

*Slide Presentation:*  
Selected Post-Booker Cases  
Addressing Criminal History Issues

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## Criminal History:

Questions of Fact vs. Questions of Law

U.S. v. Carpenter (7<sup>th</sup> Cir, May 6, 2005)  
(Judge Easterbrook)

“Criminal history is all about prior convictions; its ascertainment therefore is an issue of law excluded by Booker’s own formulation and governed by *Almendarez-Torres v. United States*... Neither judges nor juries pass on the wisdom of legal rules case by case, and *Booker* ... is about who finds facts rather than what legal consequences those facts may have.”

## “Fact of Prior Conviction Exception”

*Booker* leaves undisturbed the Apprendi principle:

"Any fact (other than a prior conviction), which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt."

(125 S. Ct. at 756)

**Shepard v. United States**  
**125 S.Ct. 1254 (March 7, 2005)**  
**Justice Souter**

Part III: SOUTER, joined by STEVENS, SCALIA, GINSBURG

Court addressed the application of the prior conviction exception to a disputed fact "about a prior conviction."

# Shepard v. United States

## 125 S.Ct. 1254 (March 7, 2005)

### *Background:*

Defendant pled guilty to being felon in possession of firearm per 18 USC §922(g)(1).

Maximum guideline sentence: 37 months.

Gov sought 15-year minimum per 924(e):ACCA applies if offender has three previous convictions for "violent felonies."

Shepard had three prior burglary convictions.  
Gov says these are "violent felonies"

Taylor v U.S. (1990): only "generic burglary" (e.g., committed in a building or enclosed space) is a violent crime under the ACCA.

Shepard's three earlier convictions were under burglary statute of Massachusetts, which is broader than generic burglary.

**Shepard v. United States**  
**125 S.Ct. 1254 (March 7, 2005)**

Shepard's indictment did not specify whether burglary of a structure, i.e., generic burglary, was at issue in his convictions.

***Issue:*** whether a sentencing court could look to police reports or complaint applications to determine if an earlier guilty plea had admitted, and supported a conviction for, generic burglary.

**Shepard v. United States**  
**125 S.Ct. 1254 (March 7, 2005)**

Court reiterated its holding in Taylor that a sentencing court addressing § 924(e) cannot consider items from the record of a prior conviction that were not **conclusively validated** in the earlier proceeding.

(125 S. Ct. at 1260-61)

**Shepard v. United States**  
**125 S.Ct. 1254 (March 7, 2005)**

A sentencing court is limited to examining the statute of conviction, charging document, plea agreement, plea transcript, and "any explicit factual finding by the trial judge to which the defendant assented."

(125 S.Ct. at 1257)

When the definition of the prior crime itself does not reveal whether the conviction was for generic burglary, the "only certainty of a generic finding lies in jury instructions, or bench trial findings and rulings, or (in a pleaded case) in the defendant's own admissions or accepted findings of fact confirming the factual basis for a valid plea."

(125 S.Ct. at 1262)

**Shepard v. United States**  
**125 S.Ct. 1254 (March 7, 2005)**

DC's inquiry into whether a prior conviction was for "generic" burglary was "too removed from the **conclusive significance of a prior judicial record . . .** to say that *Almendarez --Torres* clearly authorizes a judge to resolve the dispute."

**KEY:**

*Shepard* characterized *Taylor's* statutory construction rule as of Sixth Amendment significance.

**Shepard v. United States**  
**125 S.Ct. 1254 (March 7, 2005)**

Justice Thomas:

Joined opinion except as to Part III:

Concurring Opinion:

Both *Almendarez-Torres* and *Taylor* have been eroded by the Court's subsequent Sixth Amendment jurisprudence.

Predicts *Almendarez-Torres* will be overturned.

**KEY POINTER:**

Five justices may be ready to apply *Apprendi* to require prior convictions to be alleged in indictment and prove BRD at trial.

## BLAKELY / BOOKER STRATEGY

With Supreme Court hinting that Almandarez-Torres might be overturned:

in cases where prior convictions raise the statutory maximum sentence, the defense should argue that the priors must be treated as elements -- thus pleaded and proven BRD to jury.

### *Example:*

When a prior offense has the effect of converting a misdemeanor into a felony, Almandarez-Torres does not apply, because both the maximum sentence and the very nature of crime change.

United States v. Rodriguez-Gonzales, 358 F.3d 1156(9th Cir. 2004) (context: 8 U.S.C. §1325)

## ACCA - Career Offender

The term "violent felony" under 18 U.S.C. §924(e)(2)(B)(ii) [ACCA] has been construed to have the same meaning as "crime of violence" under U.S.S.G. § 4B1.2 (Career Offender)

United States v. Nolan,  
397 F.3d 665, 666 (8th Cir. 2005)

Not Required To Plead / Prove To Jury  
Priors re: ACCA

U.S. v Moore

401 F.3d 1220 (10th Cir, March 23, 2005)

ACCA case.

**Held:** Booker / Shepard "do not require the government to charge in an indictment or prove to a jury either the existence of prior convictions or their classification as 'violent felonies.'"

"[B]ecause determining **whether a given felony constitutes a 'violent felony' is a question of law and not fact**, the Sixth Amendment does not require that determination to be made by a jury."

Not Required To Plead / Prove To Jury  
Priors re: Guideline Enhancements

U.S. v Gallegos-Aguero (11th Cir., May 18, 2005)

Illegal re-entry case. No obligation to plead / prove to whether prior conviction is within category of offenses set forth in 2L1.2

U.S. v Schlifer (7<sup>th</sup> Cir., April 7, 2005)

Drug Case. No obligation to plead / prove to jury predicate facts re: Career Offender

No Obligation To Plead / Prove to Jury  
Predicates re: Career Offender Status

**U.S. v. Marcussen**

**403 F.3d 982, (8th Cir, 4/11/05)**

***Held:*** predicate offenses for C.O. do not have to be pleaded in indictment or proven to a jury  
BRD

"[W]e previously have rejected the argument that the nature of a prior conviction is to be treated differently from the fact of a prior conviction. ... **Once the sentencing court determines that a prior conviction exists, it is a legal question for the court whether the crime meets the "crime of violence" definition of § 4B1.2 of the United States Sentencing Guidelines ... The Supreme Court's post-Booker opinion in *Shepard v. United States* lends further support to the rule that the sentencing court, not a jury, must determine whether prior convictions qualify as violent felonies."**

## *Shepard* Applied re: Underlying Conduct

U.S. v. Lewis (7<sup>th</sup> Cir, April 19, 2005)

(Judge Easterbrook)

***Held:*** DC violated *Shepard* in evaluating the nature of defendant's prior robbery conviction.

“Recidivist enhancements depend on the crime of which the person has been convicted, **not on the precise conduct that led to the conviction.**”

"Instead of evaluating the elements of robbery under Indiana law, or the risks posed by robberies as a class, **the district court stressed what Lewis was alleged to have done.** The judge wrote that **affidavits** in the earlier prosecution 'indicate that Lewis entered a jewelry store ... armed with a short--barreled pump action shotgun, demanded that the store owner open and remove the contents of the store safe, and then fled with an amount of currency and jewelry.'"

U.S. v. Lewis (7<sup>th</sup> Cir, April 19, 2005)  
(Judge Easterbrook)

*Per Shepard:*

"Affidavits attached to an information as part of Indiana practice are not part of the "charging document" for this purpose. **The affidavit is just a police report under oath, and Shepard holds that police reports may not be considered."**

"Although it is tempting to treat the district judge's use of the affidavits as a trifle----after all, robbery always is a "crime of violence"---- **the line between categorical and person – specific classification is important."**

## Scope of the “Prior Conviction” Exception

U.S. v. Gutierrez-Ramirez

(5th Circuit, April 5, 2005)

***Held:*** DC erred per *Shepard* in considering a California **abstract of judgment** to determine that defendant's prior California conviction qualified as a "drug trafficking offense" per 2L1.2

"[T]he abstract of judgment is generated by the court's clerical staff, so it is not an 'explicit factual finding by the trial judge to which the defendant assented,' which the court may consider under *Shepard*. Additionally, considering the low level of reliability associated with abstracts of judgment in California, we are satisfied they should not be added to the list of documents *Shepard* authorizes the sentencing judge to consult."

## Scope of the “Prior Conviction” Exception

### **U.S. v Garza-Lopez**

**5th Circuit (May 19, 2005)**

Vacates sentence / remands per *Shepard* where DC improperly relied on **PSR's characterization of Def's prior offense as a "drug trafficking offense"** re: enhancement under 2L1.2.

## Scope of the “Prior Conviction” Exception

U.S. v. Fagans (2d Cir, April 27, 2005)

The District Court also increased the Criminal History Category from III to IV (by adding two points) because Fagans committed his current offense while on probation. The PSR noted, without objection by the Defendant, that he was serving a term of 6-12 months probation at the time of the offense. These "fact[s] of a prior conviction" do not implicate Defendant's Sixth Amendment rights. (Cites Booker) **While the exact scope of the phrase "fact of a prior" conviction has yet to be determined, see Shepard v. United States ..., the conviction itself, and the type and length of a sentence imposed seems logically to fall within this exception.** Thus, the Defendant's criminal history calculation was correct under the Guidelines and did not affect his Sixth Amendment rights.

## Scope of the “Prior Conviction” Exception

U.S. v Washington

404 F.3d 834

4th Cir (April 15, 2005)

Sentence remanded per Shepard.

DC found Def to be C.O. because prior conviction was for a "crime of violence," as it "otherwise involved conduct that presents a serious potential risk of physical injury to another." USSG § 4B1.2(a)(2).

Held: Sixth Amen violated because DC relied on facts beyond what Shepard permits:

## U.S. v Washington, 404 F.3d 834

### *Quote:*

[T]he court then found additional facts about the building that was subjected to the break-in. These facts included what, **from the court's common experience**, the building's likely contents were; the identity of any occupants; and the probable level of security. These additional, hypothetical facts were specific: *e.g.*, that "drugs and guns" would be present on the premises; that such items would be "protected from theft"; that, "even if no one affiliated with the Task Force was present at the time" of the break-in, "one or more members or employees" could "show up there at any time of day or night in view of the oft-times clandestine and nocturnal nature of their work"; and that any such employee "would be armed."

## Scope of the “Prior Conviction” Exception

U.S. v Smith

390 F.3d 661, amended 405 F.3d 726  
(9<sup>th</sup> Cir, April 27, 2005)

**Per *Shepard*, DC may rely on plea colloquy transcript to establish the elements of Def's prior convictions, and for Def's admissions.**

## Impact of *Shepard* On Career Offender Status

U.S. v Schlifer (7<sup>th</sup> Cir., April 7, 2005)

In making Career Offender determination, DC may make finding as to whether prior convictions are “related” per 4A1.2(a)(2)

## Impact of Shepard On Career Offender Status

**U.S. v. Ngo** (7<sup>th</sup> Cir., May 3, 2005)

Circuit orders *Paladino* remand

District Court sentenced D as Career Offender  
Found two prior robbery convictions were  
not “related” per 4A1.2(a)(2) [not  
consolidated for sentencing or part of a  
common scheme / plan]

Circuit’s analysis focuses on **Shepard**.

## U.S. v. Ngo (7<sup>th</sup> Cir., May 3, 2005):

*Excerpt:*

The Almendarez--Torres exception for prior convictions still stands after Shepard but the Court signaled that the purview of the exception is quite narrow. A plurality of the Court concluded that the disputed fact in Shepard ---- whether a prior conviction was for "generic" burglary ---- was "too removed from the conclusive significance of a prior judicial record . . . to say that Almendarez--Torres clearly authorizes a judge to resolve the dispute." **...This language suggests that the recidivism exception exempts only those findings traceable to a prior judicial record of "conclusive significance." Otherwise, Sixth Amendment concerns arise.**

## U.S. v. Ngo (7<sup>th</sup> Cir., May 3, 2005):

No error re: DC's finding that Ngo's **crimes were not consolidated**: falls within narrow parameters permitted by Shepard, i.e., those findings that can be made by resorting only to information with the "conclusive significance" of a prior judicial record.

Court finds error re: DC's finding that Ngo's **crimes were not part of a common scheme or plan**: DC resorted to sources of information without the "conclusive significance" of a prior judicial record; thus, not "clearly authorized" by *Almendarez--Torres*.

## U.S. v. Ngo (7<sup>th</sup> Cir., May 3, 2005):

The problem presented by Shepard arises in cases like Ngo's where sentencing occurred under the mandatory guidelines system, but it will not arise in future guidelines cases in light of Booker's remedial opinion. The Sixth Amendment implications of judicial factfinding have now been cured by Booker with respect to guidelines sentencing because the guidelines are no longer binding. **But no such cure exists with respect to statutory enhancements ---- such as the one applied in Shepard----which mandate higher sentences and leave no discretion to the judge.**

## Impact of Booker On Career Offender Status

**U.S. v. Rosas** (7<sup>th</sup> Cir, May 19, 2005)

Drug / Firearm case: 262-mo sentence per C.O.

Prior for fleeing police officer = “crime of violence”

Correct analysis pre-Booker

Circuit remands per *Paladino*:

District court to determine if it would have sentenced differently under advisory guidelines

(Paladino applies where no 6<sup>th</sup> Amen violation)

**KEY: Booker offers hope that 3553(a) discretion can save defendants who are locked into C.O. status for such convictions as fleeing the police**

## Impact of Booker On Career Offender Status

**U.S. v Harp** (4<sup>th</sup> Cir., May 4, 2005)

**Career Offender status / sentence affirmed.**

*Issue:* was prior state conviction a "controlled substance offense" – i.e., "punishable by imprisonment for a term exceeding one year" per 4B1.2(b)

Circuit cites pre-Booker law: rejects individualized analysis of defendant's state conviction: as long as defendant could have received a sentence greater than one year under state statute, 4B1.2(b) is met for C.O.

*Held:* Booker does not change outcome

# Impact of Booker On Career Offender Status

## **U.S. v Person**

(Dist Mass, April 27, Judge Michael A. Ponsor)

Def qualifies as C.O. Range: 262 - 327

Court downward departs / sentences to 84 mos

Booker not discussed, but impact is evident.

Opinion explains basis for departure and alternatively explains that sentence is reasonable per 3553(a):

## U.S. v Person

### Basis for downward departure per guidelines:

"The court nevertheless made the determination that, even under a mandatory Sentencing Guidelines regime, it would **depart downward to a sentence of 84 months**, based upon the conclusion that the **career offender status would grossly overstate the seriousness of the defendant's criminal history**. Defendant possesses only one scorable prior conviction for drug distribution, which netted him a sentence of approximately twelve months' incarceration. **The other prerequisite offense, resisting arrest, grew out of a relatively minor fracas and resulted in a sentence of probation.** While the defendant clearly does have other convictions, they simply do not justify, in any realistic sense, the imposition of the full sentence called for under the advisory career offender guidelines."

## U.S. v Person

Alternative basis as “reasonable” sentence per 3553(a):

"To the extent that the court's decision to depart downward is incorrect either in substance or in scope, the court would conclude that **the same sentence was reasonable in light of the criteria set forth in 18 U.S.C. § 3553.** In determining a reasonable sentence, the court would take into consideration **the overstatement of the defendant's criminal history**, and the fact that he suffered a **severe psychological injury as a young child** when he realized the people who were raising him were not (as he had been told) his true parents. Beyond this, the court would take into consideration that **the sale itself was extremely small and that the defendant has a very high capacity for rehabilitation. He possesses both marketable skills as a meat cutter and electrician, and a supportive family.**"

## Shepard And 851 Enhancements

United States v. Velazquez

(8th Cir, May 20, 2005)

### ***21 USC 851:***

post-Shepard, certified copies of prior convictions continue to be acceptable to prove prior convictions

# Booker & Crack / Powder Sentencing

## *Criminal History Over-Representation As Factor*

### US v. Clay

(E.D.Tenn. May 6, 2005, USDJ Ronnie Greer)

156-month sentence imposed [guidelines much higher]

“1. The defendant's history and characteristics as set forth above;

“2. His criminal history category which over states his criminal history and weighs in his favor against the likelihood that he will commit another offense;

“3. The fact that he withdrew from the conspiracy and led a productive life for one year prior to his arrest in this case weighs in his favor against the likelihood that he will commit another offense; and

“4. The unjustified disparity in the 100:1 quality ratio for punishment between cocaine base or crack and powder cocaine.”

# Criminal History & Foreign Convictions

**U.S. Supreme Court: Small v. U.S.** (April 26, 2005)

**Held:** foreign convictions do not fall within scope of 18 USC 922(g)(1), which forbids “any person ... convicted in any court ... of a crime punishable by imprisonment for a term exceeding one year ... to ... possess ... any firearm.”

**Justice Stephen G. Breyer:** "We hold that the phrase encompasses only domestic, not foreign, convictions(.)"

Ruling may have broader significance in future debate re: whether to incorporate foreign convictions into Criminal History calculations.

4A1.2(h): does not include foreign convictions (but may be considered re: upward departure)

## Criminal History Issues Within Substantive Statute Of Conviction

### **21 U.S.C. §§ 841(b)(1)(A) and 846:**

**Mandatory life sentence if two conditions met:**  
**(1) threshold amount of controlled substance**  
**(eg, crack: 50 or more grams)**  
**(2) violation must have occurred "after two or**  
**more prior convictions for a felony drug offense**  
**have become final."**

### **U.S. v Powell (2d Cir, April 13, 2005)**

**Vacates / remands for resentencing: district**  
**court erred in treating two prior drug convictions**  
**as one and refusing to impose mandatory life term**