QUESTION PRESENTED

Should this Court grant this petition for a writ of certiorari to determine whether, when a New York judge imposes an enhanced sentence upon a criminal defendant pursuant to the State's persistent felony offender statute, the judge's determination that, considering the history and character of the defendant and the nature and circumstances of his criminal conduct, the imposition of a life sentence would best serve the public interest is itself a factfinding for *Apprendi* purposes that is required to be proved to a jury beyond a reasonable doubt, and whether imposing such enhanced sentence violates clearly-established holdings of this Court under *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and its progeny?

LIST OF PARTIES

The parties to the proceeding in the United States Court of Appeals for the Second Circuit were:

> Petitioner Carlos Portalatin and Respondent Harold Graham, Superintendent, Auburn Correctional Facility;
>
> Petitioner William Phillips and Respondent Dale Artus, Superintendent, Clinton Correctional Facility; and
>
> Petitioner Vance Morris and Respondent Dale Artus, Superintendent, Clinton Correctional Facility.[1]

[1]The consolidated appeal to the Second Circuit originally included two additional petitioners who were ultimately severed from an *en banc* rehearing of the appeal (*Besser v. Walsh*, No. 05-4375-pr, and *Washington v. Poole*, No. 07-3949-pr). *See Portalatin v. Graham*, 624 F.3d 69, 78 n. 3 (2d Cir. 2010) (*en banc*).

TABLE OF CONTENTS

INDEX TO APPENDICES

TABLE OF AUTHORITIES

CONSTITUTIONS

STATUTES AND RULES

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

PRELIMINARY STATEMENT

Petitioner respectfully prays that a writ of certiorari issue to review the October 18, 2010, order of the United States Court of Appeals for the Second Circuit (*en banc*) reversing the grant of a writ of *habeas corpus* to petitioner.

OPINIONS BELOW

The opinion of the Court of Appeals for the Second Circuit, *Portalatin v. Graham*, 624 F.3d 69 (2d Cir. 2010) (*en banc*), is included as Appendix A. The prior three-judge panel decision in the case, *Besser v. Walsh*, 601 F.3d 163 (2d Cir. 2010), is included as Appendix B. The opinion of the District Court, *Portalatin v. Graham*, 478 F.Supp.2d 385 (E.D.N.Y. 2007), is included as Appendix C. The order of the New York Court of Appeals denying petitioner's application for leave to appeal to that Court, *People v. Portalatin*, 5 N.Y.3d 793, 801 N.Y.S.2d 814 (2005) (Ciparick, J.), is included as Appendix D. The Decision & Order of the Appellate Division, Second Department (N.Y.), *People v. Portalatin*, 18 A.D.3d 673, 795 N.Y.S.2d 334 (2d Dep't 2005), is included as Appendix E.

JURISDICTION

This Court has jurisdiction to review the Order of the Court of Appeals pursuant to 28 U.S.C. § 1254(1). This petition is being filed within 90 days of the

entry of judgment on October 18, 2010. The District Court granted a writ of *habeas corpus* to petitioner, who argued that his sentencing pursuant to New York's persistent felony offender statute violated the Sixth Amendment under *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and its progeny. The Court of Appeals initially affirmed and remanded the case to the District Court for a determination as to harmless error. On October 18, 2010, after rehearing the appeal *en banc*, the Court of Appeals reversed the grant of the writ.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. "In all criminal prosecutions, the accused shall enjoy the right to a . . . trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . ." U.S. Const., Amend. VI.

2. "No State shall . . . deprive any person of life, liberty or property, without due process of law." U.S. Const., Amend. XIV.

3. Section 70.10 of the New York Penal Law, entitled "Sentence of imprisonment for persistent felony offender," provides, in pertinent part:

> 1. Definition of a persistent felony offender. (a) A persistent felony offender is a person, other than a persistent violent felony offender as defined in section 70.08, who stands convicted of a felony after having previously been convicted of two or more felonies, as provided in paragraphs (b) and (c) of this subdivision.
>
> * * *
>
> 2. Authorized sentence. When the court has found, pursuant to the provisions of the criminal procedure law, that a person is a persistent felony offender, and when

it is of the opinion that the history and character of the defendant and the nature and circumstances of his criminal conduct indicate that extended incarceration and life-time supervision will best serve the public interest, the court, in lieu of imposing the sentence of imprisonment authorized by section 70.00, 70.02, 70.04, 70.06 or subdivision five of section 70.80 for the crime of which such person presently stands convicted, may impose the sentence of imprisonment authorized by that section for a class A-I felony. In such event the reasons for the court's opinion shall be set forth in the record.

4. Section 400.20 of the New York Criminal Procedure Law, entitled "Procedure for determining whether defendant should be sentenced as a persistent felony offender," provides, in pertinent part:

1. Applicability. . . . Such sentence may not be imposed unless, based upon evidence in the record of a hearing held pursuant to this section, the court (a) has found that the defendant is a persistent felony offender as defined in subdivision one of section 70.10 of the penal law, and (b) is 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.

2. Authorization for hearing. When information available to the court prior to sentencing indicates that the defendant is a persistent felony offender, and when, in the opinion of the court, the available information shows that a persistent felony offender sentence may be warranted, the court may order a hearing to determine (a) whether the defendant is in fact a persistent felony offender, and (b) if so, whether a persistent felony offender sentence should be imposed.

* * *

5. Burden and standard of proof; evidence. Upon any hearing held pursuant to this section the burden of proof is upon the people. A finding that the defendant is a persistent felony offender, as defined in subdivision one of section 70.10 of the penal law, must be based upon proof beyond a reasonable doubt by evidence admissible under the rules applicable to the trial of the issue of guilt. Matters pertaining to the defendant's history and character and the nature and circumstances of his criminal conduct may be established by any relevant evidence, not legally privileged, regardless of admissibility under the exclusionary rules of evidence, and the standard of proof with respect to such matters shall be a preponderance of the evidence.

* * *

8. Cases where further hearing is not required. Where the uncontroverted allegations in the statement of the court are sufficient to support a finding that the defendant is a persistent felony offender and the court is satisfied that (a) the uncontroverted allegations with respect to the defendant's background and the nature of his prior criminal conduct warrant sentencing the defendant as a persistent felony offender, and (b) the defendant either has no relevant evidence to present or the facts which could be established through the evidence offered by the defendant would not affect the court's decision, the court may enter a finding that the defendant is a persistent felony offender and sentence him in accordance with the provisions of subdivision two of section 70.10 of the penal law.

9. Cases where further hearing is required. Where . . . the uncontroverted allegations with respect to the defendant's history and the nature of his prior criminal conduct do not warrant sentencing him as a persistent felony offender, or where the defendant has offered to present evidence to establish facts that would affect the court's decision on the question of whether a persistent felony offender sentence is warranted, the court may fix a date for a further hearing. Such hearing shall be

> before the court without a jury and either party may introduce evidence with respect to . . . any . . . matter relevant to the issue of whether or not the defendant should be sentenced as a persistent felony offender. At the conclusion of the hearing the court must make a finding as to whether or not the defendant is a persistent felony offender and, as it deems relevant to the question of whether a persistent felony defendant is a persistent felony offender and is of the opinion that a persistent felony offender sentence is warranted, it may sentence the defendant in accordance with the provisions of subdivision two of section 70.10 of the penal law.
>
> 10. Termination of hearing. At any time during the pendency of a hearing pursuant to this section, the court may, in its discretion, terminate the hearing without making any finding. In such case, unless the court recommences the proceedings and makes the necessary findings, the defendant may not be sentenced as a persistent felony offender.

STATEMENT OF THE CASE

Introduction

Petitioner Carlos Portalatin was convicted by a jury of second-degree kidnapping and first-degree robbery arising from an alleged carjacking in Brooklyn, New York, in July of 2002. New York Penal Law §§ 135.20, 160.15[4].

Following delivery of the verdict, the court held a hearing pursuant to New York Penal Law § 70.10 and Criminal Procedure Law § 400.20 to determine whether to sentence petitioner, as a persistent felony offender ("PFO"), to life imprisonment rather than to a term within a range with a 25-year maximum. After hearing argument and considering written submissions, the court found,

inter alia, that petitioner had an "inclination to prey upon others" and had squandered opportunities for rehabilitation. Based on his social and criminal history, the court rejected the claim that he could be rehabilitated and sentenced him as a PFO to 18 years to life.

On appeal, petitioner argued that his PFO adjudication violated his due process and jury trial rights under *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Blakely v. Washington*, 542 U.S. 296 (2004). The Appellate Division affirmed the conviction and sentence and the State Court of Appeals denied leave to appeal.

Petitioner raised the *Apprendi-Blakely* issue in a petition for writ of *habeas corpus*. Hon. John Gleeson granted the writ, finding that the sentencing was contrary to, and an unreasonable application of, the rule clearly established in *Apprendi* as further explained in *Blakely*. The State appealed, and the appeal was heard in tandem with the appeals of three other petitioners who had raised similar *Apprendi* claims, as well as that of a petitioner whose conviction had become final prior to *Blakely*.

A three-judge panel of the Court of Appeals ruled that the State's sentencing of the petitioners under the PFO statute violated their Sixth Amendment rights to a jury trial and, under AEDPA, constituted an unreasonable application of clearly established federal law. The Court then reheard the appeal *en banc* as to petitioner and two co-petitioners. In a 9 to 3 ruling, the Court held that, in sentencing the petitioners to life terms pursuant to the PFO statute, the State

courts did not engage in an unreasonable application of clearly established Supreme Court precedent. Accordingly, the Court reversed the grant of the writ as to petitioner and affirmed the denials as to the co-petitioners. *Portalatin v. Graham*, 624 F.3d 69 (2d Cir. 2010) (*en banc*) (Appendix A).

The *en banc* majority addressed two main contentions of the petitioners. First, it rejected the contention that the "step two" determination under the statute, involving an assessment of the history and character of the defendant and nature and circumstances of his criminal conduct, required impermissible fact-finding under *Blakely* in that it required the court to hold a hearing and set forth findings of fact beyond the existence of prior convictions before it could impose an enhanced sentence. *Id.* at 88. As a threshold matter, the Court found that the New York Court of Appeals had construed the statute to provide for an expanded range of authorized sentences once a defendant was proven to have two prior qualifying felonies. *Id.* To reach this determination, the Court found, the New York courts had to have deemed the step two requirement to be merely procedural. Once the first step was satisfied, any other factfinding upon which the sentencing court relied could not be a condition precedent to the imposition of the sentence, but rather "simply inform[ed] the judge's discretion to select an appropriate sentence within those ranges authorized by statute." *Id.* at 89. And, given this statutory construction, the *Apprendi* maximum for each petitioner was

fixed at the enhanced range of life imprisonment once the step-one recidivism findings were made. *Id.* at 91.

The Court also rejected the petitioners' contention that the court's step-two opinion that the defendant's history and character and the nature and circumstances of his criminal conduct warranted the imposition of an enhanced sentence, was itself a factfinding under *Apprendi* and *Blakely* that could only have been made by a jury beyond a reasonable doubt, on the ground that this contention was not "clearly established" in this Court's precedents such that AEDPA permitted a grant of the writ. *Id.* at 92.

In reaching this conclusion, the Court found that the first step of invoked the recidivism exception in *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), and this Court's precedents did not clearly state whether a judge's opinion or judgment about a defendant's criminal history, character, and conduct fell within that exception. As a result, the court held that it could not be said that the New York courts unreasonably applied clearly-established precedent of this Court in concluding that the PFO statute was different in kind from those invalidated in *Blakely* and *Cunningham v. California*, 549 U.S. 270 (2007). *Id.* at 93. Thus, even assuming that the PFO statute required courts to consider "subsidiary facts respecting a defendant's criminal history before imposing a PFO sentence," such consideration did not necessarily constitute judicial factfinding in violation of *Blakely*. *Id.*

Only a month ago, the New York Court of Appeals yet again rejected a PFO argument, without explanation. *People v. Battles*, __ N.Y.3d __, __ N.Y.S.2d __, 2010 N.Y. Slip Op. 09160 (December 14, 2010). Chief Judge Lippman dissented, noting New York's status as a sole outlier from other states in refusing to recognize that its discretionary enhanced-sentencing statute violates *Apprendi*, and predicted that its continued countenancing of sentencings under the PFO statute will not "ultimately survive constitutional scrutiny." *Battles*, 2010 N.Y. Slip Op. 09160 at 6 (Lippman, C.J., dissenting).

Since *Apprendi*, this Court has repeatedly held that a judge may not increase a defendant's sentence beyond the statutory maximum authorized by the jury's verdict or defendant's admissions. Most recently, in *Cunningham*, the Court expressly rejected the claim that a maximum sentence could be increased based on judicial findings that could be characterized as falling within a sentencing judge's "traditional" factfinding role. The Court reaffirmed that any factfinding necessary to elevate a maximum sentence "falls within the province of the jury employing a beyond-a-reasonable-doubt standard." *Id.* at 292.

The majority's decision in this case is difficult to reconcile with this Court's *Apprendi* decisions. *Blakely* makes clear that judicial findings cannot increase a sentence above the maximum applicable "solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." 542 U.S. at 303 (emphasis omitted). And *Cunningham* reaffirms that there is no exception to this rule for

findings "'that traditionally ha[ve] been incident to the judge's selection of an appropriate sentence.'" 549 U.S. at 289 (citation omitted). Since a determination that petitioner's history and character and the nature and circumstances of his criminal conduct is, even under the New York Court of Appeals's interpretation of the PFO statute, required before an enhanced sentenced may be imposed, that determination must be a "factfinding" that was subject to *Apprendi* restraints under this Court's precedents.

The majority's decision is, in addition, inconsistent with that of the Ninth Circuit Court of Appeals in *Kaua v. Frank*, 436 F.3d 1057 (9th Cir. 2006), *cert. denied*, 549 U.S. 1245 (2007), which affirmed a grant of *habeas* relief based on an *Apprendi* challenge to sentencing under a similar two-step statute that required a judge to determine "whether an extended sentence is necessary for the protection of the public" before imposing an enhanced sentence.

This Court's review is necessary to maintain consistency between the Circuit Courts of Appeals, and to establish whether a judge's opinion about a defendant's history and character and the nature of his criminal conduct constitutes a fact that must be found by a jury before such a sentence can be imposed in New York, and whether imposing such enhanced sentence violates clearly-established holdings of this Court under *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and its progeny.

The State's Case at Trial

At approximately 12:30 a.m. on July 12, 2002, Stephen Francis was stopped alone in his car at a red light when petitioner Carlos Portalatin opened the passenger door, got inside, pointed a gun at him, and ordered him to drive. Francis drove until petitioner told him to stop, whereupon another man came to the car and handed petitioner vials of white powder in exchange for $10 (F4-5).[2]

For the next several minutes, petitioner directed Francis to drive, until he ordered him to stop on a desolate street. Francis stopped, hit the gas pedal, then the brakes, and grabbed the barrel of petitioner 's gun while punching him. After Francis opened the door and ran, petitioner drove away (F5-6).

At 3:20 a.m., two sergeants pulled petitioner over for turning without signaling, and asked him to exit the car, which he did (F7-8). As one looked inside the car, petitioner punched and kicked the other. Petitioner tried to grab both sergeants' guns, then ran, but was apprehended a block away. Police recovered Francis's telephone and an envelope containing white powder from petitioner, and other property of Francis's from the car (F8-9). They did not recover a gun (F9).

[2]The transcript of the sentencing proceeding is submitted as Appendix G, and the Department of Probation report is submitted as Appendix J. Because the testimony at trial was voluminous and essentially undisputed for present purposes on appeal in State court, it is recounted below with citations to the Brief for Defendant-Appellant, submitted as Appendix F, which sets forth relevant testimony, with references to the trial transcript.

The Defense Case

Petitioner testified that he was a drug user who would have sex with strangers for money (F9-10). The night of the incident, Francis drove up and asked if he wanted to have a good time. When petitioner got into Francis's car, Francis promised to give him drugs and money (F10). After petitioner bought some crack, they drove to an isolated area and had sex (F11).

Shortly afterward, when petitioner asked Francis when he was going to give him money, Francis said he would the next day (F11). When Francis got out of the car to urinate, petitioner, upset, drove off (F12).

Petitioner admitted stealing the car but denied having a gun, forcing Francis to drive, or forcibly taking his property. He admitted struggling with police but denied having grabbed at their guns (F12).

The Verdict

The jury convicted petitioner of second-degree kidnapping and first-degree robbery (F16).

Petitioner's Adjudication and Sentencing as a Persistent Felony Offender

According to the Department of Probation report, petitioner had a criminal justice history dating from 1989, including convictions for two felonies, two misdemeanors, and one violation (J2-3). The report discussed petitioner's family,

education, employment, and history of drug abuse (J6-7), and opined that he "ha[d] not benefitted from former court sanctions" (J5).

At sentencing on April 28, 2003, the State asked the court to sentence petitioner as a PFO under New York Penal Law § 70.10. Petitioner was arraigned as a PFO based on his 1995 conviction for attempted second-degree burglary and 1998 conviction for attempted fifth-degree criminal sale of a controlled substance.[3] He admitted having those convictions (G7-9). The court stated that, based on them, he was "at least a second if not a third felony offender" and thus "appear[ed] to be eligible for discretionary [PFO] adjudication" (G8-9). Similarly, the court and parties, in the arguments and decision regarding whether petitioner should be subjected to an enhanced sentence, referred to whether he should be adjudicated a PFO (G9, G15, G17, G21).

The prosecutor alleged that petitioner "pose[d] a significant threat to society as evidence[d] by," in part, "his significant criminal history." He urged the court to sentence petitioner to a prison term of 25 years to life, as a PFO, based upon his history and character, and because he had "victimized [Francis] again during

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[3]The attempted burglary was a "violent felony conviction" (*see* N.Y. Penal Law §§ 110/140.25, 70.02[1](b), (c)), making petitioner eligible to be sentenced as a "second violent felony offender" to a prison sentence of, at most, 25 years (N.Y. Penal Law § 70.04[3](a)). His additional felony conviction made him eligible, under § 70.10, for consideration for discretionary adjudication and sentencing as a PFO, which carried a maximum sentence of life imprisonment. *See* N.Y. Penal Law § 70.10[2].

this trial by coming up with the defense that he did come up with[,] the allegations that he put forward" (G9-10).

Defense counsel submitted a pre-sentence memorandum prepared by the Osborne Association that detailed petitioner's employment, educational, criminal justice, and family background as well as his history of drug abuse and learning disabilities and their detrimental effects on him (Appendix H). The memorandum also suggested that he would benefit from drug treatment and educational and vocational programs and could become a productive member of society, and recommended that the court impose the minimum sentence (H2-3, H9).

In addition to addressing several factors from the Osborne memorandum, defense counsel noted that the PFO statute required the court to consider "the history and character of the defendant as well as the nature and circumstances of his criminal conduct." Counsel opined that "[PFO] adjudications are always reserved for the worst of the worst," but urged the court "not to consider [petitioner] for [the] status of a persistent violent [*sic*] felony offender" because he did not have a history of violence and had "never harmed anybody" (G15-19).

The court said it had read and considered the probation report, the prosecutor's letter, and the Osborne Association memorandum (G2, G19). After finding that the crime must have been a "truly terrifying experience" for Francis and that there was a gun involved despite one not having been recovered (G19-20), the court stated:

> What this Court thinks of the facts of the case is not really relevant, because the jury has spoken, and they found [petitioner] guilty; but I would note that looking back on the history of this defendant, and having read these reports, it is clear that there is very little in his experience of his life that would support the story he gave on the witness stand, or would in any way excuse what he did (G20).

The court also addressed petitioner's criminal justice contacts with more particularity. It found that he "began his criminal career in 1989," then "fail[ed] to take advantage of opportunities that might have provided drug treatment, that might have in some way assisted him" (G19-21). It found he had several bench warrants and parole revocations and concluded that "no sooner is he released [from custody] than there is a new crime" (G21). It discerned a "pattern of drug charges" that "very well [might have] explain[ed] part of the problem," but determined that "his inclination to prey upon others cannot be excused by the fact that he can't control his own problems." It similarly found he had failed to seize opportunities afforded by family and employment to "get on the right track" (G20-21).

Rejecting the Osborne Association's conclusion that petitioner could be rehabilitated, the court said it was "not very optimistic about this given the defendant's history and nature of this offense . . ." (G21-22). It concluded that petitioner "certainly has earned a persistent adjudication as I look at this Rap sheet and the circumstances of this offense and other offenses" (G21), and sentenced him to concurrent prison terms of 18 years to life (G21-22).

New York's Persistent Felony Offender Statute

New York's PFO statute, New York Penal Law § 70.10, authorizes imposition of a sentence within the Class A-I felony range of 15 years to life to 25 years to life. This range exceeds the maximum term of 25 years in prison that petitioner, convicted of a Class B felony (N.Y. Penal Law § 160.15[4]), could have received as a second violent felony offender, the highest applicable under the verdict alone.

Under the plain wording of § 70.10, before a New York court can impose an enhanced PFO sentence, the State must find (1) that the defendant has previously been convicted of two or more felonies, and (2) that "extended incarceration and life-time supervision will best serve the public interest." Penal Law § 70.10[2] further requires that the court "set forth in the record" "the reasons for its opinion before it can impose an enhanced sentence.

Section 400.20[1] of the New York Criminal Procedure Law similarly provides that a PFO sentence "may not be imposed unless" the court

> (a) has found that the defendant is a [PFO] as defined in [§ 70.10[1]], *and* (b) is 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 (emphasis added).

The step-two finding must be based on a "preponderance of the evidence." N.Y. Crim. Proc. Law § 400.20[5].

In *People v. Rosen*, 96 N.Y.2d 329, 728 N.Y.S.2d 407, *cert. denied*, 534 U.S. 899 (2001), decided only eight months after *Apprendi*, the New York Court of Appeals, although upholding § 70.10 against an *Apprendi* challenge, recognized the requirement of additional factfinding at step two and understood that an enhanced sentence could not be imposed without that factfinding:

> [T]he court must first conclude that defendant had previously been convicted of two or more felonies for which a sentence of over one year was imposed . . . . *Then, the court must consider other enumerated factors to determine whether it "is of the opinion that a [PFO] sentence is warranted*" (CPL 400.20[9]).

96 N.Y.2d at 334-335, 728 N.Y.S.2d at 410 (emphasis added).

But the Court relegated the step-two factfinding to a mere discretionary exercise, holding that the "sole determinate" [*sic*] of whether a defendant could receive a PFO sentence was the finding of the qualifying predicate felonies at step one. 96 N.Y.2d at 335, 728 N.Y.S.2d at 410. *Rosen* acknowledged that under § 70.10 a step-two finding is required before an enhanced PFO sentence can "actually" be imposed. 96 N.Y.2d at 335, 728 N.Y.S.2d at 410. The court concluded, however, that *Apprendi* permitted the judge to make such a finding.

Then, in *People v. Rivera*, 5 N.Y.3d 61, 800 N.Y.S.2d 51 (2005), *cert. denied*, 546 U.S. 984 (2005), the Court, in a divided opinion, rejected a post-*Blakely* constitutional challenge to New York's PFO sentencing scheme. In spite of the explicit substantive and procedural safeguards associated with step two and all the court had said about it in *Rosen*, which it purported to reaffirm, the *Rivera*

court stated that "no further findings are required" to impose an enhanced sentence under the statute once there has been a judicial finding of two qualifying prior felonies. 5 N.Y.3d at 67-68, 800 N.Y.S.2d at 55-56. The *Rivera* Court again acknowledged "the legislative command that sentencing courts consider the defendant's "history and character" and the "nature and circumstances" of the defendant's criminal conduct, but dismissed that requirement as "merely another way of saying that the court should exercise its discretion." 5 N.Y.3d at 70-71, 800 N.Y.S.2d at 51.

Thus, the Court of Appeals has repeatedly recognized the statutory "command," "requirement," and "mandatory" provisions that the sentencing judge hold a hearing on the defendant's history and character, consider those factors, make on-the-record factfinding, and reach an "opinion" based on it. The *Rivera* Court nonetheless again dismissed this requisite factfinding as the mere exercise of ordinary sentencing discretion, and not violative of *Apprendi*, because the prior convictions alone make a defendant eligible for enhanced sentencing. The *Rivera* Court asserted,

> Under our interpretation of the relevant statutes, defendants are <u>eligible</u> for persistent felony offender sentencing based *solely* on whether they had two prior felony convictions. Thus, . . . no further findings are required. This conclusion takes defendant's sentence outside the scope of the violations described in *Apprendi* and its progeny.

5 N.Y.3d at 67, 800 N.Y.S.2d at 55 (original emphasis in italics; added emphasis underlined).

Petitioner's State Appeal

Petitioner appealed to the New York Supreme Court, Appellate Division, Second Department, and argued that his sentence and adjudication as a PFO based on facts not found by a jury beyond a reasonable doubt violated his Fourteenth Amendment Due Process and Sixth Amendment rights, in light of *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Blakely v. Washington*, 542 U.S. 296 (2004). The Appellate Division affirmed the conviction and sentence, ruling that the *Apprendi-Blakely* claim was "unpreserved for appellate review and, in any event, without merit." *People v. Portalatin*, 18 A.D.3d 673, 795 N.Y.S.2d 334 (2d Dep't 2005). Leave to appeal to the New York Court of Appeals was denied on July 6, 2005. *People v. Portalatin*, 5 N.Y.3d 793, 801 N.Y.S.2d 814 (2005) (Ciparick, J.).

The District Court's Grant of *Habeas Corpus* Relief

Having exhausted his state remedies on the *Apprendi-Blakely* issue, petitioner filed a petition for a writ of *habeas corpus* on September 14, 2006, seeking vacatur of his sentence on the ground that his sentencing as a PFO was contrary to, and involved an unreasonable application of, this Court's decision in *Apprendi*, as applied in *Blakely v. Washington* (A88-127). The State opposed the writ on the merits and interposed no procedural defense.

On March 22, 2007, United States District Judge John Gleeson granted the writ, ruling that the PFO sentencing scheme under which petitioner was sentenced violated the Sixth Amendment right to a jury trial and was both contrary to and constituted an unreasonable application of clearly established federal law as determined by this Court in *Blakely*, because it required judges to make judicial factual findings other than prior convictions in order to enhance a criminal defendant's sentence. *Portalatin v. Graham*, 478 F.Supp.2d 385 (E.D.N.Y. 2007) (Appendix C).

The Initial Appeal to the Court of Appeals

The State appealed, and the Court consolidated the appeal with three others in which the petitioners had also challenged their sentences under the PFO statute as violative of *Apprendi* and *Blakely*: *Phillips v. Artus*, Docket No. 06-3550-pr; *Morris v. Artus*, Docket No. 07-3588-pr; and *Washington v. Poole*, Docket No. 07-3949-pr. Oral argument took place on April 16, 2008, in tandem with argument on a fifth, pre-*Blakely* appeal, *Besser v. Walsh*, Docket No. 05-4375-pr.

On March 31, 2010, the Court held, in *Besser v. Walsh*, 601 F.3d 163 (2d Cir. 2010) (Appendix B), as to all petitioners but Besser, that the PFO statute violated the Sixth Amendment right to a jury trial and that the Sixth Amendment prohibition on the type of judicial factfinding resulting in PFO sentences became clearly established in *Blakely*, which clarified *Apprendi* by making clear that any fact other than a prior conviction, no matter how generalized or amorphous, that

increased a sentence beyond the statutory maximum was required to be found by a jury beyond a reasonable doubt. The Court rejected petitioner Besser's claim because his direct appeal had become final before this Court's decision in *Blakely*.

The Rehearing by the Court of Appeals *En Banc*

By order dated April 30, 2010, the Court granted the State's motion for rehearing *en banc* in *Portalatin*, *Phillips*, and *Morris*, and dismissed the appeal in *Washington* as moot by reason of the petitioner's death.

On October 18, 2010, the Court, in *Portalatin v. Graham*, 624 F.3d 69 (2d Cir. 2010) (*en banc*) (Appendix A), reversed the grant of the writ of *habeas corpus* to petitioner and affirmed the denials of the writ to Phillips and Morris.

The Court rejected both of petitioner's two main contentions. His first contention was that the "step two" determination under the statute required impermissible factfinding under *Blakely* because it required the sentencing court to hold a hearing and set forth findings of fact not found by the jury that went beyond the existence of prior convictions before it could impose an enhanced sentence. *Id.* at 88. As a threshold matter, addressing this contention, the Court found that the New York Court of Appeals, in *People v. Rivera*, 5 N.Y.3d 61, 800 N.Y.S.2d 51 (2005), had "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." *Id.*

at 85. "In other words, the Court wrote, "the maximum 'range' of available sentences is established once the defendant is proven to have two prior qualifying felonies." *Id.*

To reach this determination, the Court found, the *Rivera* court had to have deemed the step two requirement, that the sentencing court articulate its reasons for imposing a life sentence, to be merely "procedural" and not constitutionally significant. Once that step of the statute was satisfied,

> 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.

Id. at 89.

The Court acknowledged that it was bound only by the State's interpretation of what the terms of the statute mean, not by its pronouncement of the statute's "operative effect" for constitutional purposes. *Id.* at 90, *citing Wisconsin v. Mitchell*, 508 U.S. 476, 483-484 (1993). It then determined that *Rivera* "was not merely a characterization of the PFO statute's practical operation, but an exposition of its terms." And the exposition of those terms, the Court found, authorized an enhanced sentence based on the defendant's criminal history alone. *Portalatin*, 624 F.3d at 90. Thus, the Court held, "[w]e must presume that the New York Court of Appeals meant what it said: the [step two] statutory directive to consider

the history and character of the defendant, and the nature and circumstances of his crime, is a procedural requirement that is only triggered once a judge is already *authorized* to impose the class A-I sentence." *Id.* (original emphasis).

Accordingly, the Court held, because the New York Court of Appeals had interpreted step two "as a procedural requirement that informs only the sentencing court's discretion, the New York courts were not unreasonable to conclude that this consideration is unlike the factfinding requirements invalidated in *Blakely* and *Cunningham*." "Here," the Court said, "under the New York Court of Appeals's construction of the statute, the *Apprendi* maximum for each petitioner was fixed at that of a class A-I felony [offender] once the recidivism findings were established . . . . [And u]nder *Rivera*, any facts that the sentencing judge considered beyond those respecting recidivism do not implicate the Sixth Amendment, for they did not — and could not — lead to a sentence in excess of that *Apprendi* maximum." *Id.* at 91.

The Court next addressed petitioner's second main contention, that the sentencing court's step-two opinion that an enhanced sentence is warranted, which involved an assessment of the defendant's history and character and the nature and circumstances of his criminal conduct, was itself a factfinding that, under *Apprendi* and *Blakely*, could have been made only by a jury. *Id.* at 92. The Court found that it could not determine from this Court's precedents whether a New York court's finding, for example, that a defendant's criminal history was

"especially violent," or simply that the nature of the defendant's criminal history justified an enhanced sentence, was constitutionally significant. *Id.*

In reaching this conclusion, the Court noted that the statute encompassed a defendant's recidivism, but found that this Court had not clarified the scope of *Almendarez-Torres* recidivism exception vis-à-vis whether it encompassed qualitative judgments about those convictions or the defendant's overall criminal history. Since it could not "divine a clear answer" as to the scope of *Almendarez-Torres*, AEDPA prevented it "from faulting a state court for selecting one reasonable conclusion over another," and in turn it could not say that the New York courts unreasonably applied clearly established precedent of this Court in concluding that the PFO statute was different in kind from those invalidated in *Blakely* and *Cunningham*. *Id.* at 92-93. Thus, even assuming that the statute required courts to consider "subsidiary facts respecting a defendant's criminal history before imposing a PFO sentence," such consideration did not necessarily constitute judicial factfinding in violation of *Blakely*. *Id.*

In conclusion, the Court distinguished the PFO statute from those considered in *Blakely* and *Cunningham* because the PFO statute as interpreted in *Rivera* encompassed a defendant's recidivism: "Unlike in *Blakely* and *Cunningham*, recidivism findings are the touchstone: the predicate felonies alone expand the indeterminate sentencing range within which the judge has the discretion to

operate, and that discretion is cabined only by an assessment of defendant's criminal history." *Id.* at 94.

Judge Winter dissented in an opinion joined by Judges Pooler and Sack. Noting that it had not been "seriously questioned" that the sentencing courts had engaged in factfinding, the dissent stated that the majority had identified only one constitutional argument dispositive of the petitioners' claims — regarding the applicable maximum sentences for *Apprendi* purposes — but that one argument had been specifically rejected by this Court's decisions in *Cunningham* and *Blakely*. Other than that sole, untenable argument, the majority never responded to the petitioners' claims that the statute *as applied* was unconstitutional, and "proffer[ed] no other identifiable constitutional theory to which AEDPA deference [could] be given." *Id.* at 95.

The dissent found that (1) reasoning identical to that of the majority regarding what constituted the maximum applicable sentence for each petitioner under the jury's verdict for *Apprendi* purposes had been expressly rejected by this Court in *Blakely* and *Cunningham*, and, contrary to the majority's determination, the *Apprendi* maximum sentence for each petitioner was not life imprisonment but that for a second felony offender for the crimes of conviction (*id.* at 98-99); (2) in each case, the court imposed a sentence with a maximum of life imprisonment based on statutorily required findings of fact beyond those found by the jury or admitted by the defendant (*id.* at 100-101); (3) the required judicial factfindings

at issue went beyond determinations of predicate felonies and therefore were not permissible under *Almendarez-Torres*, which exempted from *Apprendi*'s reach sentencing schemes based solely on the existence of predicate felonies (*id.* at 102-103); and (4) it was irrelevant that the judicial factfinding at issue involved traditional sentencing considerations, since that characterization of it did not render it free from *Apprendi* restraints. *Id.* at 103-104.

In conclusion, the dissent summed up:

> Except for the argument made with regard to maximum sentences for *Apprendi* purposes, which has been specifically rejected by the Supreme Court, nothing in [the majority] opinion identifies a constitutional argument that even arguably disposes of Portalatin's and Morris's claims regarding factfindings altering their maximum sentences. I therefore respectfully dissent. *Id.* at 104.

REASONS FOR GRANTING THE PETITION

The petition for a writ of certiorari should be granted to determine whether, when a New York judge imposes an enhanced sentence upon a criminal defendant pursuant to the State's persistent felony offender statute, the court's conclusion that, considering the history and character of the defendant and the nature and circumstances of the defendant's criminal conduct, the imposition of a life sentence would best serve the public interest is itself a factfinding for *Apprendi* purposes that must be found by a jury beyond a reasonable doubt, and to determine whether the state court's holding to the contrary was an unreasonable

application of clearly-established precedents of this Court. The petition should also be granted to maintain consistency between the Second and Ninth Circuit Courts of Appeals inasmuch as the *Portalatin* decision is inconsistent with that of the Ninth Circuit in *Kaua v. Frank*, 436 F.3d 1057 (9th Cir. 2006), *cert. denied*, 549 U.S. 1245 (2007), which affirmed a grant of *habeas* relief based on an *Apprendi* challenge to sentencing under a two-step statute that was very similar to New York's PFO statute.

In *Apprendi v. New Jersey*, 530 U.S. 466 (2000), this Court held that the Fifth, Sixth, and Fourteenth Amendments require that *any* fact, other than the existence of a prior felony, that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt. 530 U.S. at 487-490. Whether the required fact is characterized as an "element" of the crime or a "sentencing factor" is not determinative. *Id.* at 494. "[T]he relevant inquiry is one not of form, but of effect — does the required finding expose the defendant to a greater punishment than that authorized by the jury's verdict?" *Id.* at 494.

Thus, when a factor is used to increase a sentence beyond the maximum authorized term — rather than merely to determine what sentence should be imposed "*within the range* authorized by the jury's finding" — "it is the functional equivalent of an element of a greater offense than the one covered by the jury's guilty verdict." *Id.* at 494 n.19 (original emphasis). Such factor must, therefore,

be determined by a jury and found beyond a reasonable doubt. *Id.* at 490. In *Ring v. Arizona*, 536 U.S. 584 (2002), the Court applied *Apprendi* to invalidate Arizona's capital sentencing scheme, under which the imposition of a death sentence depended on a judge's finding of at least one of 10 statutory aggravators. 530 U.S. at 592-593, 597, 603.

In *Blakely v. Washington*, 542 U.S. 296 (2004), this Court made clear that the "statutory maximum" sentence for *Apprendi* purposes is not necessarily the maximum provided for in a state's penal code, but "the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*. *Id.* at 303-304 (original emphasis). *Blakely* was also significant because it applied *Apprendi* to a sentencing enhancement scheme requiring judicial factfinding far more general than was required in the schemes invalidated by *Ring* and *Apprendi*, requiring the court only to find "substantial and compelling reasons justifying" a sentence increase. Rejecting Washington's attempt to distinguish its sentencing scheme from those in *Apprendi* and *Ring*, this Court ruled that:

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

542 U.S. at 305 (original emphasis).

And in *Cunningham v. California*, 549 U.S. 270 (2007), the Court invalidated California's determinate sentencing law (D.S.L.), which permitted a judge to impose a sentence in the upper of three sentencing ranges when the judge found "circumstances in aggravation," meaning "*facts* which justify the imposition of the upper prison term." 549 U.S. at 274, 278 (original emphasis). In striking down California's sentencing scheme, this Court characterized the D.S.L.'s requirement that the prosecution prove "matters pertaining to the defendant's history and character and the nature and circumstances of his criminal conduct . . . by a preponderance of the evidence" — language identical to that in C.P.L. § 400.20[5] — as "a clear factfinding directive to which there is no exception." *Id.* at 279.

Faced with this Court's clear exposition of the *Apprendi* rule across many factual contexts, numerous other states with flawed enhanced sentencing statutes have taken judicial measures to bring those statutes into compliance with *Apprendi* restraints. *See State v. Price*, 171 P.3d 1223, 1226 (Ariz. 2007); *State v. Frawley*, 172 P.3d 144, 146, 153 (N.M. 2007); *State v. Gomez*, 239 S.W.3d 733, 737, 740-41 (Tenn. 2007); *State v. Maugaotega*, 168 P.3d 562, 574-75 (Haw. 2007); *State v. Bell*, 931 A.2d 198 (Conn. 2007); *State v. Foster*, 845 N.E.2d 470 (Ohio 2006); *State v. Schofield*, 895 A.2d 927 (Me. 2005); *State v. Fairbanks*, 688 N.W.2d 333, 336-337 (Minn. Ct. App. 2004), *rev. granted* (Minn. Jan. 20, 2005), *rev. denied* (Minn. Dec. 13, 2005).

In addition, in a decision prior to the Hawaii State Court decision in *Maugaotega*, the Ninth Circuit Court of Appeals affirmed a grant of *habeas* relief based on an *Apprendi* challenge to Hawaii's enhanced sentencing law involving a statute whose language the Circuit Court described as "nearly identical" to that of New York's PFO statute. *See Kaua v. Frank*, 436 F.3d 1057, 1061 n. 25 (9th Cir. 2006), *cert. denied*, 549 U.S. 1245 (2007).[4] The Circuit reasoned that the mandatory second step of the two-step process for extended sentencing violated *Apprendi* because it required the court to "determine whether an extended sentence is necessary for the protection of the public," *id.* at 1059, a decision "a jury should have made." *Id.* at 1062.

Portalatin, however, is inconsistent with the Ninth Circuit's holding in *Kaua*, and New York remains the sole outlier in refusing to recognize that its discretionary recidivist sentencing statute runs afoul of *Apprendi*. *See People v. Battles*, __ N.Y.3d __, __ N.Y.S.2d __, 2010 N.Y. Slip Op. 09160 (December 14, 2010); *People*

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[4]The *Kaua* Court noted that Hawaii's extended-sentencing statute, Haw. Rev. Stat. § 706-662(4) (2004),

> requires the sentencing court to conduct a two-step process . . . . First, the court must find that the defendant falls within the class of "multiple offenders" subject to an extended sentence . . . . Under [the statute], this first step requires the court to find that the defendant is being sentenced for two or more felonies, or is already under a sentence of imprisonment for a felony. Second, the court must determine whether an extended sentence is necessary for the protection of the public. 436 F.3d at 1059.

v. Quinones, 12 N.Y.3d 116, 879 N.Y.S.2d 1, *cert. denied*, 130 S.Ct. 104 (2009); *People v. Rivera*, 5 N.Y.3d 61, 800 N.Y.S.2d 51 (2005), *cert. denied*, 546 U.S. 984 (2005); *People v. Rosen*, 96 N.Y.2d 329, 728 N.Y.S.2d 407, *cert. denied*, 534 U.S. 899 (2001). Despite the PFO's directive that a court may not impose a higher-range sentence unless it has found that the history and character of the defendant and the nature and circumstances of his criminal conduct justify it, *see* C.P.L. § 400.20[1], the *Rivera* Court stated that no factual findings beyond the defendant's prior convictions are required to impose an enhanced sentence. *Rivera*, 5 N.Y.2d at 67-68, 800 N.Y.S. 2d at 55-56. But the *Rivera* Court also left the step-two judicial factfinding requirement intact, including the requirement that the sentencing court render an opinion about the defendant's history and character and the nature and circumstances of his criminal conduct, before imposing an enhanced sentence under the statute. That Court attempted to minimize the constitutional import of step two by characterizing the consideration of evidence under it as a mere opportunity for a defendant to receive an "airing and explanation," 5 N.Y.3d at 68, 800 N.Y.S.2d at 56, and the trial judge to fulfill his or her "most traditional sentencing role." *Id.* at 69, 800 N.Y.S.2d at 57. This approach, however, ignores *Blakely*'s clear holding that such distinctions are irrelevant: "Whether the judicially determined facts *require* a sentence enhancement or merely *allow* it, the verdict alone does not authorize the

sentence." *Blakely*, 532 U.S. 305 n.8 (original emphasis); *accord*, *Cunningham*, 549 U.S. at 290.

In this case, the majority incorrectly credited the *Rivera* Court's explanation regarding the PFO statute's step-two requirement when it found that that Court had deemed that step merely procedural. *Portalatin*, 624 F.3d at 88-89. It agreed with New York that once the step-one recidivism finding was made, any other facts the sentencing court relied on could not properly be understood to be elements of the underlying offense for *Apprendi* purposes, but rather "simply inform[ed] the judge's discretion to select an appropriate sentence" within the ranges authorized by the statute. *Id.* at 89. The majority, citing *Wisconsin v. Mitchell*, 508 U.S. 476, 483-484 (1993), acknowledged that it was bound only by the State's interpretation of what the terms of the statute mean, not its pronouncement of its "operative effect" for constitutional purposes. *Id.* at 90. It concluded, however, that *Rivera*'s explanation about the operation of the statute was "not merely" a characterization of its practical operation, but was "an exposition of its terms," which permitted an enhanced sentence based on the step one findings — the defendant's criminal history — alone. *Id.* As a result, the majority found that it was not unreasonable under AEDPA for the State to conclude that the step-two factfinding was unlike the factfinding requirements invalidated in *Blakely* and *Cunningham*, and that the maximum prison sentence for *Apprendi* purposes was set at life once the step-one recidivism findings were made. *Id.* at 91. The New York Court, however, always

acknowledged that step one only made someone "eligible" for an enhanced sentence, and that the statute did not permit a court to impose an enhanced sentence unless the court formed an opinion about the severity of the defendant's criminal history and the nature and circumstances of his criminal conduct. But since the opinion could be based on prior felonies alone, there was no *Apprendi* violation. *See ante* at 17-19.

The problem with that analysis is that it ignores this Court's repeated instruction that *any* finding that is necessary to the imposition of an enhanced sentence is a finding that must be made by the jury regardless of the name or characterization the State places upon it. In upholding the New York court's conclusion, the majority below fell into the same trap the state court did, finding that the judge's step-two opinion — whether the history and character of the defendant and the nature and circumstances of his criminal conduct are such that extended incarceration and lifetime supervision will best serve the public interest — was merely a procedural requirement that did not itself constitute a finding of fact for *Apprendi* purposes.

In *Cunningham*, this Court, relying on *Blakely*, held that because the California's D.S.L. required that the middle range be imposed unless the judge found an aggravating fact beyond the elements of the charged offense, that range was the statutory maximum for *Apprendi* purposes and any sentence above it violated its "bright-line rule." 549 U.S. at 288-294. The Court rejected

California's argument that the D.S.L. merely permitted judges to engage in discretionary factfinding "that traditionally has been incident to the judge's selection of an appropriate sentence within a statutorily prescribed sentencing range." *Id.* at 868.

In *Blakely*, addressing Washington's enhanced-sentencing statute, the Court held that it "does [not] matter that the judge must, after finding aggravating facts, make a judgment that they present a compelling ground for departure. He cannot make that judgment without finding some facts to support it beyond the bare elements of the offense. Whether the judicially determined facts *require* a sentence enhancement or merely *allow* it, the verdict alone does not authorize the sentence." 542 U.S. at 305 n. 8 (original emphasis).

Precisely the same is true under New York's PFO statute, which makes an increase in a defendant's punishment contingent upon the court's being "of the opinion that the history and character of the defendant and the nature and circumstances of his criminal conduct" warrant a Class A-I felony sentence. Just as the judge in *Blakely* had to make a "judgment" that the facts he or she found "present[ed] a compelling ground for departure" from the standard sentencing range, a New York judge must be of the "opinion" that the facts he or she has found warrant imposition of a life sentence. Indeed, like "judgment" in *Blakely*, the use of the word "opinion" is simply another way of saying that it is the court that gets to decide the key factual issue of whether "the history and character of

the defendant and the nature and circumstances of his criminal conduct" warrant the higher sentence.

No matter what the terminology, the New York statute authorizes enhancement of a sentence above the maximum range otherwise applicable, based on *judicial* factfinding beyond the jury verdict alone. As in *Blakely*, *supra*, 542 U.S. at 305, "the jury's verdict alone does not authorize" the enhanced sentence and the judge "acquires that authority" to impose it "only upon finding some additional fact."

And in *Kaua*, decided between *Blakely* and *Cunningham*, the Ninth Circuit ruled that imposing an enhanced sentence pursuant to Hawaii's two-step statute violated *Apprendi* because it required the court to "determine whether an extended sentence is necessary for the protection of the public," 436 F.3d at 1059, a decision "a jury should have made." *Id.* at 1062.[5]

Given the *Kaua* decision and this Court's unequivocal pronouncements in *Blakely* and *Cunningham*, it should have been clear to the New York Court of

[5]The *Kaua* Court suggested that the Hawaii and New York statutes were "arguably distinguish[able]" from each other based on the differing state court interpretations of the respective statutes, noting that the New York court, unlike Hawaii's, had explained that the defendant's prior felony convictions were the "sole determina[nt]" of whether a defendant would be subject to enhanced sentencing under New York's PFO statute, and that New York had interpreted its step-two determination to be something other than a factual finding. *Kaua*, 436 F.3d at 1061 n. 25. The *Kaua* Court's purported distinction of the two statutes was unnecessary to its opinion that Hawaii's statute violated *Apprendi*, and so should carry no weight. More important, though, is that, for the reasons espoused within the instant petition, the distinction does not withstand constitutional scrutiny.

Appeals and the Second Circuit for AEPDA purposes that the imposition of petitioner's enhanced sentence violated *Apprendi* because it permitted the judge to impose that sentence *only* upon reaching an opinion that the petitioner's history and character and the nature and circumstances of his criminal conduct "indicate[d] that extended incarceration and life-time supervision [would] best serve the public interest." Absent that opinion, a life sentence could not be imposed — that sentencing range was not yet available. Calling that opinion a procedural requirement, or characterizing it as an exercise of discretion, did not alter the acknowledged reality that the opinion was a *sine qua non* of imposing the enhanced sentence and, therefore, a fact that must be found by a jury.

The *Portalatin* majority failed to recognize this principle, however, and its failure led to its erroneous conclusion that, once the step-one recidivism findings were made, petitioner's maximum sentence for *Apprendi* purposes was set at the higher-range for a class A-I felony offender. *Portalatin*, 624 F.3d at 91. The New York Court of Appeals's analysis contains the same fatal flaw. Since step two is a factfinding, not a mere exercise of discretion, the New York Court of Appeals was wrong to conclude that step one was the sole determinant of whether a defendant could receive a PFO sentence. That conclusion was not a matter of statutory interpretation; it was incorrect constitutional analysis to which no AEDPA deference is owed.

Clinging to the eligibility theory, the *Rivera* Court reasoned that, since the recidivism finding alone is "necessary and sufficient" for imposition of the enhanced sentence, 5 N.Y.2d at 67, 800 N.Y.S.2d at 56, the step-two finding of an opinion, while required by statute, merely involves the exercise of traditional judicial sentencing discretion "within a range," 5 N.Y.2d at 69, 800 N.Y.S.2d at 57, and is not subject to Sixth Amendment constraints. This analysis ignores the nature of New York's sentencing scheme even as the State's Court of Appeals has interpreted it. The PFO statute requires the sentencing court to choose between two separate ranges: in petitioner's case, a Class B felony range with a maximum term of 25 years and a Class A-I felony range with a minimum of between 15 and 25 years and a maximum of life. The applicable range is determined not just by whether a defendant has two prior convictions, but, rather, whether the judge has found those prior convictions and has formed an opinion as to which of the two ranges is appropriate. The sentence the court ultimately imposes is not merely one within the range authorized by a step-one finding that a defendant is a PFO. Rather, it falls either within the range authorized by the statute under which the defendant was convicted, or within a second, higher range authorized by the PFO statute once both of its prongs are met. N.Y. Penal Law § 70.10[2].

Indeed, the *Rivera* Court conceded as much when it observed in that case that, having made the recidivism finding, the trial court "went on to consider other facts in weighing "*whether to impose* the authorized persistent felony offender

sentence." 5 N.Y.2d at 67, 800 N.Y.S.2d at 56 (emphasis added). It further acknowledged that, if the judge's "view of the facts surrounding defendant's history and character were different," he "might well have" imposed a less severe sentence — that is, one dramatically *below* the enhanced range of between 15 and 25 years to life. *Id.* In other words, in making its step-two determination, the judge was not deciding where "within" the persistent felony offender range to impose sentence — whether to impose 15 to life, 25 to life, or something in between — but whether it could apply the enhanced range at all.

The *Portalatin* majority's conclusion, that this Court had been unclear as to the scope of its decision in *Almendarez-Torres* and that it therefore could not fault a state "for selecting one reasonable conclusion over another," is similarly problematic. This Court concluded in *Almendarez-Torres* that a sentencing court could determine a defendant's prior convictions to increase his maximum sentence. 523 U.S. 224. In *Apprendi*, while the Court left this holding undisturbed, it treated it as "a narrow exception to the general rule" that a court may not find facts that subject a defendant to a maximum sentence in excess of that which he could have received based on the verdict alone. 530 U.S. at 489-490. Given that the *Almendarez-Torres* exception is based on the reliability of a jury verdict, viewing a qualitative judgment about the gravity of prior crimes, such as a long and a disturbing criminal history, to be simply part and parcel of the existence of those convictions, is itself unreasonable.

In sum, to leave the *Portalatin* decision unaddressed by this Court would leave New York as a sole outlier among other states that have cured their similarly-flawed enhanced-sentencing statutes pursuant to this Court's *Apprendi* holdings, and leave intact a decision of the Second Circuit Court of Appeals that is inconsistent with the Ninth Circuit's decision in *Kaua*. Although this Court made clear in *Blakely* and *Cunningham* that only a jury may decide beyond a reasonable doubt facts that raise the maximum lawful punishment to which a criminal defendant may be sentenced, the *Portalatin* majority has countenanced imposition of sentences pursuant to New York's PFO statute that violated clearly-established *Apprendi* holdings of this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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