factor," the *Jones* Court offered a second justification for the recidivism exception later echoed by *Apprendi*.[56] It asserted that "unlike virtually any other consideration . . . a prior conviction must itself have been established through procedures satisfying the fair notice, reasonable doubt, and jury trial guarantees."[57] This statement by the *Jones* Court suggests that *Almendarez-Torres* was limited only to prior convictions.

2. Upholding the prior conviction exception.

Although *Apprendi* did not overrule *Almendarez-Torres*, the *Apprendi* Court sought to narrow its holding by limiting the case to its facts. Initially, the Court stressed that the defendant in *Almendarez-Torres* had admitted to three prior convictions and that he then proceeded to challenge the sentence increase because the indictment did not list those convictions.[58] Although the Court attempted to frame the decision as dealing only with the "sufficiency of the indictment" as opposed to the larger jury question, the result in *Almendarez-Torres* still left the defendant without a jury to determine the contested

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53 Id at 239–40, quoting *United States Attorney General v Delaware & Hudson Co*, 213 US 366, 408 (1909).

54 *Jones*, 526 US at 248 ("[D]iminishment of the jury's significance by removing control over facts determining a statutory sentencing range would resonate with the claims of earlier controversies, to raise a genuine Sixth Amendment issue not yet settled.").

55 Id at 249.

56 Id.

57 Id.

58 *Apprendi,* 530 US at 488.

facts.[59] To explain this outcome, the Court stated that "the certainty that procedural safeguards attached to any 'fact' of prior conviction . . . mitigated the due process and Sixth Amendment concerns otherwise implicated in allowing a judge to determine a 'fact' increasing punishment beyond the maximum of the statutory range."[60] As in *Jones*, this statement suggests that the Court in *Apprendi* read the exception to jury factfinding as limited only to prior convictions. Although the *Apprendi* Court openly speculated that *Almendarez-Torres* might have been "incorrectly decided," the Court chose not to overrule *Almendarez-Torres*'s decision because the recidivist issue there was not contested in *Apprendi*.[61]

Despite *Almendarez-Torres*'s shaky ground, the Court still refused to overrule *Almendarez-Torres* when it was presented with the direct opportunity to do so, six years after *Apprendi*. In a denial of certiorari, Justice John Paul Stevens, writing for the Court, refused to hear a case involving the same statute at issue in *Almendarez-Torres* because judicial finding of a defendant's prior conviction history "will seldom create any significant risk of prejudice to the accused."[62] Moreover, Stevens appealed to stare decisis, noting that "countless judges in countless cases have relied on *Almendarez-Torres* in making sentencing determinations."[63] Notably, Stevens dissented in *Almendarez-Torres*.[64]

3. *Shepard*'s clarification of the prior conviction exception.

Shepard is the Court's most recent clarification of the prior conviction exception, but the decision does not directly address the issue of a defendant's supervised release status. The Court held that judges could not examine police reports or complaint applications to clarify a facially ambiguous conviction document because such reports were "too far removed from the conclusive significance of a prior judicial record."[65]

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59 See id.

60 Id.

61 Id at 489–90. In a concurring opinion, Justice Clarence Thomas wrote that *Almendarez-Torres* was wrongly decided. See id at 520–21 (Thomas concurring). This is significant because Thomas was part of the 5-4 majority in *Almendarez-Torres*.

62 *Rangel-Reyes v United States*, 547 US 1200, 1201 (2006) (denying certiorari).

63 Id.

64 *Almendarez-Torres*, 523 US at 248.

65 *Shepard*, 544 US at 25. Police reports range widely in their content and in how they are created. They may contain a police officer's lengthy analysis of an investigation, or a succinct description of facts at the scene of a crime. Some may be highly subjective, whereas others may simply be the objective reporting of facts. Officers may rely on witness statements or their own observations in drawing up a report. States have disallowed or allowed police reports as evidence at trial depending on their indicia of reliability and whether they fall under the business records

At issue was whether the defendant had previously been convicted of a "generic burglary," defined as burglary of a home or building, or a "nongeneric burglary," defined as burglary of a ship or motor vehicle. If the defendant had committed a "generic burglary," then his sentence would have been enhanced under federal law.[66] Massachusetts, the state in which Shepard was convicted, did not distinguish between generic and nongeneric burglary convictions, and the defendant's conviction document pursuant to his guilty plea did not make clear which type he had committed.[67]

The Court ruled that a judge may only look at 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."[68] In justification, the Court again relied on the rule of constitutional avoidance, reasoning that the prior conviction requirement set forth in the statute must be construed narrowly so as not to raise constitutional doubts.[69]

II. THE SPLIT

Lower courts have struggled over whether the prior conviction exception precludes a judge from finding facts *related* to a defendant's prior conviction. Specifically, the circuit courts are split as to whether the Sixth Amendment requires a jury to find that a defendant committed an offense while on supervised release.[70] Furthermore, state courts of last resort are divided on this constitutional issue. Relying on *Al-*

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exception to hearsay. See generally George L. Blum, *Admissibility in State Court Proceedings of Police Reports as Business Records*, 111 ALR 5th 1, § 26(a)–(b) (2003). To prevent these evidentiary complications at sentencing, the *Shepard* Court issued a bright-line rule by refusing to allow a judge to examine police reports.

66 Under the Armed Career Criminal Act, a defendant would receive an enhanced sentence if he had previously been convicted of three violent felonies. 18 USC § 924(e). A burglary is a violent felony under the Act only if committed in a building or enclosed space, not including a boat or vehicle. Id.

67 *Shepard*, 544 US at 17–18.

68 Id at 26.

69 Id at 25–26. Writing for the Court, Justice David Souter stated that the factual findings here were "too much like the findings subject to *Jones* and *Apprendi*, to say that *Almendarez-Torres* clearly authorizes a judge to resolve the dispute." Id at 25. Justice Thomas, however, disagreed and went further by stating that the use of police reports would give rise to constitutional error, not doubt. See id at 27 (Thomas concurring). As a result, only a plurality of the Court joined the constitutional doubt argument.

70 Under the Federal Sentencing Guidelines, the defendant's parole or probation status at the time of the offense enables a sentence enhancement beyond the maximum prescribed by statute for the offense, but does not specify that a jury must find such a fact. See USSG § 4A1.1(d).

mendarez-Torres, a majority of circuit and state courts have broadly interpreted the prior conviction exception to allow a judge to enhance a sentence by finding the fact that the defendant committed his crime while on supervised release. By contrast, the minority position, relying on *Apprendi*, has narrowly interpreted the exception so that a judge may find prior convictions and other facts reflected in conviction documents, but not the defendant's supervised release status.

A. The Majority View: Allowing Judges to Find Supervised Release Status under the Prior Conviction Exception

1. Circuit courts.

The Second, Seventh, and Tenth Circuits have held that a judge may find the fact that a defendant committed a crime while on supervised release without violating the Sixth Amendment. These Circuits reason that such a fact falls under the prior conviction exception as articulated in *Apprendi*. Although the Sixth and Eighth Circuits have not explicitly ruled on the precise question, their holdings suggest that they might side with the majority position.[71]

The Second Circuit in *United States v Fagans*[72] relied on a presentence report to enhance the defendant's sentence for possessing a stolen firearm in violation of 18 USC § 922(j).[73] More specifically, the district court increased the defendant's criminal history category under the Federal Sentencing Guidelines because the report indicated that the defendant committed the offense while on a probationary term of six to

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71 See, for example, *United States v Becerra-Garcia*, 28 Fed Appx 381, 385 (6th Cir 2002) (holding that a judge may determine that the defendant's prior conviction was for an aggravated felony); *United States v Campbell*, 270 F3d 702, 704 (8th Cir 2001) (holding that a judge may determine that the defendant's prior convictions were for violent felonies).

72 406 F3d 138 (2d Cir 2005).

73 Id at 141. Many sentencing judges determine a defendant's supervised release status based on presentence reports, court files, or records kept by the departments of corrections. See Tyesha E. Lowery, *One "Get Out of Jail Free" Card: Should Probation Be an Authorized Courts-martial Punishment?*, 198 Milit L Rev 165, 175 (2008) (discussing judges' reliance on presentence reports). Probation officers write presentence reports, which contain a compilation of a defendant's criminal history, describe facts of mitigation and aggravation, and recommend sentences to judges. Id. Defendants have the opportunity to rebut findings contained in the reports, although the report itself and assertions made in the reports are not subject to more rigorous evidence rules at trial. See *United States v Sherlin*, 67 F3d 1208, 1218 (6th Cir 1995). Hearsay evidence, for example, may be admitted at the sentencing hearing. Thus, sentencing hearings do not have full Sixth Amendment protections, although the defendant does retain his right to counsel. *McConnell v Rhay*, 393 US 2, 4 (1968).

twelve months from a state conviction.[74] Though acknowledging the uncertain scope of the prior conviction exception, the Second Circuit claimed that "the conviction itself and the type and length of a sentence imposed seem logically to fall within this exception" and thus did not implicate the defendant's Sixth Amendment rights.[75]

The Seventh Circuit in *United States v Williams*[76] upheld the district court's finding of prior convictions and the fact that the defendant committed the offense while on probation.[77] The defendant in *Williams* was convicted under 18 USC § 922(g)(1), which prohibits possession of a firearm as a felon. His criminal history, including the fact of his probationary status at the time of the offense, placed him in the highest criminal history category under the Federal Sentencing Guidelines.[78] In a presentence report, the probation officer recommended a sentencing range of 92 to 115 months.[79] Without the defendant's criminal history, his sentence would have ranged from 33 to 41 months.[80]

In light of *Almendarez-Torres*, the Seventh Circuit concluded that the prosecution need not prove a defendant's criminal history to a jury in order for the court to apply sentence enhancements.[81] The Seventh Circuit defined "criminal history" to include prior convictions or "the nature of those convictions," including the defendant's probationary status at the time of the crime.[82] Furthermore, the *Williams* court stated that subsequent cases have not only left the *Almendarez-Torres* holding "undisturbed" but have also acknowledged its "continuing

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74 A convict's supervised release status is determined by a supervised release proceeding, which may result in changes to the length of his release. If a court has authority to impose and subsequently modify terms of a defendant's supervised release, the clerk will record these changes of his release status in court documents. See, for example, Cal Penal Code § 1203.3(a). Other times, a parole board, following a grant or revocation of parole, will determine a defendant's supervised release status. In such cases, parole officers create and maintain such records. The probation officer might make reference to such records, court files, and any records of conviction in drawing up his presentence report. Federal and state laws also regulate the form and content of a presentence report. As with sentencing hearings, supervised release proceedings lack full Sixth Amendment protections. See *Morrissey v Brewer*, 408 US 471, 480 (1972).

75 *Fagans*, 406 F3d at 142.

76 410 F3d 397 (7th Cir 2005).

77 Id at 398. Although the Seventh Circuit remanded the district court's sentence, it did so because the district court believed the Sentencing Guidelines to be mandatory before *Booker v United States*, 543 US 220 (2005), had been decided, not because its findings violated the Sixth Amendment. *Williams*, 410 F3d at 404.

78 Id at 399.

79 Id. In *Williams* and *Fagans*, the defendants did not object to the presentence report. *Williams*, 410 F3d at 399; *Fagans*, 406 F3d at 141.

80 *Williams*, 410 F3d at 401.

81 Id.

82 Id at 402.

validity."[83] Although the Seventh Circuit recognized that the *Almendarez-Torres* holding might be in tension with *Apprendi*, *Blakely*, and *United States v Booker*,[84] it felt bound to follow *Almendarez-Torres* until the Supreme Court overruled it.[85]

The Tenth Circuit in *United States v Corchado*[86] upheld a sentence enhancement based on the fact that the defendant sold heroin while he was on probation for a previous drug conviction.[87] This fact increased the defendant's criminal history category under the Federal Sentencing Guidelines.[88] As a result, the defendant's sentence range increased from 70 to 87 months to a range of 87 to 108 months when coupled with his offense level.[89] Finding no Sixth Amendment violation, the Tenth Circuit relied on *Almendarez-Torres* to apply the prior conviction exception to "subsidiary findings" or "certain facts related to [prior] convictions" such as whether the defendant was under court supervision when he committed the crime.[90] Moreover, the *Corchado* court justified its holding by pointing to recidivism as "a traditional, if not the most traditional, basis for a sentencing court's increasing an offender's sentence."[91] In *United States v Pineda-Rodriguez*,[92] the Tenth Circuit also pointed out that facts such as a defendant's supervised release status are "easily verified" and their use as sentence enhancements "requires nothing more than official records, a calendar, and the most self-evident mathematical computation."[93]

A majority of circuits have upheld the constitutionality of judicial factfinding of supervised release status based on a broad reading of *Almendarez-Torres*, finding that the fact of supervised release is analogous to that of a prior conviction.

2. State courts.

Although of less authority than federal circuit court decisions, state court decisions confronting constitutional challenges to sentenc-

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83 Id.

84 543 US 220, 226–27 (2005) (holding that the Federal Sentencing Guidelines violated the Sixth Amendment insofar as they were mandatory and subsequently rendering the Guidelines advisory).

85 *Williams*, 410 F3d at 402.

86 427 F3d 815 (10th Cir 2005).

87 Id at 819.

88 See USSG § 4A1.1(d).

89 *Corchado*, 427 F3d at 819.

90 Id at 820.

91 Id, quoting *Almendarez-Torres*, 523 US at 243.

92 133 Fed Appx 455 (10th Cir 2005).

93 Id at 458.

ing statutes are important in tracking the different ways in which courts have reacted to *Apprendi* and *Blakely*. Since *Booker* rendered the Federal Sentencing Guidelines advisory, defendants have increasingly brought Sixth Amendment challenges against state statutes that allow enhancements based on judge-found facts.

Most recently, the California Supreme Court in *People v Towne*[94] made three primary arguments as to why a jury need not find the fact that the defendant committed a crime while on parole. First, a defendant's parole status is an aspect of recidivism, an exception recognized by *Almendarez-Torres*. Echoing arguments made in *Almendarez-Torres*, the *Towne* court stated that "recidivism is not related to the commission of the present offense" and thus is "indistinguishable from a prior conviction."[95] Second, it reasoned that the record of a defendant's parole status is usually "well documented in the same type of official records used to establish the fact and nature of a prior conviction—court records, prison records, or criminal history records maintained by law enforcement agencies."[96] And third, the *Towne* court stated that Sixth Amendment procedural safeguards attend the fact of a defendant's parole status at the time of the crime because such a circumstantial fact "arises out of a prior conviction."[97]

The Washington Supreme Court in *State v Jones*[98] similarly held that a judge could increase a sentence based on a factual finding that the defendant was on community placement at the time of the offense. The court stated that the judge may rely on "the criminal history submitted, and those documents flowing from the prior conviction and sentence, such as the presentence report and department of corrections' records."[99] To justify such judicial factfinding, the court concluded that, similar to the prior conviction inquiry, finding that the defendant's release status is "inherently reliable" satisfies Sixth Amendment procedural safeguards because the status "arises out of a prior conviction," and "is the type of inquiry traditionally performed by judges."[100]

Furthermore, the Washington Supreme Court analogized to *Shepard*. Because *Shepard* allowed judicial examination of documents other than the prior conviction document, such as jury instructions and the plea transcript, the Washington Supreme Court reasoned that

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94 186 P3d 10 (Cal 2008).
95 Id at 19.
96 Id at 20 & nn 6–7.
97 Id at 20.
98 149 P3d 636 (Wash 2006).
99 Id at 642.
100 Id.

courts can likewise examine presentence reports.[101] Such judicial documents are reliable because they are records "flowing from the prior conviction" and thus contain adequate procedural safeguards mandated by the Sixth Amendment.[102]

Similarly, the Indiana Supreme Court in *Ryle v State*[103] ruled that the presentence investigation report documented by the probation officer was sufficiently reliable such that a jury need not examine the evidence of a defendant's probationary status contained therein.[104] First, it noted that Indiana law set forth training and various other requirements for probation officers that "ensure[d] the reliability of their work product."[105] Second, the court analogized to *Shepard*. Unlike the police reports at issue in *Shepard*, the presentence investigation report compiled by the probation officer in *Ryle* was not "too far removed from the conclusive significance of a prior judicial record."[106] Specifically, the report referred to conviction documents as well as department of corrections documents to conclude that the defendant was on a two-year probation term when he committed the offense.[107]

State courts have thus emphasized three primary justifications for judicial factfinding: tradition, procedural safeguards, and reliability.

B. The Minority View: Prohibiting Judges from Finding Supervised Release Status under the Prior Conviction Exception

1. The Ninth Circuit.

The Ninth Circuit is the sole circuit to prohibit a judge from finding supervised release status under the prior conviction exception, holding instead that a jury must find the fact. In *Butler v Curry*,[108] the Ninth Circuit ruled that a jury must make such a finding because a judicial determination of the defendant's status runs afoul of the Sixth

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101 Id at 643.

102 *Jones*, 149 P3d at 643.

103 842 NE2d 320 (Ind 2005).

104 *Ryle*, 842 NE2d at 324–25. The state prosecuted Kenna Ryle under the 2003 version of Indiana's penal code, which required the court to impose a presumptive sentence unless it found aggravating factors. Ind Code Ann § 35-50-2-4 (West 2004). In 2005, Indiana changed its sentencing statute to provide for "advisory" terms, where a judge could impose any sentence within the sentencing range at his discretion. 2005 Ind Legis Serv PL 71-2005 (West).

105 Id at 324.

106 Id at 325, quoting *Shepard*, 544 US at 25.

107 *Ryle*, 842 NE2d at 325.

108 528 F3d 624 (9th Cir 2008).

Amendment.[109] The state court judge imposed an "upper term" sentence under California's determinate sentencing law based on a finding of an aggravating fact (committing a crime while on probation), where based on the jury verdict alone the judge could only impose a "middle term" sentence.[110] The *Butler* court held that this judicial fact-finding violated *Blakely*.[111]

The Ninth Circuit adopted the reasoning in *Shepard* and drew a constitutional distinction between facts contained in conviction documents and all other facts, including those reflected in probation documents. The Ninth Circuit stated that "*Shepard* limited the consideration of prior convictions at judicial sentencing to those facts that can be established by the 'prior judicial record' of conviction."[112] Unlike the judge-based majority position, the Ninth Circuit narrowly construed the definition of a "prior judicial record" to include only "facts directly reflected in the documents of conviction, not [ ] secondary 'facts that are derived or inferred' from a prior conviction or from the conviction documents."[113] Thus, the Ninth Circuit would preclude from judicial examination records from the department of corrections or parole boards, which arguably "flowed from" the prior conviction document.

Acknowledging that probationary status is "likely to be recorded in court documents," the Ninth Circuit nevertheless emphasized the importance of safeguards that attend a criminal conviction.[114] It concluded that the reliability of the records depended on the proper process: "[T]he prior conviction exception is justified by the reliability of court documents created as part of a process with Sixth Amendment safeguards."[115] Based on this justification, the Ninth Circuit also allowed a judge to find the defendant's initial sentence because such a fact would be reflected in conviction documents. In certain cases, a

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109 Id at 647–48. But see *Horton v Schwartz*, 2008 WL 4907607, *10–13 (CD Cal) (ruling that the fact of a defendant's length of incarceration falls within the prior conviction exception).

110 The Ninth Circuit analyzed the application of California's determinate sentencing law before it was amended in 2007 to allow for judicial discretion in imposing a penalty, similar to how the Federal Sentencing Guidelines were made advisory by *Booker*. See Cal Penal Code § 1170(b) (West 2007), amended by 2007 Cal Legis Serv ch 3 (SB 40) (West). However, the court suggested that on remand, the petitioner Butler would be resentenced under the 2007 law, not under the law as how it was written when he committed the crime. *Butler*, 528 F3d at 652 n 20.

111 *Butler*, 528 F3d at 628. See also *Cunningham v California*, 549 US 270, 275 (2007) (finding California's determinate sentencing law to be unconstitutional under the Sixth Amendment).

112 *Butler*, 528 F3d at 644.

113 Id at 645, quoting *United States v Kortgaard,* 425 F3d 602*,* 610 (9th Cir 2005).

114 *Butler*, 528 F3d at 646.

115 Id at 645. See also id at 647 ("Insofar as these cases [from the other circuits] held only that the question whether the defendant was *originally sentenced* to probation at the time of conviction comes within the *Almendarez-Torres* exception, we do not disagree.").

judge might use the fact of an earlier sentence to enhance a defendant's current sentence.[116]

The Ninth Circuit described the parole process and how it does not comport with Sixth Amendment standards.[117] Parole may be revoked or modified according to due process standards, which are more relaxed than what the Sixth Amendment demands.[118] The court stated that the judge can modify supervised release terms at any time[119] and that certain modifications may have fewer procedural safeguards than those attached in probation revocation hearings.[120] Furthermore, the court based its reasoning, in part, on the fact that the Ninth Circuit did not apply the prior conviction exception to convictions as a juvenile or to prior removal proceedings. Supervised release, juvenile, and prior removal proceedings all "lack full Sixth Amendment protections."[121]

Notably, courts that review *Apprendi* errors will determine such errors to be harmless, and thus not reversible, when the "judge was presented with sufficient documents at sentencing . . . to enable a reviewing or sentencing court to conclude that a jury would have found the relevant fact beyond a reasonable doubt."[122] Thus, even under the Ninth Circuit's approach, defendants "will [not] always, or even often, obtain relief when a judge, rather than a jury, has made such a finding."[123] Although this practically presents a loophole under the Sixth Amendment, the defendant is still afforded protection under the reasonable doubt standard. In contrast, the judge-based majority view assesses recidivism-related facts using a preponderance of the evidence standard.

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116 See, for example, 8 USC § 1326(b) (providing that in cases of reentry of certain removed aliens, earlier convictions and the type of sentences imposed may be used to increase the alien's sentence).

117 See *Butler*, 528 F3d at 646–47.

118 Id, citing *Morrissey v Brewer*, 408 US 471, 488–89 (1972) (holding that the minimum requirements of due process in a parole revocation hearing include written notice, disclosure of evidence, the right to confront witnesses, and the opportunity to present evidence in front of a neutral hearing body, among other safeguards).

119 *Butler*, 528 F3d at 646.

120 Id at 647.

121 Id at 644. For a discussion of the circuit split on whether juvenile convictions should be treated as prior convictions under *Apprendi*, see Molly Gulland Gaston, Note, *Never Efficient, but Always Free: How the Juvenile Adjudication Question is the Latest Sign that* Almendarez-Torres *Should Be Overturned*, 45 Am Crim L Rev 1167, 1175–84 (2008) (arguing that the prior conviction exception should not apply to juvenile convictions).

122 *Butler*, 528 F3d at 647 n 14.

123 Id.

2. State courts.

A minority of state appellate courts have also refused to extend the prior conviction exception to the fact of a defendant's supervised release status. The Arizona Court of Appeals, in *State v Gross*,[124] held that the trial court violated *Apprendi* when the judge found that the defendant committed two felonies while on supervised release.[125] The court in *Gross* asserted that the "plain language in *Apprendi* requires that the defendant's release status be submitted to the jury and proved beyond a reasonable doubt."[126] The jury verdict exposed the defendant to a maximum punishment of seven and a half years in prison, but his release status finding exposed him to nine and a half years.

The *Gross* court acknowledged that the trial court could simply review "objective, documentary evidence" with relative ease in determining the defendant's release status.[127] However, it stated that this characteristic of factfinding was not relevant in deciding whether a judge or jury should make the determination. Instead, the question should be whether or not a fact increased the maximum punishment: "Under *Apprendi*, it is a defendant's exposure to additional punishment, not the ease or accuracy with which that fact can be determined by a trial court, that is pivotal in triggering" a defendant's right to jury factfinding.[128]

Similarly, the North Carolina Court of Appeals in *State v Wissink*[129] ruled that a jury must find beyond a reasonable doubt that the defendant committed the felony while on probation.[130] The court cited two reasons for its position. First, it was "bound by the language" in *Apprendi* and *Blakely*, stating that "only the fact of a prior conviction is exempt from being proven to a jury beyond a reasonable doubt."[131]

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124 31 P3d 815 (Ariz Ct App 2001).

125 Id at 818.

126 Id. At the time, the Arizona court held the sentencing provision unconstitutional, where the provision allowed the trial judge to enhance the defendant's sentence based on his bail status. The Arizona state legislature since amended its sentencing law to require a jury finding to impose a mandatory minimum within a statutory range. See Ariz Rev Stat §§ 13-701(c), 13-708.

127 *Gross*, 31 P3d at 819.

128 Id.

129 617 SE2d 319 (NC Ct App 2005), affd in part and revd in part, 645 SE2d 761 (NC 2007). The court analyzed the 2003 version of North Carolina's sentencing law under which the defendant was sentenced, which allowed a court to enhance a defendant's sentence based on his supervised release status. NC Gen Stat § 15A-1340.14(a), (b)(7) (2003) (creating a point system that adds one point for offenses committed while on supervised release). The state legislature amended the law in 2005 (presumably in response to *Blakely*) to require a jury to find such a fact beyond a reasonable doubt. 2005 NC Sess Laws 145.

130 *Wissink*, 617 SE2d at 325.

131 Id.

Second, the fact of the defendant's probationary status lacked the safeguards of a jury trial and proof beyond a reasonable doubt, which were "recognized in *Apprendi* as providing the necessary protection for defendants at sentencing."[132] The North Carolina Supreme Court subsequently affirmed this ruling.[133]

In sum, the lower courts remain divided over the proper interpretation of the prior conviction exception. Although both sides claim that their positions follow the Sixth Amendment, the judge-based majority view places more emphasis on tradition, whereas the jury-based minority view focuses on the procedural safeguards in the prior proceedings.

III. SOLUTION

This Part proposes a solution that is distinct from both the majority and minority views, concluding that the fact of a defendant's supervised release status does not fall within the prior conviction exception. That is, if a defendant might have committed his crime while on supervised release, a judge cannot find this fact to increase the maximum sentence. As a result, prosecutors must plead the fact in an indictment and prove it to a jury beyond a reasonable doubt.

Part III.A explains that the Supreme Court's justification for the prior conviction exception has shifted from tradition to the fact that the prior conviction proceeding satisfies Sixth Amendment safeguards. Thus, the judge-based majority position is not tenable so long as it continues to make the highly contested claim that judges traditionally find facts related to recidivism.

Part III.B proposes that a judge can increase the maximum sentence only upon finding facts that were previously and necessarily (1) found by a jury for conviction, (2) admitted by the defendant pursuant to a guilty plea, or (3) found by a judge for conviction in a bench trial. As a result, a judge cannot find the fact of a defendant's release status. In all three types of prior proceedings, the defendant is afforded full Sixth Amendment protections, unless properly waived. Thus, the proposed rule includes a narrower reading of the prior conviction exception than either the judge-based or the current jury-based view. The judge-based view allows the judge to find facts that are related to the prior conviction, including the defendant's supervised release status. The jury-based view allows the judge to find the fact of an earlier sentence imposed by the judge—a fact not found by the jury.

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132 Id.

133 See *Wissink*, 645 SE2d at 761.

Part III.C shows that the judge-based view fails to satisfy a defendant's Sixth Amendment right to a jury trial. It also attempts to supply the judge-based view with a stronger doctrinal argument to support factfinding by a judge. The stronger version of the judge-based view argues that where a jury conviction authorizes the judge to impose a term of supervised release, it also authorizes the judge or parole board to subsequently modify the length of the release. If a judge can find the fact of a defendant's previous sentence to enhance his current sentence, as the jury-based view allows, then the judge should be able to find the defendant's supervised release status. Yet, such a solution ultimately fails because the "*facts reflected in the jury verdict*," not what the jury authorizes, are what judges may find to enhance a defendant's sentence.[134]

Part III.D argues that the jury-based view as articulated by the Ninth Circuit similarly fails, even though it reaches the correct result. The current jury-based view provides a justification that is inconsistent with Sixth Amendment case law as reflected in *Apprendi*, *Blakely*, and *Shepard*. To the extent that it allows a judge to find the fact of a defendant's previous sentence, the Ninth Circuit's view becomes indistinguishable from the judge-based view. Unlike a jury conviction, the subsequent sentence imposed by a judge is not found by a jury. But the Ninth Circuit, like the judge-based position, allows a judge to find facts that arose from proceedings *authorized* by the jury. Instead, this Comment proposes that a judge may find only facts that a jury *found* previously—a rule that is narrower than the current jury-based position but more consistent with Sixth Amendment doctrine.

Part III.E applies the new rule to a typical sentencing statute to illustrate how it would operate in practice and how it would function differently than either the majority or minority rules.

A. Emphasizing Procedural Safeguards over Tradition

The Supreme Court has identified two primary ways to justify the prior conviction exception: (1) tradition and (2) the presence of Sixth Amendment safeguards in the prior conviction proceeding. A court's traditional authority to find recidivism-related facts is one justification given by the *Almendarez-Torres* Court. Another justification is ensuring that Sixth Amendment safeguards accompany the recidivism-related fact. The conflict between the two justifications arises because the argument based on tradition does not require that Sixth Amend-

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134 See *Blakely*, 542 US at 303.

ment safeguards accompany the recidivism-related fact. If the prior conviction exception were grounded solely on tradition, as interpreted by *Almendarez-Torres*, then a judge would be able to find supervised release facts, even though a jury in the prior proceeding did not find those facts.

Yet after *Almendarez-Torres*, the Supreme Court has repeatedly justified the prior conviction exception on the basis that a jury had established the conviction in the prior criminal proceeding. Beginning with *Jones*, the Court held that unlike other facts of enhancement, "a prior conviction must itself have been established through procedures satisfying the fair notice, reasonable doubt, and jury trial guarantees."[135] Then, in *Apprendi*, the Court pointed out that the jury procedural safeguards attending the fact of a prior conviction "mitigated the due process and Sixth Amendment concerns," in situations where a judge finds a fact to enhance a defendant's sentence beyond the statutory maximum.[136] Such justifications for the prior conviction exception mark a subtle but notable point of departure from *Almendarez-Torres*.

Cunningham v California[137] also deemphasized the tradition argument. Attempting to preserve California's determinate sentencing regime, the state supreme court asserted that the law "simply authorize[s] a sentencing court to engage in the type of factfinding that *traditionally* has been incident to the judge's selection of an appropriate sentence within a statutorily prescribed sentencing range."[138] Striking down California's sentencing law as violating the Sixth Amendment, the Supreme Court rebuked this argument by citing approvingly to Judge Joyce Kennard's concurring-dissenting state supreme court opinion: "Nothing in the [US Supreme Court's] majority opinions . . . suggests that the constitutionality of a state's sentencing scheme turns on whether . . . it involves the type of factfinding that traditionally has

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135 *Jones*, 526 US at 249.

136 *Apprendi*, 530 US at 488. Furthermore, the *Apprendi* Court asserted:

> [T]here is a vast difference between accepting the validity of a prior judgment of conviction entered in a proceeding in which the defendant had the right to a jury trial and the right to require the prosecutor to prove guilt beyond a reasonable doubt, and allowing the judge to find the required fact under a lesser standard of proof.

Id at 496.

137 549 US 270 (2007).

138 *People v Black*, 113 P3d 534, 543 (Cal 2005) (emphasis added), vacd by *Black v California*, 549 US 1190 (2007) (vacating the California Supreme Court decision in light of *Cunningham*).

been performed by a judge."[139] Although the Court in *Cunningham* was not directly analyzing the prior conviction exception, its emphasis on procedural safeguards over tradition signals a similar trend.

Further, the argument that recidivism-related facts were traditionally found by a judge is less compelling in this context because the system of supervised release is a modern phenomenon.[140] There does not appear to be any strong historical analogue to supervised release violations as a basis for sentence enhancements. Thus, *Almendarez-Torres*'s account of recidivism as the traditional province of the judge cannot be so easily transplanted into the context of supervised release findings. Hence, any solution must ask whether the defendant's Sixth Amendment rights were fully protected before a judge enhances his sentence beyond the statutory maximum.

B. Proposal: "Facts Reflected in the Jury Verdict Alone"

Courts should apply the prior conviction exception in a way that is consistent with the rulings of *Apprendi*, *Blakely*, and *Shepard*. To that end, judges can increase the maximum sentence only upon finding facts that were previously and necessarily (1) found by a jury for conviction, (2) admitted by the defendant pursuant to a guilty plea, or (3) found by a judge for conviction in a bench trial.[141] Thus, a judge may find only the fact of the prior conviction itself or facts that were necessary to support the prior conviction. A defendant's release status does not fall into this category.

The *Apprendi* Court stated that a defendant could not be "expose[d] . . . to a penalty exceeding the maximum he would receive if punished according to the facts reflected in the jury verdict alone."[142]

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139 *Cunningham*, 549 US at 289 (citations omitted). Nevertheless, the *Towne* court asserted that judicial factfinding of recidivism-related facts is "one more typically and appropriately undertaken by a court," echoing language that had been rejected by *Cunningham*. *Towne*, 186 P3d at 19.

140 Although the early origins of probation can be traced back to the mid-eighteenth century, probation was not available for all adult criminals until 1956. *Probation and Parole: History, Goals, and Decision-making: Origins of Probation and Parole*, 3 Crime and Justice, online at http://law.jrank.org/pages/1817/Probation-Parole-History-Goals-Decision-Making-Origins-probation-parole.html (visited Sept 1, 2009); Marc R. Lewis, Comment, *Lost in Probation: Contrasting the Treatment of Probationary Search Agreements in California and Federal Courts*, 51 UCLA L Rev 1703, 1708 (2004).

141 Because the defendant waives his Sixth Amendment jury trial right in the last two scenarios, this Part will only focus on the first scenario: whether a jury had already found facts contested at a sentencing hearing for a later crime. Further, the analysis of the first scenario will lead to the same outcome as would an analysis done under the second and third scenarios. However, the focus on the first scenario does not mean that the latter two scenarios are not just as important.

142 *Apprendi*, 530 US at 483 (emphasis omitted).

In clarifying *Apprendi*'s language, which was misinterpreted by some courts as dictum,[143] the Court in *Blakely* further emphasized the primacy of jury factfinding, where it held that a judge could not impose a sentence exceeding that justified "solely on the basis of facts reflected in the jury verdict or admitted by the defendant."[144] *Apprendi* and *Blakely* force the conclusion that a jury must find the fact of a defendant's supervised release status at the time of the crime. It is true that the *Blakely* Court did not mean an earlier jury verdict when it referred to "*the* jury verdict." Nevertheless, its reasoning applies as a justification for the prior conviction exception when read together with *Apprendi*, which explicitly upheld the prior conviction exception.

The fact of supervised release status is not reflected in the jury verdict or an earlier verdict and cannot be used as an enhancement beyond the maximum. By contrast, a prior conviction would have been found by a jury, and it would have been reflected in the earlier jury verdict. As the conviction encompasses all of the facts and elements necessary to that particular conviction, a judge may also find such facts and elements to enhance a defendant's sentence. Although circumstantial or mens rea facts necessary for conviction are not technically a fact of conviction, a judge may find such facts because they are reflected in the jury verdict.[145]

Shepard further buttresses interpreting the prior conviction exception in this way. In *Shepard*, the Court analyzed what kinds of documents may be examined by a sentencing judge in order to decipher a facially ambiguous conviction document.[146] It held that the judge may look at 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."[147] For jury trial cases, the Court in *Taylor v United States*[148] similarly held that a court could look to statutory elements, charging documents, and jury instructions to find that the defendant's previous conviction was for burgling a building.[149] It is important to note—and this is where both the judge-based

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143 See, for example, *Black*, 113 P3d at 534, vacd by *Black*, 549 US 1190; *State v Ring*, 200 Ariz 267 (2001), revd, *Ring v Arizona*, 536 US 584 (2002).

144 *Blakely*, 542 US at 303 (emphasis omitted).

145 For example, if the prior conviction was for murder, the intent mens rea can be found by the judge in the later criminal proceeding.

146 See *Shepard*, 544 US at 26.

147 Id (emphasis added).

148 495 US 575 (1990).

149 Id at 602.

and jury-based positions go astray in analogizing to *Shepard*—that the underlying inquiry was what facts the jury found or to which the defendant pleaded guilty. That basic premise, grounded in *Apprendi* and *Blakely*, was undisputed. Rather, the only dispute in *Shepard* and *Taylor* was over the kinds of documents that may be examined to clarify what the jury found or to what the defendant pleaded guilty.[150]

C. The Majority View Fails

Courts following the majority view advocate three basis claims to support judicial factfinding. First, courts rely on *Almendarez-Torres* for the proposition that a judge may find facts related to recidivism, including a defendant's release status at the time of the crime.[151] Second, they cite to *Shepard* for the proposition that a court may look to "comparable judicial record[s]" to determine a defendant's release status.[152] Third, courts assert that Sixth Amendment safeguards are satisfied because the fact of a defendant's release status is a fact that "arises out of" a prior conviction.[153]

All three claims lack adequate justification. First, *Almendarez-Torres*, although not overruled, has been sharply questioned by subsequent Court decisions.[154] *Almendarez-Torres* itself did not deal with the fact of a person's supervised release status, but only with the defendant's prior conviction. Subsequent Supreme Court decisions have also limited the *Almendarez-Torres* holding to the specific recidivism-related fact of a prior conviction.[155] To read *Almendarez-Torres* as allowing a judge to find *all* recidivism-related facts ignores *Apprendi*'s interpretation of *Almendarez-Torres*. Further, the *Apprendi* Court pointed out that the defendant in *Almendarez-Torres* had admitted his prior convictions and challenged the findings made by the judge because they were not included in the indictment. And again, courts cannot rely heavily on *Almendarez-Torres*'s tradition argument because the Supreme Court has moved away from that justification.

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150 See *Shepard*, 544 US at 22 (dismissing the government's position that argued for a judge to examine testimony about a building break-in because the jury verdict would not have necessarily rested on that finding); *Taylor*, 495 US at 602 (allowing judges to examine documents showing "that the *jury necessarily had to find an entry of a building to convict*") (emphasis added).

151 See Part II.A.1.

152 See Part II.A.2; *Shepard*, 544 US at 26.

153 See Part II.A.2; *Towne*, 186 P3d at 20.

154 See *Apprendi*, 530 US at 487 (stating that *Almendarez-Torres* "represents at best an exceptional departure from the historic practice that we have described").

155 See id at 488 ("[O]ur conclusion in *Almendarez-Torres* turned heavily upon the fact that the additional sentence to which the defendant was subject was the prior commission of a serious crime.").

Second, as alluded to in Part III.B, *Shepard* did not allow a judge to look at documents in order to determine facts other than prior convictions or the necessary facts underlying those convictions. The *Shepard* Court concluded that charging documents, jury instructions, and "comparable judicial record[s]" could be reviewed to clarify what the defendant admitted to in his plea or what the jury must have found in order to convict.[156] Nevertheless, the Indiana court in *Ryle* likened probation documents to the *Shepard* documents, noting that "probation officers are trained, tested, hired, and supervised directly by the judiciary."[157] But the relevant point is whether those documents indicated facts that a jury found—not how professionally prepared those documents were. Because the fact of a defendant's supervised release status is not a fact necessary for conviction, *Shepard* does not help the majority.

Third, although the defendant's release status "arises out of" or "flows from" the prior conviction in a general sense, such ambiguous language cannot substitute for sound analysis. A jury does not find facts that would lead to the modification of a defendant's release status. Yet, the judge-based position would use such determinations created from a process without Sixth Amendment safeguards to enhance a defendant's sentence. As the jury-based view rightly points out, such enhancements would violate *Apprendi* and *Blakely*. But there is a stronger argument for the judge-based view that even the current jury-based view cannot rebut.

When the jury convicts a defendant, it authorizes a relaxed form of factfinding in supervised release proceedings. Just as the conviction allows a judge to impose a term of incarceration or supervised release, the conviction also authorizes modifications of the supervised release term based on a judge's or a probation officer's factfinding. The initial sentence along with any subsequent changes to it are all part of the defendant's original sentence. If a judge may find the defendant's sentence, as even the jury-based position allows, then the judge should also be able to find the defendant's release status for enhancement purposes. Both facts are created by the judge or the parole board and are produced in a post-verdict process authorized by the jury's finding of guilt.

Neither fact is found by a jury, though. And under *Blakely*, it is not what the jury *authorizes* but what it *finds* that matters constitutionally.[158] *Blakely* holds that a judge may impose a maximum sentence based only on facts reflected in the jury verdict. *Apprendi* holds that

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156 *Shepard*, 544 US at 26.

157 *Ryle*, 842 NE2d at 324.

158 See *Blakely*, 542 US at 303.

the prior conviction exception is justified because a jury already found the earlier conviction. This common emphasis on jury factfinding supports the proposed rule that a judge can only find facts that were previously found by a jury.

There is also a slippery slope problem for the judge-based view. If a judge can use the fact of a defendant's supervised release status to enhance his sentence, can the judge use the fact of his poor performance on supervised release to do the same?[159] If so, can the judge also use the fact that a defendant possessed illegal drugs while on supervised release to convict him in a subsequent criminal proceeding? The logical extension of the judge-based position would allow judicial factfinding in these cases based on prior jury authorization. But clearly, convicting a defendant for possession of illegal drugs without a jury trial goes against the Sixth Amendment. It is true that a judge may use these facts to revoke the defendant's term of supervised release. But the judge cannot use these facts to impose a *separate* sentence or to impose enhancements to a *separate* sentence, unless a jury *finds* these facts.

D. The Minority View Fails

Although courts embracing the minority view reach the right result, their justifications are inconsistent with *Apprendi* and *Blakely*. Those courts correctly state that because a jury did not find facts that determine a defendant's supervised release status, the fact of the defendant's status does not fall under the prior conviction exception.[160] However, the Ninth Circuit also ruled that the sentence initially imposed by a judge would be a fact "coming within the prior conviction exception."[161] The Ninth Circuit cited to *Shepard* to support its rule allowing a judge to find "facts that can be established by the 'prior

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159 While the California Supreme Court in *Towne* held that a judge could find a defendant's parole status, it stated that a jury must find a defendant's unsatisfactory performance on parole. 186 P3d at 20. The *Towne* court offered two reasons for this distinction. First, a defendant's performance on parole "does not relate to a prior conviction." Id at 21. Second, a finding of unsatisfactory performance is not accompanied by Sixth Amendment procedural safeguards because parole revocation proceedings do not require a right to a jury trial. Id. Yet, these two reasons also apply to a finding of a defendant's parole status at the time of the crime. A defendant's parole status "relates" to a prior conviction in the same way that a person's performance on parole relates to the prior conviction—that is, both facts arise out of a prior conviction. Moreover, a defendant's parole status may have been modified after the initial sentencing, and such changes are not accompanied by Sixth Amendment safeguards. See *Butler*, 528 F3d at 646. Thus, the court's line-drawing seems less motivated by doctrinal consistency and more so by administrative convenience.

160 See, for example, *Butler*, 528 F3d at 646–47.

161 Id at 645.

judicial record' of conviction."[162] Thus, the fact of an earlier sentence imposed may be used to enhance a defendant's sentence under the Ninth Circuit's reading. For example, certain statutes may allow for a sentence increase if the defendant had committed a prior "aggravated felony."[163] A statute may define an aggravated felony in many ways. For example, it may be defined as a crime whose penalty, imposed by a judge, is more than a year of imprisonment.[164]

There are two problems with the jury-based view, as expressed by the Ninth Circuit in *Butler*. First, a defendant's supervised release status and his sentence share a common trait in that a jury finds neither of these facts. These facts are created by the judge or parole board subsequent to the jury conviction. Although "documents of conviction" as defined by *Butler* may record a defendant's sentence, *Blakely* requires that enhancements be based on what the jury finds.[165] The jury verdict is the relevant document, not the conviction document recording the sentence imposed.

Importantly, a sentencing hearing—like a supervised release proceeding—lacks full Sixth Amendment safeguards.[166] A jury is not present at the sentencing hearing, where the judge considers facts in mitigation and aggravation in imposing a sentence within the statutory range. Also, the Confrontation Clause of the Sixth Amendment does not apply because the judge may consider hearsay evidence.[167] Nevertheless, the jury-based view, like the judge-based view, would take a fact not found by the jury and use it to enhance a defendant's sentence beyond the statutory maximum. It is true that the jury authorizes a judge to impose a sentence within the statutory range. Yet again, identical to the response to the failed argument of the judge-based view, it is not what the jury *authorizes* but what it *finds* for conviction that is constitutionally significant.

Second, the jury-based view misinterprets *Shepard* in the same way as the judge-based position. When the *Shepard* Court referred to a "prior judicial record," it did not mean a prior judicial record of conviction that included the sentence imposed, as was interpreted by the Ninth Circuit. Rather, the *Shepard* Court referred to judicial records

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162 Id at 644, quoting *Shepard*, 544 US at 25.

163 See, for example, 8 USC § 1326(b), cited by *Butler*, 528 F3d at 645 n 13.

164 See, for example, 8 USC § 1101(a)(43)(F)–(48)(B), cited by *Butler*, 528 F3d at 645 n 13.

165 *Butler*, 528 F3d at 645.

166 Still, the Sixth Amendment right to counsel attaches during sentencing hearings. See *McConnell v Rhay*, 393 US 2, 4 (1968) ("The right to counsel at sentencing must . . . be treated like the right to counsel at other stages of adjudication.").

167 See *Sentencing Hearing*, 21 Am Jur 2d Crim Law § 742 (2008).

"made or used" by the court in adjudicating guilt.[168] Sentencing documents are not "made or used" by the jury to determine a defendant's guilt. Instead, they are produced in a post-verdict sentencing hearing that lacks Sixth Amendment safeguards. The documents that a judge may examine, under *Shepard*, are used to determine what the jury found or what the defendant admitted to in the guilty plea, and nothing more.[169] *Blakely* supports such an interpretation of *Shepard* because it states that a judge can impose a maximum sentence "solely on the basis of facts reflected in the jury verdict or admitted by the defendant."[170]

The jury-based view propounded by the Ninth Circuit reaches a different conclusion from the judge-based view because court records showing subsequent changes to a defendant's sentence of probation are not reflected in the "documents of conviction." According to the Ninth Circuit, the defendant's initial sentence is recorded in such documents, and thus a judge may rely on facts contained therein. At first, the initial sentence appears to be integral to the conviction in a way that subsequent changes to the sentence are not. To justify this intuition, the Ninth Circuit in *Butler* stated that a record of the defendant's initial sentence, as opposed to a record of subsequent changes to the sentence, is "created as part of a process with Sixth Amendment safeguards."[171] But this is false. As discussed above,[172] a sentencing hearing does not contain full Sixth Amendment protections. Thus, the Ninth Circuit's approach fails to explain the distinction between the initial sentence and the modified sentence in other terms.

One distinction between an initial sentence and a modified sentence may be that a judge imposes the former but a parole board imposes the latter. But no court on either side of the split thinks this is a relevant difference. Another distinction between a sentence initially imposed and a modified sentence is sequence. It may be that a modified sentence is less reliable because it is further removed from the trial verdict. Yet this question turns on how an institution maintains its judicial records, which can vary greatly from state to state. *Apprendi*'s bright-

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168 544 US at 21, 25 ("The Government argues for a wider evidentiary cast, however, going beyond conclusive records made or used in adjudicating guilt and looking to documents submitted to lower courts even prior to charges.").

169 For a similar interpretation of *Shepard* to the one offered in this Comment, see *United States v Medina-Almaguer*, 559 F3d 420, 423 (6th Cir 2009) (holding that a court cannot increase a sentence by relying on officer testimony that the defendant had previously bought heroin because such testimony does not show that the defendant "necessarily admitted" to buying heroin).

170 *Blakely*, 542 US at 303 (emphasis omitted).

171 *Butler*, 528 F3d at 645.

172 See notes 166–167 and accompanying text.

line rule does not allow for this kind of analysis. More importantly, the point is whether the records were produced in a process with Sixth Amendment jury protections, not how well they were maintained.

In sum, although the minority view reaches the correct outcome, its justification does not comport with *Apprendi*, *Blakely*, and *Shepard*.

E. Application and Implications for State Sentencing Regimes

The earlier sections demonstrate that a judge may not find the fact that the defendant committed his crime while on supervised release. The judge, however, may still find the fact of a defendant's prior conviction to enhance his sentence beyond the statutory maximum. Under the relevant Supreme Court precedent, a judge may only find facts previously and necessarily (1) found by a jury for conviction, (2) admitted by the defendant pursuant to a guilty plea, or (3) found by a judge for conviction in a bench trial. *Shepard* also limits the kinds of documents that a judge may examine to find the fact of a prior conviction or facts that were necessarily encompassed by the prior conviction.

Suppose a defendant is convicted of selling heroin and faces a statutory minimum of fifty months and a maximum of ninety months in prison. The state statute allows for an increase of thirty months if a judge finds a prior conviction. The presentence report records that the defendant had a previous drug conviction. The judge may rely on the presentence report prepared by the probation officer, police reports, and additional testimony to impose any sentence *within* the fifty to ninety month range.

Under *Shepard*, however, the judge cannot rely on the report alone to enhance the sentence by thirty months. Such a report, drawn up by a probation officer, is analogous to a police report in *Shepard* in that neither was produced in a setting with Sixth Amendment safeguards. The judge can only look to a record of the verdict. If only a specific kind of drug or a specified quantity can trigger the sentence enhancement under the statute,[173] then under *Shepard*, the judge may also look to the indictment and jury instructions to determine the necessary facts found by the jury in convicting the defendant for the previous drug charge.

Suppose instead that the state statute allows for a sentence increase based not just on any prior felony conviction, but on a prior aggravated felony conviction. The statute defines an aggravated felony as a crime

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[173] See, for example, NY Penal L § 220 et seq (specifying different classes of crimes for various quantities of controlled substances).

that authorizes a sentence of at least one year in prison, independent of what sentence a judge may impose. The prosecution presents a record of the defendant's earlier conviction for a crime that carries a six to thirty month sentencing range. A judge may impose the sentence enhancement based on a finding of prior conviction after examining *Shepard*-approved documents. A jury had earlier convicted the defendant of a crime, which is an aggravated felony by statutory definition.

If, instead, an aggravated felony is defined as a crime for which a *judge previously imposed an imprisonment term* of more than a year,[174] then the later sentencing judge may not find the fact of the earlier sentence imposed to determine whether the prior conviction was for an aggravated felony in order to increase the maximum sentence. The Ninth Circuit mistakenly allows such judicial factfinding.[175] However, under the proposed approach, such judicial factfinding would not be allowed because a jury did not find the fact of a defendant's sentence.

If the statute allows for a sentence increase based on the fact that the defendant committed the crime while on supervised release,[176] then a jury must find this fact before a judge applies the sentence enhancement. Further, the trial may have to be bifurcated to prevent prejudice to the defendant. The portion of the indictment charging the defendant's crime while on release may be read after the jury convicts the defendant, and the court can hold a separate factfinding proceeding.

In the wake of *Apprendi* and *Blakely*, several states have modified their sentencing regimes to comport with Sixth Amendment requirements. For example, Kansas's sentencing guidelines state that a jury must find the factors that "may serve to enhance the maximum sentence."[177] Kansas also allows the court to conduct a "separate departure sentence proceeding" if the defendant is subject to sentence enhancements beyond the statutory maximum.[178] Alternatively, Arizona's criminal code imposes a mandatory minimum, or a mandatory maximum for more serious offenses, if the "trier of fact" finds that the

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174 See, for example, 8 USC § 1101(a)(48)(B) ("[R]eference to a term of imprisonment or a sentence with respect to an offense is deemed to include the period of incarceration or confinement ordered by a court of law regardless of any suspension of the imposition or execution of that imprisonment or sentence in whole or in part.").

175 See *Butler*, 528 F3d 624, 645 n 13 ("Indeed, we have permitted judges to make factual findings regarding the sentence initially imposed for a prior conviction.").

176 See, for example, Wash Rev Code §§ 9.94A.525(19), 9.94A.535(2)(d) (creating a point system and adding one point for offenses committed during post-release supervision).

177 Kan Stat Ann § 21-4718(b)(7).

178 Kan Stat Ann § 21-4718(b)(4). See also Adam Liptak, *Justices' Sentencing Ruling May Have Model in Kansas*, NY Times A12 (July 14, 2004) (describing a post-conviction jury finding of a probation violation that "tacked about an hour onto a four-day jury trial").

defendant committed the offense "while released from confinement," defining the trier of fact to mean a jury.[179]

State statutes that presently allow judges to find that defendants committed the crime while on release violate the Sixth Amendment. That a defendant's release status may be reliably recorded is irrelevant. The defendant is not afforded a jury factfinding process to determine his status. State statutes that allow judicial factfinding of release status to raise the sentencing maximum can be corrected in one of three ways: (1) include the marginal increase in punishment as part of the statutory range, as Arizona does, (2) prohibit sentence enhancements based on release status altogether, or (3) require a bifurcated jury factfinding procedure, as Kansas does. While several states have modified their statutes after *Blakely*, many have not yet done so. The Sixth Amendment, as articulated by the *Apprendi* line of cases, demands a higher level of protection for criminal defendants.

CONCLUSION

The Court has provided two related strands of justification—tradition and Sixth Amendment procedural safeguards—to support the prior conviction exception, although the Court appears to rely increasingly on the latter justification. The tension between tradition and procedural safeguards continues to animate the debate among the lower courts over whether a judge can find supervised release facts. To resolve the debate, this Comment has proposed a new approach in applying the prior conviction exception to be consistent with *Apprendi*, *Blakely*, and *Shepard*. A judge may find only facts reflected in an earlier jury verdict of conviction or a guilty plea in order to raise a defendant's sentencing ceiling. Thus, a judge may not find that the defendant committed a crime while on supervised release in order to enhance the sentence beyond the statutory maximum—only a jury can.

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[179] Ariz Rev Stat §§ 13-701(c), (j), 13-708.