NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

VANCE MORRIS,
Petitioner,

v.

DALE ARTUS, Superintendent, Clinton Correctional Facility and
ERIC SCHNEIDERMAN, Attorney General of New York State**,**
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether it is erroneous and unreasonable to broadly interpret the "fact of a prior conviction" exception to the *Apprendi* rule so that it encompasses findings regarding the seriousness and extensiveness of those convictions?

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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2010

VANCE MORRIS, *Petitioner*,

v.

DALE ARTUS, Superintendent, Clinton Correctional Facility, and ERIC SCHNEIDERMAN, New York State Attorney General,[1] *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Vance Morris respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit, sitting *en banc* (App. 1-37), is reported at 624 F.3d 69, *sub*. *nom*. *Portalatin* v. *Graham*. The opinion of the original three-judge panel granting the writ (App. 38-63) is reported at 601 F.3d 163, *sub*. *nom*. *Besser v. Walsh*. The opinion of the United States District Court for the Southern District of New York is not reported, but can be found at 2007 WL 2200699 (App. 64-72).

[1] Pursuant to Federal Rule of Appellate Procedure 43(c)(2), Eric Schneiderman, New York State Attorney General, is automatically substituted for Andrew M. Cuomo, former New York State Attorney General.

JURISDICTION

The United States Court of Appeals for the Second Circuit, sitting *en banc*, entered its judgment denying the writ on October 18, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides, in relevant part, "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." The Fourteenth Amendment to the United States Constitution provides, in relevant part, " ... nor shall any State deprive any person of ... liberty, ... without due process of law."

STATUTORY PROVISIONS INVOLVED

New York Penal Law §70.10 (App. 88)

New York Crim. Pro. Law §400.20 (App. 89-91)

STATEMENT OF THE CASE

The issue presented in this important habeas case involves whether the New York Court of Appeals' decisions rejecting *Apprendi*[2]/*Ring*[3]/*Blakely*[4]/*Cunningham*[5]-based challenges to the constitutionality of New York State's persistent felony offender (PFO) statutes are contrary to, or based on an unreasonable application of, controlling Supreme Court precedent. Those statutes permit a sentencing court to exercise its discretion to impose a dramatically enhanced sentence regarding a defendant who stands convicted of at least a third felony offense, but require the court to determine, before doing so, that "the history and character of the defendant and the nature and circumstances of his criminal conduct are such that extended incarceration and

[2] *Apprendi v. New Jersey*, 530 U.S. 466 (2000).
[3] *Ring v. Arizona*, 536 U.S. 584 (2002).
[4] *Blakely v. Washington*, 542 U.S. 296 (2004).
[5] *Cunningham v. California*, 549 U.S. 270 (2007).

lifetime supervision of the defendant are warranted to best serve the public interest." N.Y. Penal Law (P.L.) §§70.10(1), (2); N. Y. Crim. Pro. Law (C.P.L.) §400.20(1) (App. 88-89). That determination, in turn, requires that the court make supporting fact findings, based on a preponderance of the evidence test and under relaxed evidentiary rules. C.P.L. §400.20(5), (9) (App. 89-90).

We contend that petitioner's PFO sentence violates his rights to a jury trial and due process, because those constitutional guarantees prohibit a sentencing scheme that allows a judge, rather than a jury, to impose a sentence above the otherwise-applicable statutory maximum based on fact findings linked to, but going far beyond, the mere fact of prior convictions, and determined under a standard of proof less than beyond a reasonable doubt. A three-judge panel of the Court of Appeals for the Second Circuit ruled in petitioner's favor, *Besser v. Walsh* (*Morris* v. *Artus*), 601 F.3d 163 (2010) (App. 38-63), but the full court, upon rehearing *en banc*, vacated that decision by a vote of 9 to 3, and denied the petition. *Portalatin v. Graham* (*Morris v. Artus*), 624 F.3d 69 (2010) (App. 1-37).

After a jury trial, petitioner Vance Morris was convicted of criminal contempt in the first degree, based on allegations that he had violated orders of protection prohibiting him from visiting his ex-girlfriend. On July 24, 2002, the court sentenced him to 16 concurrent terms of 15 years to life imprisonment, finding him a discretionary persistent felony offender under P.L. §70.10(1) and C.P.L. §400.20 (App. 88-91). Regarding each of these counts, the maximum prison term petitioner otherwise could have received based on his prior convictions coupled with the jury's factual findings was four years as a second felony offender. P.L. §§70.06 (3)(e), (4)(b). After the verdict, however, the prosecution announced its intent to seek discretionary persistent felony offender sentencing. Such an application required the court to decide, first,

whether Mr. Morris was a persistent felony offender (that he had at least two prior felony convictions) and, if so, second, whether a persistent felony offender sentence should be imposed, with its concomitant minimum term of at least 15 years and maximum term of life in prison. P.L. §70.10; C.P.L. §400.20 (App. 88-91).

To make that second-step determination the court was required to find, in addition to Mr. Morris' prior felony convictions, that it was "of the opinion that the history and character of the defendant and the nature and circumstances of his criminal conduct are such that extended incarceration and lifetime supervision of the defendant are warranted to best serve the public interest." C.P.L. §400.20(1) (App. 89). Moreover, the court had to make "such findings of fact as it deems relevant to the question of whether a persistent felony offender sentence is warranted," C.P.L. §400.20(9) (App. 90), based on "any relevant evidence, not legally privileged, regardless of admissibility under the exclusionary rules of evidence," and determined by "a preponderance of the evidence." C.P.L. §400.20(5) (App. 89). In addition, the court was obligated to pronounce for the record its reasons for imposing the dramatic enhancement. C.P.L. §400.20(9) (App. 90).

A hearing was conducted in April and July of 2002 on the question of whether the court should impose a persistent felony offender sentence on Mr. Morris.

The Persistent Felony Offender Hearing

At the outset, defense counsel conceded that Mr. Morris had two prior felony convictions (App. 76). In controversy at the hearing was the second prong of the statutory scheme: whether the court should find that "the history and character of the defendant and the nature and circumstances of his criminal conduct indicate that extended incarceration and lifetime

supervision will best serve the public interest." P.L. §70.10(2); C.P.L. §§400.20(1), (5) (App. 88-89).

At the hearing, counsel for Morris argued, *inter alia*, that he should not be sentenced as a persistent felony offender since his convictions involved only relatively low-classified felonies,[6] he had never been convicted of a violent felony, and, significantly, he had originally been offered a plea bargain on which he could have served only one year in jail.

After reviewing the parties' arguments and accompanying documents, the court determined, based upon the history and character of the defendant and the nature and circumstances of his criminal conduct, that the prosecution had proven by a preponderance of the evidence that he should be sentenced as a persistent felony offender (App. 86). To support this conclusion, the court, as required by the statute, made extensive findings of fact (App . 81-86). In determining that a PFO sentence was appropriate, the court averred, regarding petitioner's convictions, that they "demonstrate his utter lack of control," his "inability to be rehabilitated," and his "propensity to prey upon helpless women" (App. 85). In addition, it relied on its conclusion that petitioner had repeatedly "terrorized" his ex-girlfriend, in the presence of his children (App. 85); his "contemptuous and defiant behavior in court as well as in prison" (App. 84); his alleged disrespect toward the court and his disobedience of court orders (App. 84); and the court's belief that, if released, petitioner would be "extremely likely to resume his course of abusive and violent behavior" toward his ex-girlfriend (App. 86). It then sentenced Mr. Morris to 16 concurrent persistent-felony-offender prison terms of 15 years to life (App. 86).

[6] The court found that Mr. Morris had previously been convicted of attempted robbery in the third degree, grand larceny in the fourth degree, attempted criminal possession of a controlled substance in the fifth degree, and third-degree robbery (App. 79-80).

State Appellate Proceedings

On appeal to the Appellate Division, First Department, Mr. Morris argued, *inter alia*, that PFO violated his Sixth and Fourteenth Amendment rights since it required the judge, rather than a jury, to make fact findings in addition to his prior convictions, using only a preponderance of the evidence standard, in order to impose the maximum sentence of life imprisonment. He argued that the appellate court was required to decide the claim on the merits although it was not presented below, because errors involving the deprivation of a jury trial and the improper allocation of the burden of proof implicate the "mode of proceedings prescribed by law" under New York precedent, making them reviewable without preservation.

In affirming petitioner's conviction, the court rejected that claim:

> Defendant's constitutional challenge under *Apprendi v. New Jersey*, 530 U.S. 466 (2000) to New York's discretionary persistent felony offender sentencing scheme is unpreserved, and we decline to review it in the interest of justice. Were we to review this claim, we would reject it (*see People v. Rivera*, 5 N.Y.3d 61 [2005]; *People v. Rosen*, 96 N.Y.2d 329 [2001], *cert. denied*, 534 U.S. 899 [2001]).

People v. Morris, 21 A.D.3d 251 (1st Dept. 2005) (App. 74-75).

Mr. Morris reasserted his constitutional challenge in his application for permission to appeal to the New York Court of Appeals, but that application was denied. *People v. Morris*, 5 N.Y.3d 831 (2005) (App. 73).

District Court Order Denying the Petition for a Writ of Habeas Corpus

Morris filed a timely petition for a writ of *habeas corpus* based on this issue. In a Memorandum of Law, he argued that the trial court's imposition of an enhanced sentence beyond the otherwise-authorized statutory maximum, based on facts in addition to recidivism, decided under a preponderance standard, violated his right to a jury trial and to have all of the essential facts of his case proved beyond a reasonable doubt, and that the state courts' rejection

of his claim represented an unreasonable application of *Apprendi v. New Jersey*, 530 U.S. 466 (2000), *Ring v. Arizona,* 536 U.S. 584 (2002), and *Blakely v. Washington*, 542 U.S. 296 (2004). He maintained further that the New York Court of Appeals decisions upholding these provisions, upon which the Appellate Division relied, were contrary to, or at least unreasonable applications of, controlling Supreme Court precedent. He noted that the court in *People v. Rosen*, 96 N.Y.2d 329 (2001) (cited by the Appellate Division), which involved the same issue presented here, had rejected that defendant's procedural argument that those claims were exempt from New York's preservation requirement only because it had denied the claims on their merits, and that accordingly, as in *Brown v. Greiner*, 409 F.3d 523, 532 (2d Cir. 2005) (*Brown I*), and *Brown v. Miller*, 451 F.3d 54, 56-57 (2d Cir. 2006) (*Brown II*), the issue was not procedurally defaulted despite petitioner's failure to raise it at the trial level.

Petitioner also pointed out that in *Brown I*, the Second Circuit, in rejecting petitioner's merits claim, declined to evaluate the impact of *Blakely*, because the state-court judgments of all petitioners whose cases were joined for decision in *Brown I* had become final before the *Blakely* decision. Here, in contrast, the state courts had the opportunity to evaluate the impact of *Blakely*.

The District Court denied the petition on the merits. *Morris v. Artus*, 2007 WL 2200659 (S.D.N.Y., decided July 20, 2007) (App. 64-72). It stated that judges are "uniquely qualifi[ed]," through their experience, to evaluate the history and character of the defendant and the nature and circumstances of his criminal conduct at sentencing (App. 70), and then concluded that "*Blakely* does not materially change the Sixth Amendment factfinding analysis" of *Apprendi* and *Ring*, so that *Brown I* (rejecting a post-*Apprendi*, pre-*Ring* petitioner's claim) and *Brown v. Miller*, 451 F.3d 54 (2d Cir. 2006) (*Brown II*) (rejecting a post-*Ring*, pre-*Blakely* petitioner's

claim) controlled (App. 70). Furthermore, the court stated that it was bound by a state court's statutory construction (App. 71), and averred that the New York Court of Appeals' decision in *People v. Rivera*, 5 N.Y.3d 61 (2005), upholding these provisions post-*Blakely*, had, based on statutory construction, eliminated the statutory framework setting out rigorous procedural provisions and fact-finding requirements that had to be satisfied before the court could impose the dramatically increased PFO sentence (App. 70-71).

Petitioner had contended that *Rivera* in fact had recognized and reiterated those requirements, but had determined that the "practical" effect of the "legislative command" that "sentencing courts consider the defendant's 'history and character' and the 'nature and circumstances' of the defendant's criminal conduct "merely" "was to "make[] explicit what sentencing courts have always done in deciding where, within a range, to impose a sentence." *Rivera*, 5 N.Y.3d at 69 (emphasis supplied). Such "practical" assessments are not entitled to deference. *Wisconsin v. Mitchell*, 508 U.S. 476, 483-484 (1993).

The Decision of the Three-Judge Panel

In *Besser v. Walsh* (*Morris v. Artus*), 601 F.3d 163 (2d Cir. 2010) (App. 38-63), the panel, in an opinion by Judge Winter, ruled unanimously that the New York Court of Appeals decisions upholding these provisions had unreasonably applied Supreme Court precedent. The panel explicitly acknowledged the validity of the Second Circuit's rejection of *Apprendi*- and *Apprendi*/*Ring*-based challenges to PFO in *Brown I* and *Brown II*. 601 F.3d at 181-182 (App. 55-56). Critically, however, those decisions did not assess the impact of *Blakely*. *Id*. Before *Blakely*, as *Brown I* and *Brown II* recognized, it was reasonable for a state court to conclude that because the factual determinations required for a sentencing increase under the statutory framework here, unlike those at issue in *Apprendi* and *Ring*, are amorphous and not elemental in

character, they could be determined by the court. 601 F.3d at 181-182 (App. 56). *Blakely*, however, "rejected the argument that the *Apprendi* rule did not apply because Washington's sentencing laws did not require the finding of any *specific* fact or facts, but rather required application of the amorphous test of 'substantial and compelling reasons,' as a prerequisite for the imposition of a sentence enhanced beyond the standard range." 601 F.3d at 181 (App. 56) (emphasis as written; citation omitted). Under *Blakely*, it is irrelevant whether the necessary finding is "a specified fact (as in *Apprendi*), one of several specified facts (as in *Ring*), or any aggravating fact (as [in *Blakely*])." *Besser*, 601 F.3d at 181 (App. 56), *quoting from Blakely*, 542 U.S. at 305 n. 8.

The panel also evaluated the impact of *Cunningham v. California*, 549 U.S. 270 (2007), which was decided after petitioner's state judgment had become final, because *Blakely* "compelled the result in *Cunningham*," which "presented no issue of law or fact materially distinguishable from *Blakely*." 601 F.3d at 184-185 (App. 58-59). It noted that the Ninth Circuit had reached the same conclusion in *Butler v. Curry*, 528 F.3d 624, 635-636 (9th Cir. 2008). 601 F.3d at 184 (App. 58).

The decision recognized that "[t]here is no material difference between the PFO statute and the schemes that the Supreme Court found objectionable in *Blakely/Cunningham*." 601 F.3d at 186 (App. 59-60). In each statutory scheme, the convicted defendant is *eligible for* enhanced sentencing based on the facts underlying the jury's verdict and/or defendant's prior convictions. The court is allowed to *impose* the increased maximum, however, only upon fact findings in addition to the prior convictions. 601 F.3d at 173-174, 186 (App. 49-50, 59-60). Absent such a finding, the court lacks discretion to impose the increased sentence, and must sentence the defendant under a less onerous range. 601 F.3d at 187 (App. 60). Just as the amorphous and

unspecified nature of the required fact findings was constitutionally irrelevant regarding the Washington and California schemes at issue in *Blakely* and *Cunningham*, they are irrelevant here as well. 601 F.3d at 188 (App. at 61-62).

The panel rejected respondent's contention that the primary New York Court of Appeals decision upholding these provisions, *Rivera*, interpreted them so as to eliminate the second-step judicial fact findings in addition to the defendant's prior convictions, mandated under C.P.L. §400.20 before the increased sentence may be imposed. Though the *Rivera* court frequently declared that two prior convictions were alone sufficient to render defendants "eligible for," or "subject to," the possibility of a maximum sentence of life, the court nevertheless "follow[ed] the language of the PFO statute in giving a sentencing court discretion to impose such a sentence but only if the court finds that 'the history and character of the defendant and the nature and circumstances of [defendant's] criminal conduct indicate that extended incarceration and life-time supervision will best serve the public interest.'" *Besser*, 601 F.3d at 173 (App. 49). "As *Rivera* stated, these factors govern 'whether to impose the authorized persistent offender sentence' or whether 'to hand down a sentence as if no recidivism finding existed.'" *Besser*, 601 F.3d at 173-174 (App. 49), *quoting from Rivera*, 5 N.Y.3d at 198-199.

The *Besser* panel recognized that the result in *Rivera* was actually based on its mistaken view that under *Blakely*, only facts other than recidivism that establish *eligibility* for the sentence increase need be found by the jury. In *Blakely* and *Cunningham* themselves, the defendants were eligible to receive the enhancement as the result of a guilty plea (*Blakely*) or a jury verdict (*Cunningham*), but were nevertheless entitled to a jury determination of the additional facts necessary before the sentence could be imposed. *Besser*, 601 F.3d at 186 (App. 60). *Rivera* also mistakenly viewed the nature of the required fact findings as somehow consequential; it

"emphasized that the history/character/criminal conduct findings are of the sort that have always guided the exercise of discretion in sentencing," *Besser*, 601 F.3d at 185 (App. 59), and "fall[] squarely within the traditional discretionary role of the judge." 601 F.3d at 185 (App. 59), *quoting from Rivera*, 5 N.Y.3d at 69. Under *Blakely* and *Cunningham*, however, "the statutory labels 'history and character' and 'nature and circumstances of [the] criminal conduct' can no longer reasonably be described as the kind of judicial fact-finding constitutionally permissible." *Besser*, 601 F.3d at 188 (App. 61).

Relying on *Brown I* and *Brown II*, the panel determined that Morris's claim was decided on the merits by the Appellate Division even though that court purported to invoke a procedural bar. 601 F.3d at 179 (App. 54). The Appellate Division cited *Rosen*, regarding which the Second Circuit held in *Brown I* that "the state court in ... *Rosen* could not have invoked state procedural law and barred Rosen's Sixth Amendment claim without first having found that the claim was without merit." *Besser*, 601 F.3d at 179 (App. 54), citing *Brown I*, 409 F.3d at 532. Accordingly, "a citation to *Rosen* in holding that a claim is procedurally barred establishes that the state court decision was interwoven with federal law," and the resulting decision is "on the merits" and therefore subject to habeas review. *Besser*, 601 F.3d at 179 (App. 54), citing *Brown I*, 409 F.3d at 532, and *Brown II*, 451 F.3d at 56-57.

Finally, the court determined that harmless-error analysis was applicable here pursuant to the Court's decision in *Washington v. Recuenco*, 548 U.S. 212 (2006), and remanded this case in order to enable the District Court to make that determination. 601 F.3d at 188-189 (App. 62).

The Decision of the Second Circuit *En Banc*

In an opinion by Circuit Judge Wesley, *Portalatin v Graham (Morris v. Artus)*, 624 F.3d 69 (2010) (App. 1-37), the full court agreed with the panel that petitioner's claim was not barred

by procedural default. 624 F.3d at 79 n. 4 (App. 12). It also acknowledged that petitioner was entitled to rely on *Cunningham*, even though it was decided after his state court judgment became final, because the result in *Cunningham* was compelled by this Court's previous decision in *Blakely* (which indisputably applied to petitioner's case), and hence *Cunningham* did not state a "new rule" for purposes of either 28 U.S.C. §2254(d)(1) or *Teague v. Lane*, 489 U.S. 288 (1989). 624 F.3d at 83-84 (App. 15-16). Nevertheless, by a vote of 9 to 3, the majority vacated the panel's decision in *Besser v. Walsh*, holding that the New York courts "did not engage in an unreasonable application of clearly established Supreme Court precedent in affirming the petitioners' sentences." 624 F.3d at 88 (App. 20).[7]

First, the majority rejected petitioner's argument that the second-step determination required under the PFO statute (the directive requiring the court to consider the history and character of the defendant and the nature and circumstances of the crime and set forth findings of fact before determining whether the increased sentence should be imposed) requires judges to find facts going well beyond the fact of the prior convictions in order to impose the enhancement, thereby violating *Blakely* and *Cunningham*. 624 F.3d at 88-91 (App. 20-24). The majority relied heavily on its belief that the New York Court of Appeals, in its decision in *People v. Rivera* upholding these provisions, construed this directive to be a "procedural" rather than a "legal" requirement, "that is only triggered once a judge is already *authorized*[8] to impose the [increased] sentence" based on the prior convictions alone:

> In essence, *Rivera* construed the statutory directive that a sentencing judge articulate the reasons for imposing a [heightened] sentence as one of procedure: the explanation itself satisfies the statutory requirement,

[7] Two additional petitioners' cases were consolidated for argument and decision by the *en banc* court: *Phillips v. Artus* and *Portalatin v. Graham*.

[8] Emphasis as written.

> regardless of whether it contains any facts beyond those respecting the defendant's predicate felonies. Accordingly, any other facts upon which the sentencing judge chooses to rely cannot properly be understood as "elements" of the underlying offense in terms of *Apprendi*, because they are not necessary factual predicates to the imposition of the sentence. Instead, they simply inform the judge's discretion to select an appropriate sentence within those *ranges* authorized by statute.

624 F.3d at 89-91 (App. 21-23) (emphasis supplied).

Thus, the majority concluded, the *Apprendi* maximum permissible sentencing range under these provisions -- the range of sentences that the court could constitutionally impose based upon the facts found by the jury and prior convictions alone -- was the term authorized for persistent felony offenders whom the court believed to merit that sentence, a minimum term of between 15 and 25 years and a maximum term of life in prison. 624 F.3d at 91 (App. 24). Strikingly, however, the majority acknowledged that if the court determined that a PFO enhancement was *not* warranted, it was *obligated* to impose a sentence within a second, far less severe "range": a sentence no more than the maximum term for *second* felony offenders, which, in Mr. Morris' case, was a prison term of just four years. 624 F.3d at 89 and n. 12 (App. 21-22).

Though the majority acknowledged that the *Rivera* decision also declared that, at this stage, "the People retain the burden to show that the defendant deserves a higher sentence," 624 F.3d at 90 (App. 23), *quoting from Rivera*, 5 N.Y.3d at 68, it concluded that "the meaning of *Rivera*'s reference to the State's 'burden' is not entirely clear -- it might, for example, mean that the State is obligated to prove by a preponderance of the evidence any of the facts it introduces in an attempt to persuade the sentencing judge, or might merely refer in an informal sense to the notion that it typically will be incumbent upon the State to oppose sentencing arguments advanced by defendants." 624 F.3d at 91 (App. 23). The majority believed it to be critical that "the [New York] Court of Appeals was emphatic that the statute does *not* impose an overarching

evidentiary burden upon the State that must be satisfied before the sentencing court may lawfully impose [the increased] sentence." 624 F.3d at 91 (App. 23) (emphasis as written).

Similarly, the majority admitted that the *Rivera* court had written that the factors relied on by the trial judge to justify imposing the increased sentence were subject to "mandatory consideration and articulation," *Portalatin*, 624 F.3d at 85 (App. 18), *quoting from Rivera*, 5 N.Y.3d at 69, but found it critical that the New York court had explained that the purpose of those requirements was to "provide the defendant with notice and an opportunity to respond," and to "facilitate[] an appellate review function that is distinct from the issue of whether the PFO sentence was lawfully imposed;" "that oversight power is unrelated to the legality of the sentence." *Portalatin*, 624 F.3d at 86 (App. 18-19); *see* 624 F.3d at 90 (App. 23).

The majority also rejected petitioner's second argument: "that -- notwithstanding the Court of Appeals' authoritative construction in *Rivera* -- the PFO statute continues to require unconstitutional factfinding, because even assuming the predicate felony convictions are sufficient to authorize a PFO sentence, the mere *fact* of those convictions does not suffice. Instead, a sentencing judge must form an opinion about the *nature* of those convictions before imposing a PFO sentence, an endeavor that necessarily entails factfinding beyond the scope of [the exception to the *Apprendi* rule regarding the fact of a prior conviction].[9] That is, a court is required to consider subsidiary facts and surrounding circumstances of those convictions to arrive at a conclusion whether 'extended incarceration and life-time supervision will best serve the public interest'" (*quoting from* P.L. §70.10(2) (App. 88) (emphasis as written)). *Portalatin* at 92 (App. 24).

[9] The exception is based on *Almendarez-Torres* v. *United States*, 523 U.S. 224 (1998), which the *Portalatin* court cited here.

The majority noted that the *Rivera* court had said that (1) a sentencing judge would be authorized to impose a life sentence "with no further factual findings, '[i]f, for example, a defendant had an especially long and disturbing history of criminal convictions,'" 624 F.3d at 92 (App. 24), *quoting from Rivera*, 5 N.Y.3d at 70-71, and that (2) the statutory provisions require the sentencing court to "arrive at a conclusion whether 'extended incarceration and life-time supervision will best serve the public interest.'" 624 F.3d at 92 (App. 24), *quoting* P.L. §70.10 and citing *Rivera*, 5 N.Y.3d at 70-71 (App. 88). We had argued that by this language, the *Rivera* court acknowledged that the scheme requires fact findings well beyond the prior convictions, based on value judgments about the seriousness of the crimes.

The majority accepted, *arguendo*, the premise that PFO requires the sentencing court to make additional findings beyond the "mere *fact* of [the prior] convictions": based on a consideration of "subsidiary facts and surrounding circumstances of those convictions," it must "form an opinion about the *nature* of those convictions before imposing a PFO sentence." 624 F.3d at 92 (App. 24). However, the majority rejected our contention that this requirement rendered the provisions constitutionally infirm, based on its determination that an opinion about the nature and seriousness of prior convictions could reasonably be construed to fall within the *Almendarez-Torres* exception ("[o]ther than the fact of a prior conviction ...") to the *Apprendi* rule:

> Assuming --without deciding -- that petitioners are correct in reading New York law to require a sentencing judge to consider subsidiary facts respecting a defendant's criminal history before imposing a PFO sentence, we are not persuaded that such consideration equates to judicial "factfinding" in violation of *Blakely*. At bottom, petitioners urge that the *Almendarez-Torres* exception to the rule of *Apprendi* should be read narrowly (and the rule of *Blakely* broadly) to forbid a sentencing judge from forming an opinion about a defendant's criminal history, based on facts underlying those prior convictions, before imposing a recidivism sentence. Yet there is no clear holding of the Supreme Court to command

such a result.

624 F.3d at 92 (App. 24-25).

The Second Circuit asserted that this Court had provided a "lack of guidance" as to the "precise scope of the recidivism exception," and noted that federal appeals courts had differed regarding whether certain facts were sufficiently related to a defendant's prior convictions so as to justify legislation providing for their judicial determination. 624 F.3d at 93 (App. 25). The opinion continues as follows:

> It might well be constitutionally significant whether a sentencing judge is required to find, for example, that a defendant's criminal history is "especially violent" before imposing a sentence, or whether, as in New York, a sentencing judge simply must find that the nature of his criminal history justifies "extended incarceration and life-time supervision." Or, perhaps after *Blakely* and *Cunningham*, it does not matter. The Supreme Court may answer that question at some future time. But, if our Court cannot divine a clear answer from the Court's existing holdings, AEDPA prevents us from faulting a state court for selecting one reasonable conclusion over another. For the time being, the recidivism exception remains, and the Supreme Court has yet to assess a statute in light of *Blakely* that tethers the authorization for an enhanced sentence solely to findings respecting recidivism. We therefore cannot say that the state courts unreasonably applied clearly established Supreme Court precedent in concluding that the PFO statute is simply different in kind from those invalidated in *Blakely* and *Cunningham*.

624 F.3d at 93 (App. 25-26).

Judge Winter dissented, in an opinion joined by Judges Pooler and Sack. The dissenters concluded that the PFO provisions were unconstitutionally applied to petitioner, and that the New York courts' contrary determination was unreasonable. They disagreed with the majority view that a sentence of a maximum of life in prison under these provisions is constitutionally tolerable under the *Apprendi* line. They concluded, instead, that the maximum permissible term under these provisions is the maximum term applicable without a PFO determination, since, without the additional fact findings required under PFO, the dramatically higher sentence of life

imprisonment could not have been imposed. 624 F.3d at 98-99 (App. 31). "No party disputes the existence of a choice between sentencing within a range with a lower maximum and sentencing to a [PFO life] term. *Blakely* is therefore directly on point." 624 F.3d at 99 (App. 31).

Further, in *Cunningham*, the Supreme Court held that it was impermissible for a judge to impose sentences within a higher, non-continuous range based on fact findings that elevated the otherwise-applicable lower sentencing range. 624 F.3d at 99 (App. 31). "Similarly, in Morris's case, the sentencing judge had to choose between two ranges: 1.5 to 4 years and 15 years to life-an eleven-year gap between the maximum in the lower range and the minimum in the higher range. *Cunningham* is, therefore, also directly on point." 624 F.3d at 99 (App. 31). "The *Apprendi* maximum for each petitioner is the maximum second felony offender sentence for their crime of conviction. That maximum in each case is less than life imprisonment." 624 F.3d at 99 (App. 31-32).

Accordingly, although the second-step findings required by PFO may be "procedural" in nature or relevant to the exercise of discretion, "the second step in the case of all petitioners involved which of two sentencing ranges was to be selected and the choice was between ranges with different maximum sentences." 624 F.3d at 101 (App. 33).

Rivera's recognition that "the People retain the burden to show that the defendant deserves the [PFO] sentence," 624 F.3d at 102 (App. 34), *quoting from Rivera*, 5 N.Y.3d at 68, is critical. Though the majority stated that its meaning was not "entirely clear," "[i]t means what it says": "[i]f the prosecution failed to prove by a preponderance of the evidence that one or more of the petitioners 'deserve' a [PFO] sentence, the petitioner would have been sentenced to a range with a lower maximum." 624 F.3d at 102 (App. 34).

Regarding the scope of the *Almendarez-Torres* exception, the dissenters noted that in the hearings conducted with respect to petitioners Morris and Portalatin, "evidence was proffered and mentioned by the sentencing judges that was not even arguably covered by *Almendarez-Torres*." 624 F.3d at 103 (App. 35).

At petitioner's sentencing hearing, the opinion notes, the sentencing court considered, *inter alia*, "many actions and characteristics of Morris, and conflicting testimony, that are not related to or inferences drawn from his prior felonies or felony of conviction." 624 F.3d at 98 (App. 30). Those included a psychiatric evaluation, tapes of 911 calls, evidence regarding "numerous instances of obscene behavior on subways, contemptuous behavior in court, contemptuous behavior toward a female prison guard, and a negative report ... from the Department of Probation." 624 F.3d at 97 (App. 29). Petitioner's girlfriend testified on his behalf regarding his lack of violent behavior. 624 F.3d at 97 (App. 29)

The dissenters noted that the sentencing judge also "engaged in what he deemed to be factfinding to choose between the second offender class E felony sentence with a four year maximum, and a ... [PFO] sentence with a minimum of 15 years and maximum of life." 624 F.3d at 98 (App. 30). He credited the prosecution's evidence, discredited the girlfriend's testimony, made findings regarding what it considered to be petitioner's "disturbing lack of self-control and a pattern of abusive and contemptuous behavior, particularly toward women," 624 F.3d at 98 (App. 30), and eventually concluded that the "People ... met their burden of establishing by a preponderance of the evidence that a [PFO] sentence ... is warranted." 624 F.3d at 97-98 (App. 30). Thus, New York's PFO provisions were unconstitutionally applied to petitioner. 624 F.3d at 95, 98, 99, 102, 104 (App. 27, 30, 31, 34, 36).

REASONS FOR GRANTING THE WRIT

I. The Court should decide whether it is erroneous and unreasonable to broadly interpret the "fact of a prior conviction" exception to the *Apprendi* rule so that it encompasses findings regarding the seriousness and extensiveness of those convictions.

A. The Second Circuit, sitting *en banc,* recognized that even under New York precedent, PFO likely requires that fact findings in addition to the bare existence of prior convictions, regarding the gravity of those convictions and the extensiveness of the defendant's criminal record, must be judicially made in order to dramatically increase a defendant's sentence, but nevertheless determined that the "prior conviction" exception to the *Apprendi* rule could reasonably be interpreted to allow such findings. That determination is worthy of the Court's review.

The *en banc* majority below repeatedly proclaims that the New York Court of Appeals' decisions upholding PFO, including its key ruling in *People v. Rivera*, 5 N.Y. 61 (2005), interpreted the statutory scheme to permit the dramatic sentencing enhancement based solely on the defendant's prior convictions. *See Portalatin*, 624 F.3d at 84-91 (App. 17-24). A closer reading of its opinion, however, demonstrates that the majority did not actually do this. Instead, it determined that under New York precedent, a sentencing court need not legally determine any fact other than prior convictions in order to *consider* imposing the sentence within the dramatically higher range allowed by PFO, but acknowledged that such facts must be found in order procedurally to justify *actually imposing* that sentence.

Moreover, regarding the findings relating to the prior convictions, the *en banc* majority acknowledged that the New York Court of Appeals' decision in *Rivera* could reasonably be read as recognizing that under PFO, fact findings related to, but going well beyond, the mere existence of the prior convictions -- findings regarding their extensiveness and seriousness -- were necessary in order to justify a sentence enhancement. 624 F.3d at 92 (App. 24). It nevertheless found that the New York courts reasonably regarded these provisions as

constitutional, since it concluded that this Court had provided "no clear holding construing the recidivism exception as narrowly as petitioners urge." 624 F.3d at 92 (App. 24-25).

The *en banc* majority's analysis would authorize a dramatic expansion of the scope of the prior-conviction exception that is antithetical to the jury-trial right and due process, as explicated in *Apprendi*, *Blakely*, and *Cunningham*. Certiorari should accordingly be granted.

The *Apprendi* Court held that "*[o]ther 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" (emphasis added). *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000). The highlighted language recognized an exception to the general rule based on *Almendarez-Torres v. United States*, 523 U.S. 224 (1998). In that decision, the Court construed a federal penal statute as authorizing the trial court to increase the maximum sentence upon determining defendant to be a recidivist, and then held that Congress's determination to permit the court to make the recidivism finding was constitutionally permissible. While the *Apprendi* Court left the *Almendarez-Torres* holding undisturbed, it explicitly treated it as "a *narrow* exception to the general rule" that a judge may not find facts that subject the accused to a maximum sentence in excess of that which he could have received based on the jury's verdict alone. 530 U.S. at 489-490; emphasis supplied.

The Court's characterization of the *Almendarez-Torres* prior-conviction exception as "narrow" was not an offhand pronouncement, but was essential to the *Apprendi* holding. The New Jersey Supreme Court had relied heavily on *Almendarez-Torres*' "sentencing factor" analysis in upholding the constitutionality of its hate-crime provision: an analysis that was directly repudiated by this Court. 530 U.S. at 481, 485-487, 489 n. 15, 494. The Court described *Almendarez-Torres* as "at best an exceptional departure from the historic practice" of

requiring juries to determine the facts relevant to the imposition of punishment, *id.* at 487, and characterized the opinion's "extensive discussion of the term 'sentencing factor'" as "virtually ignor[ing] the pedigree of the pleading requirement at issue." *Id*. at 489 n. 15.

Having stripped *Almendarez-Torres* of its analytical underpinnings, the *Apprendi* Court made it clear that its rationale applies only to facts that are matters of judicial record. The Court emphasized that "due process and Sixth Amendment concerns [are] implicated in allowing a judge to determine a 'fact' increasing punishment." 530 U.S. at 488. Contrasting the fact finding made by the trial court in *Apprendi* -- that the defendant's crime was motivated by hate -- with that made by the trial court in *Almendarez-Torres*, the Supreme Court declared:

> [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.

530 U.S. at 496.

If further clarification were needed regarding the narrowness of this exception, the Court provided it in *Shepard v. United States*, 544 U.S. 13 (2005). In *Shepard*, the Court interpreted the Armed Career Criminal Act (ACCA), which mandated a minimum 15-year prison term for anyone possessing a firearm after three prior convictions for violent felonies. Under ACCA, burglary is defined as a violent felony only if committed in a building or enclosed space ("generic burglary"), but not in a motor vehicle or boat. The Court ruled that in evaluating whether a prior guilty plea supported a conviction for generic burglary, the sentencing judge is limited to evaluating statutory elements, charging documents, written plea agreements, and plea colloquies; it may not rely on police reports or complaint applications to make its own independent fact findings. *Id*. at 16. In support of this conclusion, Justice Souter's controlling

opinion[10] ruled that an interpretation allowing a trial judge to make a "disputed finding of fact about what the defendant and state judge must have understood as the factual basis of the prior plea" would create "serious risks of unconstitutionality" under *Apprendi*:

> 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 the findings subject to ... *Apprendi*, to say that *Almendarez-Torres* clearly authorizes a judge to resolve the dispute.

544 U.S. at 25.

Under these circumstances, a broad construction of the *Almendarez-Torres* exception such as the one advanced by the *en banc* majority here -- one that enables judges to decide the seriousness of a conviction based on facts not established as a matter of judicial record -- is indefensible. However, as the Second Circuit noted, the *Almendarez-Torres* exception "does not enjoy uniform application among appellate courts charged with reviewing federal sentences." 624 F.3d at 93 (App. 25). The inconsistent holdings in this area, *see post* at 23-24, makes this case worthy of review. Nor does the deference to state-court decisions required under AEDPA pose a significant obstacle. Under 28 U.S.C. §2254(d)(1), it is not merely erroneous, but manifestly unreasonable for the New York courts and the Second Circuit to have accepted the notion that the exception is so far-reaching that it could encompass fact findings such as whether a defendant has a "long and disturbing history" of convictions, or whether those convictions warrant "extended incarceration and life-time supervision." These are value-laden judgments far removed from the bare existence of the convictions that can -- and did here -- make the difference between four years and life in prison. *See Portalatin*, 624 F.3d at 92-94.

For the most part, courts have applied the exception only to the existence of the prior

[10] This portion of Justice Souter's opinion was joined by three other justices (Justices Stevens, Scalia, and Ginsburg). Justice Thomas, concurring in the judgment, determined that to permit courts to make such findings would be plainly unconstitutional under the *Apprendi* line of cases. 544 U.S. at 26-28.

conviction and historical facts inextricably connected to it. *See, e.g., United States v. Santiago*, 268 F.3d 151, 156 (2d Cir. 2001) (court may decide whether defendant's prior convictions were committed on different occasions; under *Almendarez-Torres*, court may determine the "who, what, when and where" of a prior conviction). *Accord, e.g., United States v. Morris*, 293 F.3d 1010 (7th Cir. 2002) (court may decide whether defendant's prior convictions were committed on different occasions); *United States v. Kempis-Bonola*, 287 F.3d 699 (8th Cir. 2002) (judge may decide whether prior felony is "aggravated" within statutory definition); *United States v. Davis*, 260 F.3d 965, 969-970 (8th Cir. 2001) (court can decide that prior convictions are statutorily listed as "serious violent felonies").

However, despite *Apprendi* and *Shepard,* courts are divided regarding whether sentencing judges may constitutionally make fact findings that involve qualitative judgments about the seriousness of prior convictions.

In *United States v. Smith*, 474 F.3d 888 (6th Cir. 2007), the court held that a sentencing increase above the Guidelines range based on a judicial determination that the defendant's criminal history was "extensive and egregious" did not violate the defendant's right to a jury trial. It claimed to agree with the defendant that "the *Almendarez-Torres* exception is narrow," 474 F.3d at 891, but determined that "it is ... wide enough to encompass the ... finding here." *Id*. And in *People v. Black*, 161 P.3d 1130 (Cal. 2007), the court ruled that trial judges may lengthen sentences by determining that defendant's prior convictions are "numerous or of increasing seriousness." *Id*. at 1143.

But in *United States v. Guyon*, 474 F.3d 114, 117-118 (4th Cir. 2006), the Court recognized that a judicial determination that a Guidelines sentence "significantly under-represent[ed] the seriousness of the defendant's criminal history or the likelihood that the

defendant will commit further crimes" required review of evidence "about the full scope of [defendant's] behavior," and thus did not fall within the *Almendarez-Torres* exception. And in *United States v. Kortgaard*, 425 F.3d 602, 607-610 (9th Cir. 2005), findings regarding the "seriousness" of prior convictions and the likelihood of recidivism that were the basis of a sentence increase were similarly held to be beyond the scope of the "prior conviction" exception. *See also United States v. Washington*, 404 F.3d 834 (4th Cir. 2005) (defendant's Sixth Amendment right to jury trial was violated when sentencing court relied on facts outside the indictment in determining that a prior conviction was for a crime of violence for purposes of sentence enhancement; "plain error" found); *State v. Bell*, 931 A.2d 198, 234-235 (Conn. 2007) (right to jury trial violated by provisions requiring court to decide, in addition to prior convictions, that it was "of the opinion that such person's history and character and the nature and circumstances of such person's criminal conduct indicate that extended incarceration and lifetime supervision will best serve the public interest").

The *en banc* majority's recognition, even under the New York Court of Appeals' explanation of the statutory scheme, that further fact findings beyond recidivism are required, is manifested repeatedly. First, the majority acknowledged that "the [New York Court of Appeals] in *Rivera* clearly construed state law to provide for an expanded range of authorized sentences once a defendant is adjudged a persistent felony offender, at which point the trial judge is directed to exercise discretion in determining where within that newly expanded range to impose a sentence. ... In other words, according to New York's highest court, the maximum 'range' of available sentences is established once the defendant is proven to have two prior qualifying felonies: The judge may impose a sentence within the [higher] range permitted for an A-I felony,

or may instead impose a lower sentence within the range permitted for a second felony offense." 624 F.3d at 85 (App. 18).

In so stating, the majority acknowledged that under PFO as construed by *Rivera*, the sentencing court, upon determining that petitioner had committed two prior felony convictions, is still required, in a manner identical to trial courts in California under the scheme struck in *Cunningham*, to make a choice between two dramatically different sentencing ranges: the range with a four-year maximum for second felony offenders, or the range with a minimum of fifteen years and a maximum of life for class A-I offenders. *See also id.* at 99 (Winter, J., dissenting). Moreover, it recognized that, under *Rivera*, this choice depended on the court's "'mandatory consideration and articulation' of those factors that a trial judge finds relevant in determining what sentence to impose." 624 F.3d at 85 (App. 18), *quoting from Rivera*, 5 N.Y.3d at 69.

In addition, the majority acknowledged the reasonableness of the conclusion that under *Rivera*, the trial court must go beyond "the mere *fact* of [the prior] convictions," but also is required to form an opinion about their nature and seriousness in order to impose a PFO sentence. 624 F.3d at 92 (App. 24). And the majority further recognized that the statutory language requires the sentencing court to "arrive at a conclusion whether 'extended incarceration and life-time supervision will best serve the public interest.'" 624 F.3d at 92 (App. 24), citing P.L. §70.10 (App. 88) and *Rivera*. Here, the *en banc* opinion refers to the ultimate determination required by PFO before a life sentence is imposed: a determination that is statutorily required (P.L. §70.10(2), C.P.L. §400.20(1)) (App. 88-89), is recognized as such by *Rivera*, and involves a sensitive evaluation of the seriousness of the defendant's criminal conduct and his potential for rehabilitation. And, further, the majority noted the *Rivera* court's understanding that under PFO, "a sentencing judge would be authorized to impose a [life]

sentence with no further factual findings, '[i]f, for example, a defendant had an especially long and disturbing history of criminal convictions.'" *Portalatin*, 624 F.3d at 92 (App. 24), *quoting from Rivera*, 5 N.Y.3d at 70-71.

Though the *en banc* majority "assum[ed] -- without deciding" that this understanding of PFO is correct, it made no effort to counter it. 624 F.3d at 92 (App. 24). And, in fact, this reading of *Rivera* is derived directly from that decision and is susceptible to no other reasonable construction. In particular, by positing, as an example of a legitimate PFO finding based on "no further factual findings" beyond the convictions, a judicial determination that a defendant has an "*especially long and disturbing history*" of such convictions, 5 N.Y.3d at 70-71 (emphasis supplied), the New York court necessarily (1) recognized that more than the prior convictions alone were required to allow the enhancement, and (2) concluded that such an "especially long and disturbing history" would fall within the "fact of a prior conviction" exception to the *Apprendi* rule.[11]

The *en banc* court, however, rejected petitioner's argument that a trial court's obligation to make such additional value-laden judgments about the nature of the prior convictions requires it to make factual determinations going far beyond the mere existence of those convictions, thereby contravening of the *Apprendi* Court's mandate that the prior-conviction exception is a

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[11] As the original panel decision and the dissent from the *en banc* ruling recognize, *see Besser v. Walsh*, 601 F.3d at 173-174 (App. 49-50); *Portalatin v. Graham*, 624 F.3d at 101-102 (Winter, J., dissenting) (App. 33-34), these are but some of the numerous instances in which the New York Court of Appeals in *Rivera* acknowledged the requirement of additional fact findings to justify the life sentence. *See Rivera*, 5 N.Y.3d at 66 (C.P.L. §400.20(1) "provides that a defendant *may not be sentenced as a persistent felony offender until the court has made the requisite judgment as to the defendant's character and the criminality*" (emphasis supplied)); 5 N.Y.3d at 69 (the PFO provisions "*require* a sentencing court, in reaching its opinion [to impose the increased sentence] under Criminal Procedure Law §400.20(1)(b), to consider the specified factors and explain why that consideration led the court to impose a recidivist sentence" (emphasis supplied)); 5 N.Y.3d at 69 and n. 8 (recognizing "the legislative command that sentencing courts consider the defendant's 'history and character' and the 'nature and circumstances' of the defendant's criminal conduct'", which requires a "holistic[]" consideration of "the defendant's entire circumstances and character, including traits touching upon the need for deterrence, retribution and rehabilitation unrelated to the crime of conviction"); 5 N.Y.3d at 68 (the "history and character" and "nature and circumstances of ... criminal conduct" requirements govern "whether to impose the authorized persistent felony offender sentence" or whether "to hand down a sentence as if no recidivism finding existed").

"narrow" one. 530 U.S. at 489-490. Instead, it determined that there is a "lack of guidance" from this Court "as to the precise scope of the recidivism exception." 624 F.3d at 93 (App. 25). Accordingly, it found that the mandated qualitative fact findings regarding the seriousness of the prior convictions and whether they justify an increase in the maximum term to life imprisonment were arguably permitted under the "fact of a prior conviction" exception to *Apprendi*, and that the state court decisions rejecting petitioner's constitutional challenge therefore did not unreasonably apply clearly established Supreme Court precedent. 624 F.3d at 92-94 (App. 24-26).

In this case, the trial court, in accord with *Rivera*, evaluated the seriousness of petitioner's prior convictions as an essential basis for its determination to increase petitioner's sentences from four years to life in prison. Under *Apprendi* and its progeny, such fact findings, divorced from the legitimacy that attaches to judicial records of criminal convictions, and requiring sensitive qualitative judgments as to the seriousness and numerousness of those convictions, must be made beyond a reasonable doubt by juries, and it is utterly unreasonable for courts to conclude otherwise.

It is unnecessary that this Court reconsider the *Almendarez-Torres* holding here. It is imperative, however, based on the *en banc* majority's reasoning in this case, and the conflicting decisions regarding the scope of the "prior conviction" exception, that the Court repudiate the notion that *Almendarez-Torres* can reasonably be interpreted as legitimizing judicial determinations regarding the qualitative seriousness of prior convictions that permit dramatic sentence increases. To permit this viewpoint to stand would seriously undermine the authoritativeness of the *Apprendi* line of cases, and the jury-trial and due-process principles that those decisions were intended to protect.

B. Though it purportedly held that the New York Court of Appeals had construed PFO to require no fact finding other than prior convictions to increase sentence, the *en banc* court actually determined only that no such findings were required in order to increase the sentencing range within which such offenders are eligible to be punished. Its analysis in this regard contravenes *Ring*, *Blakely*, and *Cunningham*, and, if allowed to stand, will undermine the authoritativeness of those decisions.

Had the sentencing court decided not to sentence petitioner as a persistent felony offender, the most severe prison sentence he could have received for the class E felonies of which he was convicted is four years. Instead, he is serving a sentence of 15 years to life based not merely on the court's conclusion that he had previously been convicted of at least two felonies, but also based on its determination of a host of additional facts supposedly demonstrating their egregious nature, as well as many other facts entirely unrelated to those convictions, including allegedly contemptuous behavior in court and disobedience of prison regulations. It concluded that those convictions and the additional extraneous facts demonstrated, *inter alia,* a propensity for violence, and a "disturbing lack of self-control and a pattern of abusive and contemptuous behavior, particularly toward women" (App. 83).

As we demonstrated (Part A, *ante*, at 19-20, 22, 24-27), the *en banc* court did not uphold these provisions based on the fraudulent notion that the New York Court of Appeals had eliminated the statutory requirement of further fact findings beyond prior convictions by means of statutory construction. Instead, it determined that it was reasonable for the New York Court of Appeals, in its decisions upholding PFO,[12] to hold that the *Apprendi* rule is satisfied by provisions under which jury fact findings (plus prior convictions) merely enable a court to *consider* a sentencing increase, even if the statute requires additional fact findings beyond recidivism, such as those made here, in order to *impose* that enhanced sentence. This

[12] *People v. Quinones*, 12 N.Y.3d 116 (2009); *People v. Rivera*, 5 N.Y.3d 61 (2005); *People v. Rosen*, 96 N.Y.2d 329 (2001).

interpretation of the rule is not only incompatible with the narrow scope of the recidivism exception mandated by this Court's decisions, but is also antithetical to this Court's holding in *Ring* that juries must determine facts necessary for a sentence increase, not merely facts making the defendant susceptible to such an enhancement. And the Second Circuit's holding that *Apprendi* is satisfied as long as the jury is required to find facts enabling the judge to *choose between a higher and lower sentencing range* flatly contravenes *Blakely* and *Cunningham*. The *en banc* majority's severely constricted and plainly erroneous view of the *Apprendi* rule should not be allowed to gain a foothold.

Before *Ring*, it may have been reasonable to conclude that *Apprendi* was concerned only with guaranteeing that facts other than prior convictions making defendants merely eligible for a sentence increase must be found by a jury. *Apprendi* temporarily left undisturbed the Court's ruling in *Walton v. Arizona*, 497 U.S. 639 (1990), upholding death-penalty provisions requiring juries to determine facts making the defendant eligible to be sentenced to death, but requiring judges to find at least one aggravating factor in order to impose that sentence. In overruling *Walton*, however, the *Ring* Court rejected the state's eligibility-based argument as contradicted by *Apprendi*'s mandate that "the relevant inquiry is one not of form, but of effect." *Ring*, 536 U.S. at 604, *quoting from Apprendi*, 530 U.S. at 494. Since the Arizona provisions did not actually permit the death sentence to be imposed without additional judicial fact findings, it did not matter that the jury's verdict made the defendant theoretically eligible to receive that sentence. As the Chief Judge of the New York Court of Appeals recently recognized, in dissenting from that court's most recent reiteration of its rejection of a constitutional challenge to PFO, "[o]nce *Walton* was overruled by *Ring*, our ensuing cases, *Rivera* and *Quinones*,[13] were

[13] In *People v. Quinones*, 12 N.Y.3d 116 (2009), the Court of Appeals reaffirmed its decision in *Rivera*, based on the same reasoning.

deprived of essential support." *People v. Battles*, ___ N.Y.3d ___, 2010 WL 5070781, 2010 N.Y. Slip Op. 09160 (decided December 14, 2010) (Lippman, Ch.J., dissenting).[14]

In *Blakely*, the Court struck provisions that provided a maximum penalty of ten years for the crime of which the defendant was convicted, but required the court to impose a "standard range" sentence of 49-53 months unless the court found additional facts necessary to justify a finding that there were "substantial and compelling reasons justifying an exceptional sentence." 542 U.S. at 299. Only upon making such findings could the court impose a more severe sentence up to the 10-year maximum. Based on a finding that Blakely had acted with "deliberate cruelty," the court sentenced him to 90 months. *Id*. at 299-300.

The *Blakely* Court rejected the State's argument that the "statutory maximum" pursuant to *Apprendi* -- the maximum sentence that could constitutionally be imposed by the court -- should be ten years (the maximum statutory penalty for the crime), rather than 53 months, the upper limit of the standard range. In do doing, the Court held that "the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*": here, 53 months. *Id*. at 303 (emphasis as written).[15] "In other words," the Court explained, "the 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." *Id*. at 303-304 (emphasis as written).[16] Thus, Blakely's sentence was unconstitutional because it exceeded the standard range, due to an additional judicial fact finding. *Id*. at 303-305.

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[14] Regarding this issue, the majority in *Battles* simply stated that the defendant's constitutional challenge to PFO under the *Apprendi* line of cases was "without merit," citing *Quinones*.

[15] Recidivist findings were not at issue in *Blakely*.

[16] The *Blakely* court also rejected two additional arguments that had previously been put forward by defenders of PFO: (1) the notion that *Apprendi* does not govern fact findings not statutorily enumerated, 542 U.S. at 305, and (2) the idea that statutory provisions should survive *Apprendi* scrutiny if the ultimate sentencing decision is discretionary. 542 U.S. at 305 n. 8. These discredited arguments were not advanced by the *en banc* court.

In *Cunningham*, the statutory scheme struck by the Court enabled the sentencing court, following the jury's verdict, to choose between two distinct sentencing ranges. The court was required to impose a "middle term" sentence unless it found an additional aggravating circumstance, based on further fact findings, that would justify an "upper term" sentence. This Court determined that the permissible maximum term was the "middle term," rather than the "upper term," since the higher sentence could not be imposed without additional judicial fact findings:

> [B]road discretion to decide what facts may support an enhanced sentence, or to determine whether an enhanced sentence is warranted in any particular case, does not shield a sentencing system from the force of our decisions. If the jury's verdict alone does not authorize the sentence, if, instead, the judge must find an additional fact to impose the longer term, the Sixth Amendment requirement is not satisfied.

549 U.S. at 290.

In this case, the *en banc* opinion recognizes the necessity of factual determinations linked to, but going far beyond, prior convictions to enable the court to impose a life sentence under PFO as construed by *Rivera*, *see* Part A, *ante*, but fails to acknowledge that this makes the scheme unconstitutional under *Ring*, *Blakely*, and *Cunningham*. The majority did not understand that under *Blakely* and *Cunningham*, their view of the statute means that the "*Apprendi* maximum" here is not life imprisonment, because that sentence requires judicial fact findings beyond the prior convictions; it is four years, because that is the highest sentence the court could have imposed without such findings. *See Portalatin*, 624 F.3d at 98-99 (Winter, J., dissenting) (App. 30-32).

Indeed, the majority acknowledged that, just as in *Cunningham*, the jury verdict, supplemented by the fact of the prior convictions, merely put the court at a point where it was required to choose between two sentencing ranges:

> In ... reiterating its construction of the PFO statute in *Rosen*, the court in *Rivera* clearly construed state law to provide for an expanded range of authorized sentences once a defendant is adjudged a persistent felony offender, at which point the trial judge is directed to exercise discretion in determining where within that newly expanded range to impose a sentence ... In other words, according to New York's highest court, the maximum "range" of available sentences is established once the defendant is proven to have two prior qualifying felonies: The judge may impose a sentence within the range permitted for an A-I felony, or may instead impose a lower sentence within the range permitted for a second felony offense.

624 F.3d at 85 (App. 18). This acknowledgment labels, as outcome-determinative, petitioner's mere eligibility for the sentence enhancement based on his prior convictions, and is incompatible with this Court's pellucid holding in *Cunningham* that legislation enabling the court to choose between two sentencing ranges made possible by the jury's verdict, and to select the increased range only upon finding additional facts, is unconstitutional.

As Chief Judge Lippman persuasively explains in discussing PFO:

> The task set the sentencing judge, by the statute, ... is not, properly understood, one of sentencing discretion to situate a sentence within an already permissible enhanced range, it is rather one of determining whether, after prior convictions have been taken into account, there exists a factual predicate to access the enhanced range and impose a sentence exceeding that which could be imposed based on the jury verdict and the defendant's admissions alone.

People v. Battles, 2010 WL 5070781 (Lippman, Ch.J., dissenting).[17]

[17] Chief Judge Lippman's opinion also recognizes that the California Supreme Court's defense of California's unconstitutional sentencing scheme in *People v. Black*, 113 P.3d 534 (2005), that was rejected in *Cunningham*, strikingly resembles the New York Court of Appeals' defense of PFO in *Rivera*. *See People v Battles* (Lippman, Ch.J., dissenting).

And the *en banc* majority failed to recognize that the *Rivera* court's focus on petitioner's *eligibility* for the enhancement based on his prior convictions alone[18] does not salvage the scheme's constitutionality, but instead directly violates this Court's repeatedly expressed mandate that *Apprendi* does not merely require that the jury's verdict (plus the fact of the prior convictions) render a defendant eligible for a sentence increase; it requires that any additional fact findings necessary to justify imposing that higher sentence must be made by a jury, beyond a reasonable doubt. *Accord*, *Besser v. Walsh*, 601 F.3d at 186-187 (App. 59-60).

The majority sought to justify the "mandatory consideration and articulation [of relevant sentencing factors]" requirement (*see Portalatin*, 624 F.3d at 85-86 (App. 18-19); *Rivera*, 5 N.Y.3d at 69)) as *Rivera* did, by declaring that this mandate is "procedural" in nature, not "legal," 624 F.3d at 86, 90-91 (App. 19, 23),[19] and is intended merely to give the defendant an opportunity to be heard and to facilitate appellate review, *id.* at 86. But the "relevant inquiry" under *Apprendi* "is one not of form, but of effect." *Ring*, 536 U.S. at 604, *quoting from Apprendi*, 530 U.S. at 494. A mandate is a mandate, regardless of whether a court classifies its purpose as procedural or substantive. Its *effect* here is to require a judicial determination of additional facts before imposing the life sentence, and it is therefore irreconcilable with the *Apprendi* rule.

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[18] As the three-judge panel's decision recognized, *Besser v. Walsh*, 601 F.3d at 173-174 (App. 49-50), *Rivera*'s erroneous focus on mere eligibility as the subject of the *Apprendi* inquiry is manifested repeatedly. *See, e.g.,* 5 N.Y.3d at 67 ("[u]nder our interpretation of the relevant statutes, defendants are eligible for persistent felony offender sentencing based *solely* on whether they had two prior felony convictions"); *id*. ("[w]e could have decided *Rosen* differently by reading the statutes to require judicial factfindings as to the defendant's character and criminal acts *before* he became eligible for a persistent felony offender sentence"); *id*. at 67-68 ("The relevant question under the United States Constitution is ... whether there are any facts other than the predicate convictions that must be found to make recidivist sentencing possible. Our answer is no" (citation omitted)).

[19] The *en banc* court qualified those characterizations of the statute by acknowledging that *Rivera* had recognized that a PFO sentence imposed upon a multiple offender *is* "erroneous as a matter of law" if "the sentencing court acts arbitrarily or irrationally." 624 F.3d at 86 (App. 19), *quoting from Rivera*, 5 N.Y.3d at 68. That recognition -- forced upon the court by *Rivera*'s own language -- substantially undercuts its characterization of the second step as merely "procedural" in nature. But, even if correct, a "procedural" label attached to a statutory mandate of additional fact findings does not salvage its constitutionality. *See post* at 33.

In addition, as we have previously noted, the majority acknowledged the legitimacy of petitioner's argument that under *Rivera*, the trial court must go beyond "the mere *fact* of [the prior] convictions," but must also form an opinion about their seriousness and extensiveness in order to impose a PFO sentence. 624 F.3d at 92 (App. 24). It rejected petitioner's argument that these fact finding requirements render the PFO scheme unconstitutional, but only because of its unreasonably broad interpretation of the recidivism exception to the *Apprendi* rule. 624 F.3d at 92-94 (App. 24-26). Thus, notwithstanding its protestation otherwise, 624 F.3d at 90 (App. 22-23), the *en banc* court, just like New York's high court, was determining the practical effect of these provisions, rather than interpreting them. Such a determination is not entitled to the deference that is due to state court statutory construction. *Wisconsin v. Mitchell*, 508 U.S. 476, 483-484 (1993).

Finally, the majority's effort to compare PFO's second-step requirement to the judicial consideration of sentencing factors required under 18 U.S.C. §3553(a) as construed after *United States v. Booker*, 543 U.S. 220 (2005), *see* 624 F.3d at 91 n. 13 (App. 24), is misguided, for the same reasons that a similar analogy was rejected in *Cunningham*, 549 U.S. at 292-293 and n. 15. Unlike in *Booker*, PFO, just like the California provisions struck in *Cunningham*, "allocates to judges sole authority to find facts permitting imposition of an upper term sentence." *Cunningham*, 549 U.S. at 292-293.

The legitimacy of the majority's decision here rests entirely on the pretense that it is based on deference to the New York high court's construction of PFO. Once that facade is stripped away, however, there is nothing left to justify its outcome, or to rescue the constitutionality of the statutory scheme, even under the deferential treatment required by AEDPA. And the scope of deference due to the New York courts' rulings here is narrow. As the

majority here recognized, the "range of reasonable judgment under AEDPA can depend in part on the nature of the relevant rule. If a legal rule is specific, the range may be narrow." *Portalatin*, 624 F.3d at 79 (App. 13), *quoting from Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004). This Court has recognized that the *Apprendi* rule, as refined by subsequent decisions, is highly specific, indeed "bright-line," in character, *Blakely*, 542 U.S. at 308; *Cunningham*, 549 U.S. at 291, and state courts' applications of it are entitled to correspondingly less deference. *See Foxworth v. St. Amand*, 570 F.3d 414, 425, 435 (1st Cir. 2009).

If PFO were permitted to stand, it would be one of the few surviving remnants of legislation enabling courts to make qualitative factual judgments in addition to recidivism in order to increase a defendant's sentence beyond the otherwise-authorized maximum term.[20] But the Second Circuit's decision here may well encourage legislatures to conclude that provisions permitting dramatic sentence increases based on critical factual determinations linked to, but going far beyond, a defendant's prior criminal record, are not incompatible with the Constitution. It should not be permitted to take root.

CONCLUSION

The petition for a writ of certiorari should be granted.

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[20] "Recidivism-plus" state statutory provisions strikingly resembling PFO have been struck down repeatedly in state and federal courts. *See State v. Maugaotega*, 168 P.3d 562, 574-575 (Haw. 2007) (striking, under *Cunningham*, provisions permitting an extended prison term upon a judicial finding that a multiple offender's crimes "were so extensive that a sentence of imprisonment is necessary for the protection of the public"; statute had been previously declared unconstitutional on habeas review based on *Apprendi* in *Kaua v. Frank*, 436 F.3d 1057 (9th Cir. 2006)); *State v. Bell*, 931 A.2d 198 (Conn. 2007) (striking discretionary scheme enabling imposition of enhanced sentence if court found that the defendant was a persistent offender, and was "of the opinion that such person's history and character and the nature and circumstances of such person's criminal conduct indicate that extended incarceration and lifetime supervision will best serve the public interest"); *State v. Foster*, 845 N.E.2d 470 (Ohio 2006) (striking statute permitting increase in repeat violent offender's sentence upon judicial findings that the sentence would otherwise be inadequate to punish the offender and "to protect the public from future crime"); *and State v. Fairbanks*, 688 N.W.2d 333 (Minn. App. 2005) (declaring provisions unconstitutional that permitted sentence increase upon judicial findings that offender had two or more convictions of violent crimes and that "the offender is a danger to public safety"); *but cf. United States v. Smith*, 474 F.3d 888, 891 (6th Cir. 2007); *People v. Black*, 161 P.3d 1130 (2007) (discussed *ante* at 23).

Respectfully submitted,

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