SUPREME COURT OF THE UNITED STATES

No. 03–9168

REGINALD SHEPARD, PETITIONER *v.* UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

[March 7, 2005]

JUSTICE THOMAS, concurring in part and concurring in the judgment.

Apprendi v. *New Jersey,* 530 U. S. 466 (2000), and its progeny prohibit judges from "mak[ing] a finding that raises [a defendant's] sentence beyond the sentence that could have lawfully been imposed by reference to facts found by the jury or admitted by the defendant." *United States* v. *Booker*, 543 U. S. ___, ___ (2005) (slip op., at 5) (THOMAS, J., dissenting in part). Yet that is what the Armed Career Criminal Act, 18 U. S. C. §924(e) (2000 ed., Supp. II), permits in this case. Petitioner Reginald Shepard pleaded guilty to being a felon in possession of a firearm, in violation of 18 U. S. C. §922(g)(1), which exposed him to a maximum sentence of 10 years under §924(a)(2) and a Federal Sentencing Guidelines range of 30-to-37 months. However, §924(e)(1) (2000 ed., Supp. II) mandated a minimum 15-year sentence if Shepard had three previous convictions for "a violent felony or a serious drug offense." Shepard has never conceded that his prior state-court convictions qualify as violent felonies or serious drug offenses under §924(e). Even so, the Court of Appeals resolved this contested factual matter by ordering the District Court to impose the enhancement on remand.

The constitutional infirmity of §924(e)(1) as applied to Shepard makes today's decision an unnecessary exercise.

Nevertheless, the plurality today refines the rule of *Taylor* v. *United States,* 495 U. S. 575 (1990), and further instructs district courts on the evidence they may consider in determining whether prior state convictions are §924(e) predicate offenses. *Taylor* and today's decision thus explain to lower courts how to conduct factfinding that is, according to the logic of this Court's intervening precedents, unconstitutional in this very case. The need for further refinement of *Taylor* endures because this Court has not yet reconsidered *Almendarez-Torres* v. *United States,* 523 U. S. 224 (1998), which draws an exception to the *Apprendi* line of cases for judicial factfinding that concerns a defendant's prior convictions. See *Apprendi*, *supra*, at 487–490.

Almendarez-Torres, like *Taylor*, 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. See 523 U. S., at 248–249 (SCALIA, J., joined by STEVENS, SOUTER, and GINSBURG, JJ., dissenting); *Apprendi*, *supra*, at 520–521 (THOMAS, J., concurring). The parties do not request it here, but in an appropriate case, this Court should consider *Almendarez-Torres*' continuing viability. Innumerable criminal defendants have been unconstitutionally sentenced under the flawed rule of *Almendarez-Torres*, despite the fundamental "imperative that the Court maintain absolute fidelity to the protections of the individual afforded by the notice, trial by jury, and beyond-a-reasonable-doubt requirements." *Harris* v. *United States,* 536 U. S. 545, 581–582 (2002) (THOMAS, J., dissenting).

In my view, broadening the evidence judges may consider when finding facts under *Taylor*—by permitting sentencing courts to look beyond charging papers, jury instructions, and plea agreements to an assortment of other documents such as complaint applications and police reports—would not give rise to constitutional doubt, as the plurality believes. See *ante*, at 10–11. It would give rise

to constitutional error, no less than does the limited factfinding that *Taylor*'s rule permits. For this reason, as well as those set forth in Parts I, II, and IV of the Court's opinion, the Court correctly declines to broaden the scope of the evidence judges may consider under *Taylor*. But because the factfinding procedure the Court rejects gives rise to constitutional error, not doubt, I cannot join Part III of the opinion.