

MEMORANDUM

TO: Federal Defenders
FROM: Steve Sady
RE: ACCA Requires Pleading And Proof Of Characteristics And Sequence Of Prior Convictions
DATE: 7 September 2005

A. Under *Shepard And Haley*, The Doctrine Of Constitutional Avoidance Requires That The ACCA Be Construed To Require Pleading In The Indictment And Proof Beyond A Reasonable Doubt At Trial -- Or Admissions During The Plea Colloquy -- To Establish All The Components For Application Of The Act.

Under governing Supreme Court authority, this Court must apply the doctrine of constitutional avoidance to the question of how the ACCA must be charged and by what manner it must be proved. Because the ACCA implicates both the validity of *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), and that decision's extension, the Court must avoid the constitutional issue by statutory interpretation: the ACCA's silence on procedure should be filled with construction of the statute to require such procedures. This construction is especially appropriate because the Supreme Court construed the same statute to require pleading and proof beyond a reasonable doubt in *Castillo v. United States*, 530 U.S. 120 (2000), holding that 18 U.S.C. § 924(c) required pleading and proof of all its component parts.

1. *The Supreme Court, In Response To Serious Questions Regarding Almendarez-Torres's Viability, Has Twice Held That The Doctrine Of Constitutional Avoidance Applies To Statutes That Depend On Almendarez-Torres.*

The only possible justification for not including the components of the ACCA in the indictment and the plea colloquy is the narrow exception for prior convictions set out in *Almendarez-Torres*. Justice Thomas has renounced his deciding vote in *Almendarez-Torres*, first in *Apprendi*

v. New Jersey, 530 U.S. 466 (2000), then in *Shepard v. United States*, 125 S. Ct. 1254 (2005). Given the shift of the deciding vote, as well as the rationales of *Blakely v. Washington*, 124 S. Ct. 2531 (2004), and *United States v. Booker*, 125 S. Ct. 738 (2005), the Supreme Court has twice required that the doctrine of constitutional avoidance be applied to the difficult constitutional questions raised by the continued vitality of *Almendarez-Torres*.

- a. The Supreme Court’s Decision In *Apprendi* Required That *Almendarez-Torres* Be Narrowly Construed And Limited To Its Facts.

In the watershed ruling in *Apprendi*, the Supreme Court established the constitutional norm that the Fifth and Sixth Amendments require factors that increase the statutory maximum to be proved to a jury beyond a reasonable doubt. The *Apprendi* Court recognized a “narrow exception” to this rule for undisputed prior convictions under the immigration statutes in *Almendarez-Torres*.

Almendarez-Torres covered a narrow exception to the constitutional requirement that elements of a crime be pled and proved to the fact-finder beyond a reasonable doubt. In that case, the majority found that the fact of a prior felony judgment, which increased the statutory maximums for illegal reentry, did not need to be alleged in the indictment. The Court found that Congress intended to create a sentencing factor in 8 U.S.C. § 1326(b)(2), rather than an element. *Almendarez-Torres*, 523 U.S. at 235-39. The Court found precedent on trial rights inapplicable to the fact of a prior conviction “where the conduct, in the absence of the recidivism, is independently unlawful.” *Almendarez-Torres*, 523 U.S. at 230, 241.

One year later, the Court applied the doctrine of constitutional doubt to construe the federal carjacking statute as describing the elements of different offenses rather than setting forth “mere sentencing considerations.” *Jones v. United States*, 526 U.S. 227, 251-52 (1999). In *dicta*, the *Jones* Court declared:

[U]nder the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt.

Jones, 526 U.S. at 243 n.6. To avoid possibly finding the statute unconstitutional, the Court interpreted the fact of intent to cause substantial bodily harm as an element of the carjacking crime.

On June 5, 2000, a unanimous Court in *Castillo v. United States*, 530 U.S. 120 (2000), held that 18 U.S.C. § 924(c) described a separate offense. By rigorously construing the same section of the federal firearms statute that contains the ACCA, the Court found it unnecessary to rely on the doctrine of constitutional doubt. The Court held that Section 924(c) made a weapon's status as a machine gun an element, not a mere sentencing factor. *Castillo*, 530 U.S. at 124, 131. The Court also recognized that any doubt regarding Congress's intent would be resolved in favor of a jury determination. *Castillo*, 530 U.S. at 130.¹ Three weeks later, in *Apprendi*, the Court reached the constitutional issue and drew a bright line, which no legislature may cross.

In *Apprendi*, the Supreme Court addressed a New Jersey statute that increased the statutory maximum for assault when the crime was motivated by a discriminatory purpose. The state legislature left no room for doubt -- the additional factor was intended as a sentencing factor, not an element. The Court held the statute unconstitutional, stating: "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." *Apprendi*, 530 U.S. at 490.

¹*Castillo* independently establishes that *Almendarez-Torres* should not apply to the ACCA because of the drastic effect on the maximum sentence, the distinct definitions of conviction under the firearms and immigration statutes, and the inapplicability of protecting the defendant from the prior conviction, which the *Almendarez-Torres* Court noted did not apply under § 922(g) (*Almendarez-Torres*, 523 U.S. at 230). *Castillo*, 530 U.S. at 131.

In its opinion, the Court quoted the *Jones* Court's admonition that "the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment [require that] any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." *Apprendi*, 530 U.S. at 476 (quoting *Jones*, 526 U.S. at 243 n.6). In particular, *Apprendi* looked to its holding in *Jones* that:

[I]t is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed. It is equally clear that such facts must be established by proof beyond a reasonable doubt.

Apprendi, 530 U.S. at 490 (quoting *Jones*, 526 U.S. at 252-53). The Court expressly noted that the factor's effect, not the legislature's labeling, determined whether the factor constituted an element of the crime. *Apprendi*, 530 U.S. at 494. The *Apprendi* majority included Justice Thomas, who specifically renounced his former position as the swing vote in *Almendarez-Torres*, 530 U.S. at 520 (Thomas, J., concurring).

The constitutional protections announced in *Apprendi* apply to the ACCA. The extremely narrow exception recognized in *Almendarez-Torres* -- the fact of a prior conviction -- does not apply because that exception was described by the *Apprendi* Court as "at best an exceptional departure" based on "unique facts." *Apprendi*, 530 U.S. at 487, 490. The Court even suggested that *Almendarez-Torres* was incorrectly decided. *Apprendi*, 530 U.S. at 489 ("Even though it is arguable that *Almendarez-Torres* was incorrectly decided, and that a logical application of our reasoning today should apply if the recidivist issue were contested, *Apprendi* does not contest the decision's validity and we need not revisit it for purposes of our decision today to treat the case as a narrow exception to the general rule we recalled at the outset.") (emphasis added; footnote omitted). *Apprendi* thus

limited the reach of *Almendarez-Torres* to the unique situation where the prior conviction was not otherwise before the jury and did not implicate other factual questions related to the prior conviction.

- b. Under *Haley* And *Shepard*, The Doctrine Of Constitutional Avoidance Applies To Application Or Expansion Of *Almendarez-Torres* To The ACCA.

On May 3, 2004, the Supreme Court fundamentally changed the approach to *Almendarez-Torres* by holding that both its validity and expansion raised “difficult constitutional questions . . . to be avoided if possible.” *Dretke v. Haley*, 124 S. Ct. 1847 (2004). Then, on March 7, 2005, the Court expressly applied the doctrine of constitutional avoidance to the ACCA in *Shepard*.

The doctrine of constitutional avoidance requires that, prior to addressing difficult constitutional questions, the Court should attempt to construe the relevant statute to avoid the constitutional problem. *Clark v. Martinez*, 125 S. Ct. 716, 722-24 (2005). Because the ACCA is susceptible to construction to avoid constitutional problems, Mr. Ankeny should be treated solely under § 922(g) without reaching any constitutional question.

In *Haley*, a Texas prisoner filed a petition for habeas corpus relief under 28 U.S.C. § 2254. The prisoner had received a 16-year recidivist sentence for stealing a calculator from Wal-Mart. 124 S. Ct. at 1849-50. The Texas recidivist statute depended on temporally separate prior convictions. Although Mr. Haley did not raise the issue at his state penalty phase or on direct appeal, he was not really eligible for the recidivist sentence under Texas law because one of the offenses had occurred three days before the first conviction became final. 124 S. Ct. at 1850. However, throughout state post-conviction proceedings, Texas insisted that the procedural default required that the unlawful sentence stand.

The Fifth Circuit granted habeas corpus relief, finding that the “actual innocence” gateway to federal habeas corpus applies to non-capital sentencing. *Haley*, 124 S. Ct. at 1851; *see also Schlup v. Delo*, 513 U.S. 298 (1995). In an opinion by Justice O’Connor, the Supreme Court reversed because the availability of relief based on ineffective assistance of counsel would avoid the necessity of reaching the actual innocence question. *Haley*, 124 S. Ct. at 1852.

In its reasoning, the *Haley* Court specifically addressed and applied the doctrine of constitutional avoidance to *Almendarez-Torres*. *Haley*, 124 S. Ct. at 1853. The Court noted that a claim of actual innocence often implicates the constitutional sufficiency decision of *Jackson v. Virginia*, 443 U.S. 307 (1979). The Court then noted that “the constitutional hook in *Jackson*” was *In re Winship*, 397 U.S. 358 (1979), in which the Court held that “due process requires proof of each element of a criminal offense beyond a reasonable doubt.” *Haley*, 124 S. Ct. at 1853. The Court then explicitly applied the doctrine of constitutional doubt to both the validity and possible extension of *Almendarez-Torres*:

We have not extended *Winship*’s protections to proof of prior convictions used to support recidivist enhancements. *Almendarez-Torres* . . . ; *see also Apprendi v. New Jersey*, 530 U.S. 466, 488-90, ... (2000) (reserving judgment as to the validity of *Almendarez-Torres*); *Monge v. California*, 524 U.S. 721, 734 . . . (1998) (Double Jeopardy Clause does not preclude retrial on a prior conviction used to support recidivist enhancement). *Respondent contends that Almendarez-Torres should be overruled or, in the alternative, that it does not apply because the recidivist statute at issue required the jury to find not only the existence of his prior convictions but also the additional fact that they were sequential. . . . These difficult constitutional questions . . . are to be avoided if possible.*

Haley, 124 S. Ct. at 1853-54 (emphasis added) (citations omitted). Thus, this Court is required to consider the doctrine of constitutional avoidance in any case involving either the continued validity or the extension of *Almendarez-Torres* -- both of which are at issue in the present case.

The Supreme Court followed *Haley*'s approach in construing the ACCA in *Shepard*. There, the trial court referred to police reports and a complaint application to determine whether a prior conviction for non-generic burglary involved entry into a building, thereby qualifying the prior as generic burglary under the ACCA. The Supreme Court, applying the rule of constitutional avoidance, construed the ACCA to limit inquiry regarding the facts of the prior conviction. *Shepard*, 125 S. Ct. at 1262-63.

The Court reasoned that judicial resolution of the disputed facts would require the Court to decide whether *Almendarez-Torres* authorizes a judge to make the finding regarding the disputed fact or whether, under *Jones* and *Apprendi*, the increase in statutory maximum can only be decided by a jury under the Sixth Amendment. *Shepard*, 125 S. Ct. at 1262 (“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 findings subject to *Jones* and *Apprendi*, to say that *Almendarez-Torres* clearly authorizes a judge to resolve the dispute.”). To avoid the serious risk of unconstitutionality, the Court construed the ACCA to limit examination of the record “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.”

Thus, the Supreme Court has twice held that both the validity and extension of *Almendarez-Torres* requires application of the doctrine of constitutional avoidance.

2. *Because The Doctrine Of Statutory Avoidance Has Not Previously Been Applied To The ACCA, This Court Is Addressing This Question In The First Instance Because, Under Miller v. Gammie, Intervening Supreme Court Authority Has Undermined Previous Ninth Circuit Authority On The ACCA.*

The application of *Haley* and *Shepard* in the ACCA context is a question of first impression upon which there is no binding precedent. Under *Miller v. Gammie*, 335 F.3d 889, 900 (9th Cir. 2003) (*en banc*), intervening Supreme Court authority has undercut the theory and reasoning underlying prior circuit precedent. Therefore, the court is free to rule in the first instance.

In *Miller*, the court elaborated on the effect of intervening Supreme Court authority on earlier lower court precedent. The Court made clear that not only the narrow holding, but the reasoning or “mode of analysis” also binds this Court:

The underlying principle has been most notably explicated by Justice Scalia in a law-review article describing lower courts as being bound not only by the holdings of higher courts’ decisions but also by their “mode of analysis.” . . . Justice Kennedy expressed the same concept in terms of a definition of *stare decisis* in *County of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573 . . . (1989). “As a general rule, the principle of *stare decisis* directs us to adhere not only to the holdings of our prior cases, but also to their explications of the governing rules of law.” *Id.* at 668 . . . (Kennedy, J., concurring in part and dissenting in part).

We must recognize that we are an intermediate appellate court. A goal of our circuit’s decisions, including panel and en banc decisions, must be to preserve the consistency of circuit law. The goal is codified in procedures governing en banc review. *See* 28 U.S.C. § 46; Fed. R. App. P. 35. That objective, however, must not be pursued at the expense of creating an inconsistency between our circuit decisions and the reasoning of state or federal authority embodied in a decision of a court of last resort.

We hold that the issues decided by the higher court need not be identical in order to be controlling. Rather, the relevant court of last resort must have undercut the theory or reasoning underlying the prior circuit precedent in such a way that the cases are clearly irreconcilable.

Miller, 335 F.3d at 900 (citations omitted). This rule makes clear that the court is not barred by earlier precedent in this area.

3. *As In Buckland, The Doctrine Of Constitutional Avoidance Should Be Applied To Require Fifth And Sixth Amendment Compliance As a Matter Of Statutory Interpretation.*

In applying the doctrine of constitutional avoidance, “[E]very reasonable construction must be resorted to, in order to save a statute from unconstitutionality.” *United States v. Buckland*, 289 F.3d 558, 564 (9th Cir. 2002) (*en banc*) (quoting *Hooper v. California*, 155 U.S. 648, 657 (1895)). In *Buckland*, the court addressed the effect of *Apprendi* on the federal narcotics trafficking statute -- 21 U.S.C. § 841. Previously, courts had uniformly interpreted this statute to allow drug quantity to be determined by a judge using a preponderance of the evidence standard. In the wake of *Apprendi*, the court reexamined the statute seeking to avoid a finding that it was unconstitutional. *Buckland*, 289 F.3d at 564 (“[I]f an otherwise acceptable construction of a statute would raise serious constitutional problems, and where an alternative interpretation of the statute is ‘fairly possible,’ we are obligated to construe the statute to avoid such problems”) (quoting *INS v. St. Cyr*, 533 U.S. 289, 299-300 (2001)).

Despite the existence of a clearly labeled “penalty” provision, the Court “eschews the distinction between sentencing factors and elements of a crime: ‘the relevant inquiry is not one of form, *but of effect* -- does the required finding expose the defendant to a greater punishment than that authorized by the jury’s guilty verdict?’” *Buckland*, 289 F.3d at 566 (quoting *Apprendi*, 530 U.S. at 494). The *Buckland* court overruled prior authority treating sentencing factors as immune from Fifth and Sixth Amendment protections based on construction of the statute: “we honor the intent of Congress and the requirements of due process by treating drug quantity and type, which fix the maximum sentence for a conviction, as we would any other material fact in a criminal prosecution: it must be charged in the indictment, submitted to the jury, subject to the rules of evidence, and proved beyond a reasonable doubt.” *Buckland*, 289 F.3d at 568.

Buckland provides a perfect analogy to previous Ninth Circuit precedent on the ACCA. Initially, some courts recognized that the ACCA created a new offense. *United States v. Davis*, 801 F.2d 754, 755-56 (5th Cir. 1986). In *United States v. West*, 826 F.2d 909, 910 (9th Cir. 1986), the court rejected *Davis* and found that statutory silence allowed increase of the statutory maximum without compliance with Fifth and Sixth Amendment requirements. Now, as in *Buckland*, the statute must be revisited in light of the Supreme Court's decisions in *Blakely*, *Apprendi*, *Castillo*, and other related cases.

To avoid the constitutional questions of application and expansion of *Almendarez-Torres* and the ACCA, the statute must be construed to require charge by grand jury indictment and proof as required by the Sixth Amendment.

B. If Not Construed To Avoid The Constitutional Question, The Increase Of The Statutory Maximum, Where The Indictment Does Not Charge The ACCA And The Defendant Did Not Admit To Its Application, Violates The Fifth And Sixth Amendments Under *Apprendi*, *Ring*, And *Blakely*.

Even without resort to statutory construction, the enhancement of the sentence would violate binding Supreme Court authority regarding reasonable doubt and jury trial rights. Factual and legal distinctions from *Almendarez-Torres* leave this case to be controlled by *Apprendi*, *Ring v. Arizona*, 536 U.S. 610 (2002), and *Blakely*. The ACCA involves more than a mere fact of conviction, and the label attached to the factual predicates for increased sentence is irrelevant to Fifth and Sixth Amendment rights.

1. *The ACCA's Prerequisites Include Factors Beyond A Mere Prior Judgment That Increase The Statutory Maximum Where A Prior Conviction Is Already An Element Of The Offense.*

The ACCA requires a number of factors to be proved to increase the statutory maximum from ten years to life without parole. The required factors are more than the mere existence of prior judgments of conviction.

The federal firearms statute prohibits the possession of a firearm by a person who has been convicted of a crime punishable by more than one year in prison:

It shall be unlawful for any person –

(1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;

* * *

to . . . possess in or affecting commerce, any firearm or ammunition; . . .

18 U.S.C. § 922(g)(1). In order for the punishments to increase under the ACCA, additional facts surrounding three previous convictions, under the Section 921(a)(20) definition, as well as that the convictions were “committed on occasions different from one another,” must be proved. 18 U.S.C. § 924(e)(1). Each prior conviction must also meet the definitions for an offense to be considered a “serious drug offense” and a “violent felony.” 18 U.S.C. § 924(e)(2)(A) & (B).

In *Dillard v. Roe*, 244 F.3d 758, 772 (9th Cir. 2001), the court applied the principles underlying *Apprendi* to the California three-strikes statute and the federal firearms statute to hold that factors beyond the mere existence of a prior judgment are elements of the offense. The court considered a state statute that, like the ACCA, increased the statutory maximum based on prior conviction of a certain type of offense -- here a “serious felony” where the defendant “personally uses a firearm.” The court found that the decision was controlled by the Sixth Amendment guarantee

of a jury determination of facts resulting in an increased statutory maximum. *Dillard*, 244 F.3d at 772-73. The court’s analysis of the statute required review of facts beyond the mere fact of conviction:

Our determination concerning whether the fact that Dillard “personally use[d] a firearm” is an “element” or a “sentencing factor” requires that we look beyond the enumerated elements of the crime for which Dillard was convicted. We must analyze “the operation and effect of the law” mandating the two five-year sentence enhancements “as applied and enforced by the state.” . . . We must then determine whether, in this instance, “*Winship*’s reasonable-doubt requirement applies to facts not formally identified as elements of the offense charged.”

Dillard, 244 F.3d at 772 (citations omitted). The court then viewed the additional facts that needed to be determined beyond the existence of a judgment and held that these factors must be submitted to a jury and determined beyond a reasonable doubt: “We conclude, therefore, that the additional fact found by the trial judge in this case is an element that transforms the offense for which Dillard was charged and convicted into a different, more serious offense that exposes him to greater and additional punishment.” *Id.* at 773. On that basis, the court found that federal relief was required in the absence of proof to a jury beyond a reasonable doubt that the prior offense involved personal use of a firearm against the victim. *Id.*

Under the ACCA, the government must charge and prove three “serious drug offense[s]” or “violent felon[ies]” (18 U.S.C. § 924(e)(2)), including facts necessary for a categorical analysis of the prior convictions. The government also must charge and prove their sequence. Given *Apprendi*’s narrow limitation on *Almendarez-Torres* as precedent, the ACCA requires pleading and proof of all ACCA factors beyond the fact of a conviction.

2. *Apprendi, Blakely, And Ring Establish That Fifth And Sixth Amendment Trial Rights Require That Factors That Increase Statutory Maximums -- Regardless Of How They Are Labeled -- Must Be Either Proved To A Jury Beyond A Reasonable Doubt Or Admitted During The Guilty Plea Colloquy.*

In a series of three powerful pronouncements, the Supreme Court has adopted a rule for Fifth and Sixth Amendment rights requiring proof of any factor that increases the statutory guideline maximum to a jury beyond a reasonable doubt. These decisions also require that *Almendarez-Torres* be narrowly limited to its unique facts.

a. *Apprendi* Required Trial Rights For Facts That Increase The Statutory Maximum And Narrowly Limited *Almendarez-Torres* To Its Facts.

At the outset, the *Apprendi* Court established that the label given to the increase in punishment was not relevant: “Merely using the label ‘sentence enhancement’ to describe the [enhancing factor] surely does not provide a principled basis for treating them differently.” *Apprendi*, 530 U.S. at 476. The Court noted that any distinction between an “element” and a “sentencing factor” was unknown at the common law and did not emerge until *McMillan v. Pennsylvania*, 477 U.S. 79 (1986). However, *McMillan* involved a statutory minimum within the maximum. *Apprendi* 530 U.S. at 487 n.13. The Court ultimately held that the precedent of *Winship* and *Mullaney v. Wilbur*, 421 U.S. 684 (1975), required that factors increasing the statutory maximum must be proved to a jury beyond a reasonable doubt. *Apprendi*, 530 U.S. at 490.

As set out earlier, the *Apprendi* Court specifically addressed *Almendarez-Torres* and tightly limited it to its facts. For example, the opinion cited Justice Scalia's dissenting opinion in *Almendarez-Torres*, which approved a broad statement regarding the due process and jury protections for increasing the maximum sentence: “Since *Winship*, we have made clear beyond peradventure that *Winship*'s due process and associated jury protections extend, to some degree, ‘to determinations that [go] not to a defendant’s guilt or innocence, but simply to the length of his

sentence.” *Apprendi*, 530 U.S. at 484 (quoting *Almendarez-Torres*, 523 U.S. at 255 (Scalia, J., dissenting)). The Court noted that *Almendarez-Torres* “represents at best an exceptional departure from the historic practice [of requiring pleading and proof of factors increasing statutory maximums].” *Apprendi*, 530 U.S. at 487.

The Court then explicitly noted that the *Almendarez-Torres* decision may have been incorrectly decided and should be narrowly applied:

Even though it is arguable that *Almendarez-Torres* was incorrectly decided, and that a logical application of our reasoning today should apply if the recidivist issue were contested, *Apprendi* does not contest the decision's validity, and we need not revisit it for purposes of our decision today to treat the case as a narrow exception to the general rule we recalled at the outset. Given its unique facts, it surely does not warrant rejection of the otherwise uniform course of decision during the entire history of our jurisprudence.

Apprendi, 530 U.S. at 489 (footnote omitted). In questioning the validity of *Almendarez-Torres*, the Court noted not only Justice Scalia’s dissent in *Almendarez-Torres*, but added that *Almendarez-Torres* ignored previous Supreme Court authority that “the indictment must contain an allegation of every fact which is legally essential to the punishment to be inflicted.” *Apprendi*, 530 U.S. at 490 n. 15 (quoting *United States v. Reese*, 92 U.S. 214, 232-33 (1875)).

Under the reasoning of *Apprendi*, the reasonable doubt component of Fifth Amendment due process and the Sixth Amendment right to jury trial fully apply to any fact that increases the statutory maximum. *Almendarez-Torres* did not address other factual distinctions, which relate to factors beyond the pure fact of conviction. *Almendarez-Torres* should not, and cannot under Supreme Court precedent, be extended to these additional facts required under the ACCA.

b. *Ring* And *Blakely* Reinforced The Application Of *Apprendi* To Sentencing Facts That Increase The Maximum Sentence.

In *Ring*, the Court addressed the inconsistency between *Apprendi* and *Walton v. Arizona*, 497 U.S. 639 (1990), in which the Court had upheld fact finding (beyond a reasonable doubt) by a judge regarding sentencing factors predicate to a death sentence. The issue was tightly limited to the Sixth Amendment right to jury and did not involve aggravating circumstances relating to past convictions. *Ring*, 536 U.S. at 597 n.4. The Court found that evolving constitutional litigation leading to *Apprendi* sufficiently undermined *Walton* that it was overruled.

Citing *Apprendi*'s language that the "sentence enhancement" label was irrelevant (the dispositive question "is not one of form, but of effect"), the sentencing factors had to be found beyond a reasonable doubt by a jury. Again, the Court looked to the effect of the aggravating circumstance as exposing the defendant to greater punishment than authorized by the jury's verdict. *Ring*, 536 U.S. at 604. The Court specifically quoted Justice Thomas's concurring opinion in *Apprendi*, in which he renounced his swing vote in *Almendarez-Torres*, to state the general proposition that requires that the sentence be vacated in the present case:

[I]f the legislature defines some core crime and then provides for increasing the punishment of that crime upon a finding of some aggravating fact [,] . . . the core crime and the aggravating fact together constitute an aggravated crime, just as much as grand larceny is an aggravated form of petit larceny. The aggravating fact is an element of the aggravated crime.

Ring, 536 U.S. at 605 (quoting *Apprendi*, 530 U.S. at 501) (Thomas, J., concurring)). In reversing *Walton*, the Court stated: "Because Arizona's enumerated aggravating factors operate as 'the functional equivalent of an element of a greater offense,' *Apprendi*, 530 U.S. at 494 n. 19 . . ., the Sixth Amendment requires that they be found by a jury." *Ring*, 536 U.S. at 609.

Justice Thomas once again renounced his swing vote in *Almendarez-Torres* by joining Justice Scalia's concurring opinion in *Ring*. Justice Scalia asserted that the dissent in *Almendarez-Torres* had been "reaffirmed" by *Apprendi*: "I believe that the fundamental meaning of the jury-trial guarantee of the Sixth Amendment is that all facts essential to the imposition of the level of punishment that the defendant receives -- whether the statute calls them elements of the offense, sentencing factors, or Mary Jane -- must be found by the jury beyond a reasonable doubt." *Ring*, 536 U.S. at 610 (Scalia, J., concurring).

In *Blakely*, the Court applied *Apprendi*'s holding regarding reasonable doubt and jury trial rights to increases in available punishment in a state guidelines system. At the outset of the analysis, Justice Scalia, now writing for the majority, noted the common law rule that "every fact which is legally essential to the punishment" must be charged in the indictment and proved to a jury. *Blakely*, 124 S. Ct. at 2536-37 n.5 (citation omitted).

Blakely involved the increase in the Washington guidelines punishment scheme for kidnapping with "deliberate cruelty." From the outset, the Court noted that the aggravating factor was "neither admitted by Petitioner nor found by a jury." *Blakely*, 124 S. Ct. at 2537. The Court held that increases in guidelines punishment implicated the constitutional trial rights:

[T]he relevant "statutory maximum" is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose without any additional findings. When the judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts "which the law makes essential to the punishment" . . . and the judge exceeds his proper authority.

Blakely, 124 S. Ct. at 2537. The Court again articulated the broad scope of its ruling in applying the principle of *Apprendi* to any aggravating fact:

[T]he state tries to distinguish *Apprendi* into *Ring* by pointing out that the enumerated grounds for its departure in its regime are illustrative rather than exhaustive. This distinction is immaterial. Whether the judge's authority to impose

an enhanced sentence depends on finding a specified fact (as in *Apprendi*), one of several specified facts (as in *Ring*), or any aggravating fact (as here), it remains the case that the jury's verdict alone does not authorize the sentence. The judge acquires that authority only upon finding some additional fact.

Blakely, 124 S. Ct. at 2538. And the Sixth Amendment facts directly implicate the Fifth Amendment right to indictment under *Cotton*. Here, the ACCA's requirement that aggravating facts be found fully implicates the Fifth and Sixth Amendment rights protected by *Apprendi* and *Cotton*.

C. In The Alternative, The Failure To Allege The Enhancing Factor In The Indictment Violated The Fifth Amendment Because *Almendarez-Torres* Is No Longer Valid.

Even if statutory construction under the doctrine of constitutional avoidance and the alternative of limiting *Almendarez-Torres* to its "unique facts" did not resolve this case, the defendant should prevail because, even on its facts, *Almendarez-Torres* is no longer good law. The Supreme Court stated long ago the "one [rule of] universal application, -- that every ingredient of the offence must be accurately and clearly expressed; or, in other words, that the indictment must contain an allegation of every fact which is legally essential to the punishment to be inflicted." *United States v. Reese*, 92 U.S. 214, 232 (1875) (Clifford, J., concurring). In the context of this precedent before and the reasoning of the Sixth Amendment and reasonable doubt cases since, *Almendarez-Torres* is an invalid deviation from the common law and constitutional requirement that all the ingredients necessary for punishment be alleged in the indictment. Especially given Justice Thomas's *Shepard* concurrence (125 S. Ct. at 1263-64) pointing out that a majority of Justices believe *Almendarez-Torres* was "wrongly decided," the decision should not be applied to this sentencing.