

No.

In the
Supreme Court of the United States

JOSEPH MONROIG

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the First Circuit

PETITION FOR A WRIT OF CERTIORARI

Joshua L. Gordon
(Counsel of Record)
26 S. Main St., #175
Concord, N.H. 03301
www.AppealsLawyer.net
(603) 226-4225

November 28, 2005

QUESTIONS PRESENTED

1. Whether, under the Sixth Amendment, prior convictions used to lengthen a criminal sentence must be either proven beyond a reasonable doubt, or admitted to by a defendant who enters a plea of guilty.

PARTIES TO THE PROCEEDING

Joseph Monroig was a resident of the State of New Hampshire. He is now incarcerated in Beckley FCI, Beaver WV. As this is a criminal proceeding, the United States of America was the prosecuting party.

TABLE OF CONTENTS

QUESTIONS PRESENTED *i*
PARTIES TO THE PROCEEDING *ii*
TABLE OF AUTHORITIES *iv*
REPORT OF OPINION 2
JURISDICTION 2
CONSTITUTIONAL PROVISION 2
STATEMENT OF THE CASE 3
REASONS FOR GRANTING THIS PETITION 3
 This Case Presents the Court with the Opportunity to Determine the Continued Viability
 of *Almendarez-Torres* in Light of More Recent Holdings in *Jones*, *Apprendi*, *Blakely*,
 Booker, and *Shepard* 3
CONCLUSION 6
DECISION OF COURT OF APPEALS BELOW *following page 6*

TABLE OF AUTHORITIES

| | |
|--|---------|
| <i>Almendarez-Torres v. United States</i> , 523 U.S. 224, 118 S.Ct. 1219 (1998) | 3, 4, 5 |
| <i>Apprendi v. New Jersey</i> , 530 U.S. 466, 120 S.Ct. 2348 (2000) | 3, 4, 5 |
| <i>Blakely v. Washington</i> , 542 U.S. 296, 124 S.Ct. 2531 (2004) | 3 |
| <i>United States v. Booker</i> , ___ U.S. ___, 125 S.Ct. 738 (2005) | 3, 4 |
| <i>Jones v. United States</i> , 526 U.S. 227, 119 S.Ct. 1215 (1999) | 3, 4 |
| <i>Monge v. California</i> , 524 U.S. 721, 741 (1998) | 5 |
| <i>United States v. Moore</i> , 401 F.3d 1220 (10 th Cir. 2005) | 5 |
| <i>Shepard v. United States</i> , ___ U.S. ___, 125 S.Ct. 1254 (2005) | 4, 5 |
| <i>United States v. Williams</i> , 410 F.3d 397, 402 (7 th Cir 2005) | 5 |

No.

In the
Supreme Court of the United States

JOSEPH MONROIG

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the First Circuit

PETITION FOR A WRIT OF CERTIORARI

Joseph Monroig respectfully petitions this Court for a writ of certiorari to review the decision of the United States Court of Appeals for the First Circuit in this case.

REPORT OF OPINION

The opinion of the First Circuit Court of Appeals sought to be reviewed is not reported in the Federal Reporter, but is reprinted in the appendix hereto.

JURISDICTION

The judgment of the court of appeals was entered on August 30, 2005. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

**UNITED STATES CONSTITUTION
SIXTH AMENDMENT**

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 defense.

STATEMENT OF THE CASE

Joseph Moroig plead guilty to two counts of distributing cocaine and heroin. 21 U.S.C. § 841(a)(1). During his sentencing, he did not admit to any prior convictions, and their existence was found by a standard lower than beyond-a-reasonable-doubt. The New Hampshire District Court (*Joseph DiClerico, Jr., J.*) nonetheless took cognizance of Mr. Monroig's record, placed him in Sentencing Guidelines criminal history category VI, and imposed a sentence of 10 years. The criminal history was thus used to augment Mr. Monroig's sentence beyond what it would have been had it not been counted, or counted differently.

REASONS FOR GRANTING THIS PETITION

This Case Presents the Court with the Opportunity to Determine the Continued Viability of *Almendarez-Torres* in Light of More Recent Holdings in *Jones*, *Apprendi*, *Blakely*, *Booker*, and *Shepard*

The question presented in this petition raises the issue of the continued viability of *Almendarez-Torres v. United States*, 523 U.S. 224, 118 S.Ct. 1219 (1998).

In the 1998 *Almendarez-Torres* case, this Court found no constitutional infirmity with a federal statute that permitted a defendant's sentence to be enhanced based upon a prior conviction that had not been charged in the indictment. Although this Court's decisions in *Apprendi v. New Jersey*, 530 U.S. 466, 489 & n.15, 120 S.Ct. 2348 (2000), *Jones v. United States*, 526 U.S. 227, 119 S.Ct. 1215 (1999), and *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531 (2004), raised questions concerning the reasoning and result in *Almendarez-Torres*, the *Apprendi* line of cases still purport to exempt "the fact of a prior conviction" from their otherwise universal rule that 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.

In *United States v. Booker*, ___ U.S. ___, 125 S.Ct. 738 (2005), this Court reaffirmed its holding in *Apprendi*, thereby continuing the narrow exception carved out in *Apprendi* which

allows proof of prior convictions by a standard less than beyond-a-reasonable-doubt. *Booker*, 125 S. Ct. at 756.

Exempting prior convictions from the rule of *Apprendi* is now unsupportable. Indeed, it is supported only by *Almendarez-Torres* itself, a decision whose assumptions and reasoning on this issue have been subsequently undermined.

Just a few weeks after *Booker*, this Court decided *Shepard v. United States*, ___ U.S. ___, 125 S.Ct. 1254 (2005). There the government attempted to prove the defendant's prior conviction by reference to police reports and other non-jury documents. Justice Souter wrote the majority opinion, which held that consideration of these documents was improper. In part III of *Shepard*, Justice Souter acknowledged the constitutional doubt, but distinguished the sixth amendment issues made clear in the *Apprendi-through-Booker* line of cases from the facts of *Shepard*. Justice Souter reasoned that police reports are "too far removed from the conclusive significance of a prior judicial record, and too much like the findings subject to *Jones* and *Apprendi*, to say that *Almendarez-Torres* clearly authorizes a judge to resolve the dispute. *Shepard*, 125 S.Ct. at 1262.

This part of the *Shepard* opinion, however, was not joined by Justice Thomas, and thus was not written for the majority. Justice Thomas wrote separately that where the facts are not necessarily established by the record of conviction, and the judge has to "make a disputed finding of fact about what the defendant and [prior] judge must have understood as the prior plea's factual basis, the dispute raises the concern underlying *Jones* and *Apprendi*," that is, "the Sixth and Fourteenth Amendments guarantee a jury's standing between a defendant and the power of the State, and they guarantee a jury's finding of any disputed fact essential to increase a potential sentence's ceiling." *Shepard*, ___ U.S. at ___, 125 S.Ct. at 1256 (*Thomas, J., concurring*).

Justice Thomas did not join part III because it did not go far enough. Rather than finding a constitutional doubt concerning the continued viability of *Almendarez-Torres* after *Booker*, he found constitutional error: "*Almendarez-Torres* . . . has been eroded by this Court's subsequent

Sixth Amendment jurisprudence, and a majority of the Court now recognizes that *Almendarez-Torres* was wrongly decided.” *Shepard*, ___ U.S. at ___, 125 S.Ct. at 1264 (*Thomas, J.*, dissenting).

Based on *Shepard*, it appears that the prior conviction exception to *Booker* has been undermined. Justice Thomas noted: “The parties do not request it here, but in an appropriate case, this Court should consider *Almendarez-Torres*’ continuing viability.” *Id.*

In his dissent in *Monge v. California*, 524 U.S. 721, 741 (1998), Justice Scalia made the same sort of comments, calling the holding of *Almendarez-Torres* “a grave constitutional error affecting the most fundamental of rights.” In *Apprendi* itself, this Court went so far as to state that “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*, 530 U.S. at 489-490. Justice Scalia pointed out in his dissent in *Almendarez-Torres*, “there is no rational basis for making recidivism an exception” to the general rule that any fact altering the maximum penalty for a crime must be either admitted by the defendant or proven to a jury beyond a reasonable doubt. *Almendarez-Torres*, 523 U.S. at 258 (*Scalia, J.*, dissenting).

Based on subsequent law, the continued viability of *Almendarez-Torres* can be reasonably questioned. Because it remains the law, however, courts (such as the First Circuit in this case) nonetheless apply its holding. *See e.g., United States v. Williams*, 410 F.3d 397, 402 (7th Cir. 2005); *United States v. Moore*, 401 F.3d 1220, 1223-24 (10th Cir. 2005). Because the continuing viability of *Almendarez-Torres* is an important question of federal law that should be decided by this Court, and because it affected his plea of guilty here, Mr. Monroig requests a grant of certiorari.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully Submitted,

Joshua L. Gordon
(Counsel of Record)
26 S. Main St., #175
Concord, N.H. 03301
www.AppealsLawyer.net
(603) 226-4225

November 28, 2005