NOTES

Admitting Guilt by Professing Innocence: When Sentence Enhancements Based on *Alford* Pleas Are Unconstitutional

I. INTRODUCTION

A few days before Christmas in 1994, in Vineland, New Jersey, Charles Apprendi, Jr. was drunk.[1] At 2:04 a.m., he fired several shots from a .22 caliber gun into the home of an African-American family in

1. Apprendi v. New Jersey, 530 U.S. 466, 469, 471 (2000).

his neighborhood.[2] By 3:05 a.m., he had been arrested and had admitted that he was the shooter.[3] Apprendi was interrogated for several hours after these events.[4] At 6:04 a.m., he apparently stated that he committed the crime because the victims were black, but he later retracted this statement.[5] Apprendi was indicted on twenty-three counts in connection with the shooting, and eventually pleaded guilty to three of them: two counts of second-degree possession of a firearm for an unlawful purpose, and one count of third-degree unlawful possession of an antipersonnel bomb.[6]

None of the twenty-three counts included any reference to New Jersey's hate crime statute, which allowed between ten and twenty years to be added onto any sentence for a crime that was racially motivated. Nor did any of the twenty-three counts even allege that Apprendi acted with a "racially biased purpose."[7] The maximum possible sentence for a single second-degree firearm possession conviction was ten years. Apprendi, however, was sentenced to twelve years on a single second-degree count.[8] The judge found it more likely than not that Apprendi had committed the shooting because of racial bias against the victims, and imposed a two-year enhancement under New Jersey's hate crime statute.[9]

The Supreme Court held that Apprendi's hate crime enhancement was unconstitutional because it was based on a finding made by a judge on a preponderance of the evidence instead of by a jury beyond a reasonable doubt. Noting that the judge's application of the sentence enhancement was "significant because it increased—indeed it doubled—the maximum range within which the judge could exercise his discretion," the Court focused on the *process* by which the enhancement was applied.[10] It ruled that "[m]erely using the label 'sentence enhancement' to describe [the hate crime statute] surely does not provide a principled basis" for treating it any differently from

2. *Id.* at 469.

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.* at 469–70. The other twenty counts were dismissed pursuant to Apprendi's plea agreement. *Id.*

7. *Id.* at 468–69; *see also* N.J. STAT. ANN. § 2C:44-3(e) (West 2000).

8. *Id.* at 470–71. The judge determined that Apprendi's sentences for each of the three counts to which he pleaded would run concurrently. *Id.* at 470. This meant that the sentence for one of the more serious second-degree counts would effectively determine Apprendi's total prison term.

9. *Id.* at 471.

10. *Id.* at 474.

the possession statute under which Apprendi was convicted.[11] In other words, regardless of whether a defendant is sentenced to jail time because of a sentence enhancement statute or a criminal statute, the process is the same: both require a finding of fact beyond a reasonable doubt. Because the hate crime statute at issue authorized an enhanced sentence if a judge found on a mere preponderance of the evidence that a crime was "racially motivated," it effectively authorized judges to bypass this constitutionally mandated process. The Supreme Court, therefore, vacated Apprendi's sentence and declared the particular hate crime enhancement at issue invalid.

Although Apprendi was convicted by entering a regular guilty plea, defendants in most states and in the federal system have the option of entering an *Alford* plea, which is a means of pleading guilty without admitting factual guilt.[12] *Alford* pleas allow equivocating defendants to take a deal without having to admit guilt. They also allow defendants for whom a guilty plea is simply the best deal to take it, with no further questions asked.

When it comes to sentencing, however, *Alford* pleas can create constitutional tension. In *Apprendi v. New Jersey* and *Blakely v. Washington*, the Supreme Court held that the Sixth Amendment requires that any fact that increases a defendant's maximum sentence, other than a prior conviction, must be proven to a jury beyond a reasonable doubt.[13] As Justice Scalia wrote in *Blakely*, the Sixth Amendment's jury trial right "is no mere procedural formality, but a fundamental reservation of power in our constitutional structure."[14] Although the jury typically has the duty of making the "beyond a reasonable doubt" determination, defendants can also establish this level of proof by admitting the crime. *Alford* defendants, however, expressly refuse to admit their crimes even while pleading guilty.

Defendants entering *Alford* pleas (or any type of plea resulting in a conviction) can face enhanced sentences in three settings. First, a defendant may face sentencing enhancements based on aggravating facts or underlying conduct in a single case.[15] Second, if a defendant lands in court for a later, unrelated case, he may face a sentence

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11. *Id.* at 476.

12. *See* North Carolina v. Alford, 400 U.S. 25, 37 (1970) (allowing a defendant to "consent to the imposition of a prison sentence even if he is unwilling or unable to admit his participation in the acts constituting the crime"); *see also id.* at 33–34 (collecting authority on the availability of such pleas throughout the states).

13. Blakely v. Washington, 542 U.S. 296, 301–02 (2004); *Apprendi*, 530 U.S. at 490.

14. 542 U.S. at 305–06.

15. This is the type of enhancement that Apprendi received. *Apprendi*, 530 U.S. at 470–71.

enhancement based on the fact of his prior conviction resulting from the earlier *Alford* plea. Third, a defendant in a later case may receive an enhancement based on the underlying conduct supporting his earlier conviction. This Note only addresses the first and third types of enhancements, meaning those based on the underlying conduct either in a single case or a later case. It does not address enhancements based simply on the *fact* of a prior conviction.[16]

This Note argues that any fact that enhances an *Alford* defendant's sentence should be either specifically admitted by the defendant or proven to a jury beyond a reasonable doubt. Part II provides background information on the mechanics of *Alford* pleas and plea bargaining generally. In the context of *Alford* pleas, courts disagree on whether it is proper to base an enhancement on alleged conduct that is not crucial to the statutory definition of the crime, is not alleged in the charging instrument, and is not admitted by the defendant or proven to a jury beyond a reasonable doubt. Part III examines the nature of this conflict by briefly summarizing the landmark Supreme Court cases of *Apprendi* and *Blakely*, as well as the important exception to those cases required by *Almendarez-Torres*.[17] The difficulty surrounding the prior conviction exception arises in many contexts, but this Note focuses on the constitutional problems that arise when prior conviction enhancements stem from *Alford* pleas. Part III explores how this problem has divided the lower federal and state courts that have addressed the constitutionality of sentence enhancements for *Alford* defendants in the wake of *Apprendi* and *Blakely*. Part IV argues that because *Alford* defendants do not admit the underlying facts of their crimes, the only facts that can be conclusively established by their pleas are those that are minimal to sustain a conviction. If a judge adds a sentence enhancement based on some fact not admitted by the defendant, this is a violation of *Blakely*'s

16. An enhancement based simply on the *fact* of a prior conviction, even if that prior conviction was pursuant to an *Alford* plea, is constitutional under *Apprendi* and *Blakely*. Although some courts may consider an *Alford* plea to be a special type of plea, or one more analogous to a plea of nolo contendere, all federal circuits have, at least in some form, held that an *Alford* plea is functionally a guilty plea. *See, e.g.*, United States v. Rushwam, 275 F. App'x 684, 686 (9th Cir. 2008); United States v. McCall, 507 F.3d 670, 675 n.4 (8th Cir. 2007); Price v. Johnson, 218 F. App'x 274, 275 (4th Cir. 2007); United States v. Delgado-Lucio, 184 F. App'x 737, 740 (10th Cir. 2006); Ballard v. Burton, 444 F.3d 391, 396 (5th Cir. 2006); Burrell v. United States, 384 F.3d 22, 28, 31 (2d Cir. 2004); United States v. Mackins, 218 F.3d 263, 268 (3d Cir. 2000); United States v. Bierd, 217 F.3d 15, 23–24 (1st Cir. 2000); Young v. United States, 124 F.3d 794, 797 (7th Cir. 1997); United States v. Tunning, 69 F.3d 107, 110 (6th Cir. 1995); Blohm v. Comm'r, 994 F.2d 1542, 1554–55 (11th Cir. 1993); United States v. Lipscomb, 702 F.2d 1049, 1070 (D.C. Cir. 1983). Thus, *Alford* defendants cannot rely on their protestations of innocence to preclude a later finding that they were indeed convicted, just as through a regular guilty plea.

17. 523 U.S. 224 (1998).

rule that every fact that enhances a defendant's sentence beyond what would otherwise be the maximum sentence must be either admitted by the defendant or proven to a jury beyond a reasonable doubt. Part V concludes by suggesting that courts and defendants alike should be wary of the *Apprendi* problems that *Alford* pleas can present.

II. PLEA BARGAINS: MAKING A DEAL

To understand the pieces that make up this puzzle, some background information is necessary. First, Part II(A) discusses the Supreme Court's decision in *North Carolina v. Alford*, where the Court approved a guilty plea entered by a defendant who claimed to be factually innocent. Part II(B) then examines plea bargaining generally, giving reasons why defendants might enter regular guilty pleas and why defendants sometimes choose to enter *Alford* pleas.

A. Alford Who?

In an *Alford* plea, a defendant chooses to waive his Sixth Amendment right to trial and plead guilty, but at the same time protests his innocence.[18] In other words, the defendant does not admit guilt, but acknowledges that the government has evidence against him upon which a jury could find him guilty.

Before the Supreme Court's decision in *North Carolina v. Alford*[19] in 1970, it was unclear what courts were supposed to do with defendants who professed their innocence during plea colloquies. Prior to *Alford*, the Supreme Court held in *Hudson v. United States* that federal courts have the power to imprison defendants who plead nolo contedere, even though by making such a plea a defendant does not admit guilt.[20] *Alford* changed things by allowing courts to imprison not only defendants who refuse to admit guilt, but also those who openly protest that they are innocent—provided that the plea meets the constitutional requirements of being knowing and voluntary.[21]

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18. *See* North Carolina v. Alford, 400 U.S. 25, 37 (1970). Note also that the portion of the proceedings during which a defendant would make such a protestation is the plea colloquy, which is required under Federal Rule of Criminal Procedure 11. A plea colloquy is a verbal exchange between the judge and the defendant during which the defendant enters his plea. BLACK'S LAW DICTIONARY 300 (9th ed. 2009).

19. *Alford*, 400 U.S. at 37.

20. Hudson v. United States, 272 U.S. 451, 457 (1926). Before *Alford*, the options for such a defendant were that he could plead guilty and force himself to admit the facts, plead nolo contendere (and still go to jail), or insist on his innocence and proceed to trial.

21. *Alford*, 400 U.S. at 36–37.

Henry Alford pleaded guilty in 1963 to second-degree murder in order to avoid going to trial for first-degree murder, thereby taking the death penalty off the table.[22] Alford had maintained his innocence throughout the proceedings, even during his plea colloquy. After the trial judge sentenced him to thirty years based on his plea, Alford appealed, claiming that his plea was not valid, but his appeal in state court was unsuccessful.[23]

After two habeas petitions,[24] Alford's case finally made it to the Supreme Court in 1970. The Supreme Court upheld the guilty plea despite Alford's refusal to admit that he was in fact guilty.[25] The *Alford* Court stated that *Hudson* and other cases involving nolo contendere pleas "would be directly in point if Alford had simply insisted on his plea but refused to admit the crime";[26] the difference was that Alford not only refused to admit the crime, but also actively professed his innocence.[27] Rejecting a distinction based on this difference, the *Alford* Court found that an admission of guilt is not a "constitutional requisite to the imposition of criminal penalty."[28] The Court held that a defendant's guilty plea may be accepted as long as it is entered knowingly, voluntarily, and understandingly and is based on a "strong factual basis,"[29] *even if* the defendant protests that he is innocent or refuses to admit guilt.[30]

B. Why Defendants Use Pleas

Like most criminal defendants in the United States, Apprendi was convicted by entering a guilty plea.[31] Plea bargaining disposes of over ninety percent of all criminal cases,[32] making it an important process for courts struggling to manage the steady and massive flow of cases on their dockets. Plea bargaining first became common in the

22. *Id.* at 27–28.

23. *Id.* at 28–29.

24. The first was denied by both the United States District Court for the Middle District of North Carolina and the Fourth Circuit. *Id.* at 29. The second was again denied by the district court, but a divided panel of the Fourth Circuit reversed, finding that Alford's plea was not voluntary. *Id.* at 30.

25. *Id.* at 27–31.

26. *Id.* at 37.

27. *Id.* at 36–38.

28. *Id.* at 37.

29. *Id.* at 38.

30. *Id.* at 37–38.

31. Apprendi v. New Jersey, 530 U.S. 466, 469–70 (2000). For information about the prevalence of guilty pleas, see PETER A. JOY & KEVIN C. MCMUNIGAL, DO NO WRONG: ETHICS FOR PROSECUTORS AND DEFENDERS 143 (2009).

32. JOY & MCMUNIGAL, *supra* note 31, at 143.

United States in the mid-1800s,[33] although the Supreme Court did not acknowledge and approve of the practice until 1970.[34] Plea bargains usually involve a defendant pleading guilty to the charges against him, but defendants may also plead nolo contendere (no contest) or enter an *Alford* plea.[35]

While there are a number of advantages common to both *Alford* pleas and regular guilty pleas, some advantages are unique to *Alford* pleas. Both *Alford* and regular guilty pleas may allow defendants to obtain lower sentences than they might have otherwise received. They also provide defendants with more certain outcomes compared to the risk of a trial. Other advantages are unique to *Alford* pleas. For example, in certain cases *Alford* pleas, unlike regular guilty pleas, save defendants from embarrassing in-court admissions. Additionally, *Alford* pleas encourage defendants to be honest, both in court and with their attorneys.

Typical plea bargains involve one of two types of situations: charge bargaining or sentencing bargaining.[36] In charge bargaining, the prosecutor may reduce the severity of the charge.[37] In this situation, defendants may choose to plead to a lesser charge for several reasons. For one, the lesser charge is likely to carry a lesser maximum punishment. Second, a conviction on the lesser charge may have other advantages, such as an increase in judicial discretion in sentencing or "a statutory bar to probation."[38] Additionally, defendants may have a particular reason for avoiding a plea to the original charge. "Sometimes the desire is to avoid a repugnant

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33. JENIA I. TURNER, PLEA BARGAINING ACROSS BORDERS 9 (2009).

34. Brady v. United States, 397 U.S. 742, 752–53 (1970).

35. Interestingly, while nolo contendere pleas are explicitly recognized by the Federal Rules of Criminal Procedure as an appropriate type of plea, *Alford* pleas are not. Federal Rule of Criminal Procedure 11, which governs pleas, states: "A defendant may plead not guilty, guilty, or (with the court's consent) nolo contendere." FED. R. CRIM. P. 11(a)(1). The Advisory Committee Notes to Rule 11 discuss *Alford* pleas, indicating they are indeed recognized in the federal system. FED. R. CRIM. P. 11 advisory committee's note. Nevertheless, the Advisory Committee appears unsure of how to handle them. The only direct treatment of *Alford* pleas in the Advisory Committee Notes is a paragraph that acknowledges that "[t]he rule does not speak directly to the issue of whether a judge may accept a plea of guilty where there is a factual basis for the plea but the defendant asserts his innocence." *Id.* Furthermore, "[t]he defendant who asserts his innocence while pleading guilty or nolo contendere is often difficult to deal with in a correctional setting, and it may therefore be preferable to resolve the issue of guilt or innocence at the trial stage . . . ." *Id.*

36. 5 WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 21.1(a) (3d ed. 2009).

37. *Id.*; JOHN M. SCHEB, CRIMINAL PROCEDURE 150 (5th ed. 2009). In a third type of bargain, when a defendant is facing multiple charges, a prosecutor may offer to drop some of the charges if the defendant will plead guilty to one of them. LAFAVE ET AL., *supra* note 36.

38. LAFAVE ET AL., *supra* note 36.

conviction label," as is common with sex offenses.[39] In other circumstances, a defendant originally charged with a felony might plead to a misdemeanor, thereby avoiding possible collateral consequences of a felony conviction.[40]

In sentence bargaining, a defendant pleads to the original charge in exchange for a lesser punishment, and the prosecutor promises to "seek leniency, or he may promise to ask for some specific disposition, such as probation."[41] Unless the judge agrees to be bound by the parties' agreed-upon sentence, this is a somewhat riskier situation because a defendant is pleading to a greater charge than he would otherwise plead to under a charge bargain, and the imposition of the sentence still is within the discretion of the *judge*, not the prosecutor.[42] Even though a prosecutor can recommend a particular sentence, judges are not bound by that recommendation.[43] A prosecutor's recommendation does carry some weight, however, and defendants often enter into such agreements.[44]

Plea bargaining provides defendants with a swift and certain resolution. Commentators note that plea bargains provide "a means by which . . . the parties can obtain a prompt resolution of criminal proceedings with the benefits that flow from final disposition of a case."[45] Judge Easterbrook, a strong advocate for plea bargaining, points out that plea bargains are valuable because they represent a compromise.[46] He argues that allowing defendants to choose whether to "use or exchange their rights" is good because it allows them to choose the course of action that will leave them better off.[47] Additionally, Easterbrook argues that "risk-averse [defendants] prefer a certain but small punishment," and if every case went to trial, defendants could not choose such an option.[48] "Defendants also get the process over sooner, and solvent ones save the expense of trial."[49]

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39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.*; *see also* FED. R. CRIM. P. 32 (providing the procedures by which a judge should impose a sentence).

43. TURNER, *supra* note 33, at 24.

44. LAFAVE ET AL., *supra* note 36.

45. SCHEB, *supra* note 37, at 150.

46. Frank H. Easterbrook, *Plea Bargaining as Compromise*, 101 YALE L.J. 1969, 1975 (1992).

47. *Id.*

48. *Id.*

49. *Id.* In other words, defendants who could afford to pay for their own counsel would save this expense by entering a plea.

Given the benefits of entering a regular guilty plea, why do some defendants enter *Alford* pleas and refuse to admit guilt? In a seminal article published five years after the *Alford* decision, Professor Albert Alschuler identified several reasons why defendants plead guilty while professing their own innocence.[50] For one, as with regular guilty pleas, the possibility of an *Alford* plea allows defense attorneys to give their defendants better odds and minimize their risks, because defendants are often better off pleading than going to trial.[51] Defendants charged with crimes often have no idea what to expect after being arrested. The prospect of facing a jury trial can be daunting, especially because it is an all-or-nothing situation: win and go free, or lose and go to jail for a yet-to-be-determined amount of time. Entering an *Alford* plea allows defendants to have some control over the next steps and gives them certainty over the outcome of their cases—even if they maintain their innocence. *Alford* pleas also make courts more efficient by allowing defendants for whom maintaining perceived innocence is paramount the opportunity to plead out instead of going to trial.[52]

Unlike regular guilty pleas, *Alford* pleas allow defendants to avoid the shame of admitting guilt in especially sensitive or painful contexts, such as sex abuse cases.[53] Professor Stephanos Bibas conducted a survey of thirty-four criminal defense attorneys, prosecutors, and judges to get a sense of how and why defendants might choose a plea that is functionally the same as a guilty plea, but refuse to admit guilt.[54] He found that the most common reasons were "fear of embarrassment and shame before family and friends," "psychological denial," and avoidance of collateral consequences of admissions of guilt.[55] Other commentators suggest that sex abuse

50. Albert W. Alschuler, *The Defense Attorney's Role in Plea Bargaining*, 84 YALE L.J. 1179, 1278–306 (1975).

51. *Id.* at 1279.

52. Curtis J. Shipley, Note, *The* Alford *Plea: A Necessary but Unpredictable Tool for the Criminal Defendant*, 72 IOWA L. REV. 1063, 1073 (1987).

53. Stephanos Bibas, *Harmonizing Substantive-Criminal-Law Values and Criminal Procedure: The Case of* Alford *and Nolo Contendere Pleas*, 88 CORNELL L. REV. 1361, 1378 (2003).

54. *Id.* at 1377 ("I asked defense counsel, prosecutors, and judges why they thought these defendants would not admit guilt . . . .").

55. *Id.* at 1377–78. It is important to note that collateral consequences of an *Alford* plea can include a wide range of consequences: Bibas writes that an *Alford* plea may affect child custody disputes and prospective employment, and, unlike nolo contendere pleas, can have an estoppel effect in future civil litigation. *Id.* at 1378.

cases are particularly common environments for *Alford* pleas, given the nature of the crime.[56]

Perhaps most importantly, *Alford* pleas reduce the incentive for criminal defendants to lie and thereby alleviate their attorneys' ethical concerns.[57] Before *Alford*, attorneys faced difficult ethical questions when representing self-professed "innocent" defendants who wished to plead guilty.[58] If an admission of guilt were required for a guilty plea, defense attorneys would have very little leverage unless their clients had admitted guilt to them, whether it was true or not.[59] Pre-*Alford*, if a defendant was in fact guilty, and wished to plead guilty, he would first have to admit all underlying facts. Until he did so, his attorney would be "restrain[ed] . . . from seeking a plea agreement if an admission of guilt is a prerequisite."[60] Similarly, pre-*Alford*, if a defendant was in fact innocent, but wished to plead guilty, he would essentially have to lie by admitting the alleged facts.

These situations placed attorneys in an ethical quagmire: "Is it ethical to permit . . . client[s] to lie in court and plead guilty when they have privately indicated their innocence?"[61] This is a difficult and unanswered question. But after *Alford*, "[t]he defendant is perceived to be free to tell the truth with the knowledge that the opportunity to plea bargain will exist whether he denies actual guilt or not. Attorneys are no longer placed in these ethical dilemmas and defendants are no longer encouraged to lie."[62]

While it is advantageous to both criminal defendants and their attorneys for the defendant to be honest and frank with his attorney, some readers may cringe at this latter rationale. Essentially, the

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56. *See* Allison D. Redlich & Asil Ali Özdoğru, Alford *Pleas in the Age of Innocence*, 27 BEHAV. SCI. & L. 467, 471 (2009) (acknowledging that according to some commentators " '[i]t is no coincidence that sex offenders are among the most frequent users of Alford and nolo contendere pleas' " (quoting Bibas, *supra* note 53, at 1393–94)).

57. Bryan H. Ward, *A Plea Best Not Taken: Why Criminal Defendants Should Avoid the* Alford *Plea*, 68 MO. L. REV. 913, 920 (2003). As the argument goes, in the case of guilty defendants, *Alford* pleas allow them to honestly state, both in court and to their attorneys, that they are unable to admit the crime before a judge. In the case of innocent defendants who wish to take advantage of a plea bargain, *Alford* pleas allow them to accept the deal without falsely stating their guilt. Of course, the criminal justice system should absolutely seek to avoid this latter situation. See *infra* notes 66–68 and accompanying text for more on this scenario.

58. Ward, *supra* note 57, at 920.

59. *Id.* In other words, if an admission of guilt were required as part of a guilty plea, and if the defendant's attorney knew that his client would refuse to admit guilt no matter what, the attorney would have little room to bargain with the prosecution, since he would not have a crucial bargaining chip at his disposal. *See id.*

60. *Id.*

61. *Id.*

62. *Id.*

argument is that factually innocent defendants no longer have to lie in order to communicate with their attorneys and plead guilty in open court. Why should we laud, instead of abhor, a device that "finally allows" innocent defendants to plead guilty? Not surprisingly, this is one reason why *Alford* pleas are often criticized.[63] Theoretically, a defendant is either guilty or not guilty of the particular crime with which he is charged. If he is guilty, the argument goes, he should plead guilty in order to accelerate his own rehabilitation and to help the victim (or the victim's family) achieve peace.[64] If he is innocent, he should plead not guilty and have faith in the adversarial system.[65]

Fortunately, scholars agree that judges should be just as concerned as non-attorneys are when a defendant claims he is innocent but insists on entering a guilty plea.[66] *Alford* itself held that a judge must be satisfied that there is a "*strong* factual basis" in the record to support a defendant's conviction before accepting such a plea.[67] Additionally, regardless of the defendant's actual guilt or innocence, an *Alford* plea allows him to be sincere both in court and in conference with his attorney. This is true even for defendants who are factually guilty, because *Alford* pleas allow defendants who for whatever reason simply cannot admit guilt to avoid having to do so in open court, while also allowing them to take an attractive plea deal. The real benefit of an *Alford* plea is not that it allows innocent defendants to plead guilty, but that it allows defendants who feel that a plea really is the best deal to take it without having to admit factual guilt.[68] This would be especially true for more risk-averse defendants, for whom the value of ensuring a lesser sentence or removing the possibility of the death penalty is greater than the value of *possibly* being found not guilty at trial.

Though *Alford* pleas are more common in state courts, they are still used regularly by criminal defendants in federal court.[69] A 1997 study from the Department of Justice asserts that approximately five percent of all federal criminal defendants that year entered *Alford*

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63. *See, e.g.*, Bibas, *supra* note 53, at 1382.

64. *See id.* at 1391 ("The hope is that punishing offenders increases the chance that they will repent and change their ways.").

65. *See id.* at 1382 (arguing that accuracy in criminal justice is much more important than efficiency).

66. *See* TURNER, *supra* note 33, at 30 (paraphrasing *Alford* as noting that "judges ought to be especially careful in assessing the factual basis for a plea when the defendant refuses to admit guilt" and explaining that "[s]uch scrutiny is needed to protect innocent defendants from pleading guilty and to ensure that plea decisions are made intelligently and knowingly").

67. North Carolina v. Alford, 400 U.S. 25, 38 (1970) (emphasis added).

68. Shipley, *supra* note 52, at 1073.

69. Bibas, *supra* note 53, at 1375.

pleas.[70] The total number of federal criminal defendants included in the study was just over 85,000, meaning that the number of *Alford* defendants was over 2,400.[71] Given that *Alford* pleas are more common in state courts, literally thousands, perhaps tens of thousands, of criminal defendants enter *Alford* pleas every year. The conflict described in Part III below could have consequences for many of these defendants.

III. THE "ABCS" OF *APPRENDI*-LAND

Apprendi and *Blakely*, two Supreme Court cases decided within the past decade, together establish that any fact that increases a defendant's sentence beyond the maximum possible sentencing range must be proven to a jury beyond a reasonable doubt.[72] Any sentence enhancement that raises a sentence above what would otherwise be the maximum, based simply on a judge's finding on a preponderance of the evidence, violates the "beyond a reasonable doubt" rule of these cases. This Part provides overviews of both *Apprendi* and *Blakely*, then discusses the prior conviction exception to this line of cases. It uses the Justices' opinions from *Apprendi* and *Blakely* to explain the Sixth Amendment principles that guide the decision whether to apply enhancements. This Part then examines several lower court opinions that have addressed when judges can properly apply certain sentencing enhancements to *Alford* defendants.

The implications of the *Apprendi* line of cases are dire for enhancements based on *Alford* pleas. A regular guilty plea conclusively establishes all underlying facts of a crime, but an *Alford* plea only establishes the bare minimum set of facts needed to support a conviction. Because *Alford* defendants do not admit the underlying facts of their crimes, any fact that supports an enhancement must be one that was essential to the defendant's *Alford* conviction.

A. "A" is for Apprendi

The Supreme Court's 2000 decision in *Apprendi v. New Jersey* established the rule that any fact other than that of a prior conviction which would enhance a defendant's sentence must be submitted to the

70. CAROLINE WOLF HARLOW, U.S. DEP'T OF JUSTICE, DEFENSE COUNSEL IN CRIMINAL CASES 8 tbl.17 (2000), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/dccc.pdf.

71. *Id.*

72. Blakely v. Washington, 542 U.S. 296, 301–02 (2004); Apprendi v. New Jersey, 530 U.S. 466, 490 (2000).

jury and proven beyond a reasonable doubt.[73] In *Apprendi*, as described in Part I, the defendant pleaded guilty to possession of a firearm with an unlawful purpose.[74] Because the sentencing judge found by a preponderance of the evidence that Apprendi's actions were racially motivated, he gave Apprendi a sentence enhancement pursuant to a New Jersey hate crime statute.[75] The Supreme Court, however, held that this enhancement was based on improper judicial factfinding because the facts justifying it had not been submitted to a jury for proof beyond a reasonable doubt, as required by the Sixth and Fourteenth Amendments.[76]

The *Apprendi* majority based its opinion on "two longstanding tenets of common-law criminal jurisprudence."[77] The first of these principles is that "the 'truth of every accusation' against a defendant 'should afterwards be confirmed by the unanimous suffrage of twelve of his equals and neighbours,' "[78] meaning that no accusation should stand as true unless unanimously found to be true by a jury. The second is that " 'an accusation which lacks any particular fact which the law makes *essential to the punishment* is . . . no accusation in reason.' "[79] These complementary ideals of criminal jurisprudence reflect the goals that defendants receive a fair verdict and, if found guilty, are only punished in response to the crime of which they are found guilty. In simpler terms, the punishment should fit the crime. If punishment is based in part on facts that were not found by the jury, then a defendant has not been accused of all facts "which the law makes essential to the punishment," and the truth of the accusation has not been "confirmed by the unanimous suffrage of twelve of his equals and neighbours."[80]

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73. 530 U.S. at 490.

74. *Id.* at 469–70.

75. *Id.* at 470.

76. *Id.* at 490. Justice Stevens's majority opinion briefly addressed the Court's earlier holding in *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), that the fact of a prior conviction may constitutionally be found through judicial factfinding for purposes of a recidivism statute. *Apprendi*, 530 U.S. at 487–90. Although Justice Stevens acknowledged that *Almendarez-Torres* may have been wrongly decided, the Court declined to overrule it, stating that because of its "unique facts," a "rejection of the otherwise uniform course of decision during the entire history of our jurisprudence" was unwarranted. *Id.* at 489–90. *See also infra* Part III(C) (discussing *Almendarez-Torres* in more detail).

77. *Blakely*, 542 U.S. at 301 (explaining the principles on which the *Apprendi* decision was based).

78. *Id.* (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES *343); *see also Apprendi*, 530 U.S. at 477.

79. *Blakely*, 542 U.S. at 301–02 (emphasis added) (quoting 1 J. BISHOP, CRIMINAL PROCEDURE § 87, at 55 (2d ed. 1872)); *see also Apprendi*, 530 U.S. at 511.

80. *See Blakely*, 542 U.S. at 301.

Justice O'Connor's dissent in *Apprendi* disagreed with the majority opinion in no uncertain terms. Separation of powers played a central role in her argument: "In one bold stroke the Court today casts aside our traditional cautious approach and instead embraces a universal . . . rule limiting the power of Congress and state legislatures to define criminal offenses and the sentences that follow . . . ."[81] Unlike the majority, O'Connor viewed the historical practice as one *allowing* for judicial factfinding.[82] She continued, "[W]e have never doubted that the Constitution permits Congress and the state legislatures to define criminal offenses, to prescribe broad ranges of punishment . . . and to give judges discretion . . . ."[83]

O'Connor also viewed the majority decision as encouraging absurd results. In one scenario, she suggested that the majority meant that a fact must be submitted to the jury if it "increases the range of punishment beyond that which could legally be imposed absent that fact."[84] This would imply that the New Jersey legislature could rectify its regime by simply rewriting its statutes to achieve the same result. The legislature could increase the range of possible imprisonment for a particular offense, and then add another provision *decreasing* the sentence if a judge finds by a preponderance of the evidence that a certain fact was *not* satisfied.

B. "B" is for Blakely

In 2004, the Court again examined the interplay between judicial factfinding and sentencing in *Blakely v. Washington*. *Blakely* applied *Apprendi*'s rule to a sentence that was within the statutory range for the relevant class of crimes but exceeded the available maximum for the set of facts that had been found by the jury.[85] In *Apprendi*, the Court invalidated a hate crime statute; in *Blakely*, it extended that holding from statutory enhancements to sentencing guidelines. In the latter case, the defendant Ralph Blakely had pleaded guilty to kidnapping.[86] The facts that he admitted in his plea agreement supported a maximum sentence of fifty-three months, but

81. *Apprendi*, 530 U.S. at 525 (O'Connor, J., dissenting).

82. *See id.* at 525–30.

83. *Id.* at 544. O'Connor also criticized the *Apprendi* majority's seeming reliance on historical practice as actually "consist[ing] of only two quotations taken from an 1862 criminal procedures treatise." *Id.* at 526.

84. *Id.* at 541. This is, of course, what the Supreme Court later held in *Blakely*. 542 U.S. at 303–04.

85. 542 U.S. at 303–04.

86. *Id.* at 298.

the sentencing judge increased Blakely's sentence to ninety months after determining that Blakely had acted with "deliberate cruelty."[87] This enhancement was based on a provision of Washington's sentencing guidelines that allowed for upward departures from the guideline range in certain domestic violence cases.[88]

Blakely argued that because his sentence enhancement was based on judicial factfinding, it violated *Apprendi*.[89] The Supreme Court agreed. It held that the "statutory maximum," under *Apprendi*, means "the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant."[90] It continued, "[T]he 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."[91] The Court explained that "[w]hen a judge inflicts punishment that the jury's verdict alone does not allow . . . the judge exceeds his proper authority."[92]

In *Blakely*, the Court referred to the two goals of criminal jurisprudence[93] that motivated its *Apprendi* ruling, and articulated a third principle of jurisprudence in support of its holding that sentencing enhancements must be based on facts proven beyond a reasonable doubt. The Court explained this third principle as follows: "Our commitment to *Apprendi* in this context reflects . . . the need to give intelligible context to the right of jury trial. That right is no mere procedural formality, but a fundamental reservation of power in our constitutional structure."[94] The Sixth Amendment, in other words, is a reservation of power for the jury, as opposed to the judicial or the executive branch. This thought flows from the notion that the judiciary serves to protect the people. According to the *Blakely* Court, the Framers therefore structured the judiciary such that the "judge's

87. *Id.*

88. WASH. REV. CODE ANN. § 9.94A.120(2) (West 2000) (providing for judicial discretion to impose a sentence above the standard range); WASH. REV. CODE ANN. § 9.94A.390(2)(h)(iii) (West 2000), *invalidated by* Blakely v. Washington, 542 U.S. 296 (2004); *see also Blakely*, 542 U.S. at 299–300.

89. *Blakely*, 542 U.S. at 301–02.

90. *Id.* at 303.

91. *Id.* at 303–04.

92. *Id.* at 304. Likewise, the Supreme Court has held that mandatory application of the retroactive Sentencing Guidelines was unconstitutional. United States v. Booker, 543 U.S. 220, 249 (2005). They are now, accordingly, viewed as advisory. The courts of appeals, under *Booker*, must review sentences under a standard of "reasonableness," just as they did (for most of the time) prior to *Booker*. *Id.* at 260.

93. *See supra* notes 77–80 and accompanying text.

94. *Blakely*, 542 U.S. at 305–06.

authority to sentence derives wholly from the jury's verdict. Without that restriction, the jury would not exercise the control the Framers intended."[95] Thus, after *Blakely*, any enhancing fact that is not admitted by a defendant will need to be proven to a jury beyond a reasonable doubt—regardless of whether the enhancement is based on a finding of "a specified fact (as in *Apprendi*), one of several specified facts (as in *Ring*[96]), or *any* aggravating fact (as [in *Blakely*])."[97]

Commentators and the dissenting Justices immediately noted that *Blakely* cast "grave doubt"[98] on the future of the Federal Sentencing Guidelines, which were not significantly distinguishable from the Washington sentencing regime struck down in *Blakely*.[99] They were right. Just one year later, in 2005, the Court invalidated mandatory application of the Guidelines in *United States v. Booker*.[100] The Supreme Court's continued adherence to the *Apprendi* and *Blakely* rules shows that the dissenters' concerns were not enough to convince the majority that judicial factfinding that increases a defendant's sentence *is* acceptable in some circumstances.[101]

Blakely's extension of *Apprendi* is extremely relevant for *Alford* defendants because these defendants, by definition, do not enter pleas by which they admit all facts alleged. Defendants in all jurisdictions with determinate sentencing (or even in those with indeterminate sentencing, if the statutorily prescribed maximum term for an offense can be enhanced based on facts found by a judge) should be aware of *Blakely*'s implications on *Alford* pleas.

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95. *Id.* at 306.

96. Ring v. Arizona, 536 U.S. 584, 588–89 (2002) (applying *Apprendi* and invalidating a law allowing for the death penalty if a judge found one of ten aggravating factors to be present).

97. *Blakely*, 542 U.S. at 305.

98. Frank O. Bowman III, *A Proposal for Bringing the Federal Sentencing Guidelines into Conformity with* Blakely v. Washington, 16 FED. SENT'G REP. 364, 364 (2004).

99. *See, e.g.*, *Blakely*, 542 U.S. at 325 (O'Connor, J., dissenting); Bowman, *supra* note 98, at 364; Nancy J. King & Susan R. Klein, *Beyond* Blakely, 16 FED. SENT'G REP. 312, 312 (2004).

100. 543 U.S. 220, 233 (2005).

101. *See, e.g.*, United States v. O'Brien, 130 S. Ct. 2169, 2177 (2010) (refusing to eliminate the rule of *Harris v. United States*, 536 U.S. 545 (2002), which held that *Apprendi* does not apply to sentencing factors which increase the mandatory *minimum*). Early commentators have viewed *O'Brien*, which turned on statutory grounds, as showing the Court's unwillingness to institute any major changes in its *Apprendi* line of constitutional jurisprudence. *See* Doug Berman, *Is the Biggest SCOTUS Story This Morning What the Justices Decided Not to Decide?*, SENT'G L. & POL'Y BLOG (May 24, 2010, 11:01 AM), http://sentencing.typepad.com/sentencing_law_and_policy/2010/05/is-the-biggest-scotus-story-this-morning-what-the-justices-decided-not-to-decide.html.

C. "C" is for "Conviction"

An important limitation to the rule announced in *Apprendi* is that the fact of a prior conviction need not be proven beyond a reasonable doubt. This exception comes from the Supreme Court's decision in *Almendarez-Torres v. United States*, which held that a provision of the U.S. Code allowing for enhanced sentences for recidivists was merely a "penalty provision" and did not define a separate crime.[102] Therefore, the Court resolved that the fact of a defendant's prior conviction need not have been alleged in an indictment or proven beyond a reasonable doubt to a jury.[103]

The Court struggled in *Apprendi* to reconcile its holding with its prior decision in *Almendarez-Torres*. Justice Stevens, writing for the *Apprendi* majority, candidly acknowledged that "it is arguable that *Almendarez-Torres* was wrongly decided" and suggested that if a similar recidivist provision were at issue in *Apprendi*, it might well have been decided that such a recidivist provision must require proof of prior convictions beyond a reasonable doubt.[104]

Despite the Supreme Court's apparent discomfort with the prior conviction exception to *Apprendi*, it "has yet to question [it] in a majority opinion."[105] The continued vitality of this exception has presented difficulties for courts attempting to apply it, particularly for courts called on to determine its scope.[106]

In *United States v. Shepard*, the Supreme Court avoided resolution of the larger question regarding the scope of the prior conviction exception by limiting its holding to the context of the Armed Career Criminal Act ("ACCA").[107] The *Shepard* Court held that in order to determine any fact relating to a prior conviction, courts should undertake a limited factual inquiry.[108] This inquiry is limited

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102. Almendarez-Torres v. United States, 523 U.S. 224, 226 (1998).

103. *Id.* at 226–27.

104. Apprendi v. New Jersey, 530 U.S. 466, 489–90 ("[I]t is arguable . . . that a logical application of our reasoning today should apply if the recidivist issue were contested"); *see also id.* at 487 (admitting that *Almendarez-Torres* is "at best an exceptional departure from the historic practice").

105. LAFAVE ET AL., *supra* note 36, § 26.4(i).

106. *Id.*

107. 544 U.S. 13, 25–26 (2005). *Taylor* made no specific reference to guilty pleas. The Court there held that a given offense fits the generic version of that offense if the necessary elements of the generic offense are either found in the statutory definition of the crime or are included in the charging paper and jury instructions such that they "actually required the jury to find all the elements of [the] generic [offense] in order to convict the defendant." *Taylor*, 495 U.S. at 602 (emphasis added); *see also* Armed Career Criminal Act of 1984 (codified as amended 18 U.S.C. § 924(e) (2006)).

108. *Shepard*, 544 U.S. at 25–26; *see also* LAFAVE ET AL., *supra* note 36, § 21.4(i).

only to certain parts of the record: "[T]he terms of the charging document, the terms of a plea agreement or transcript of colloquy between judge and defendant *in which the factual basis for the plea was confirmed by the defendant*, or to some comparable judicial record of this information."[109] Despite the fact that *Shepard* turned on the Court's interpretation of a federal statute, lower courts have turned to it for guidance in many contexts where facts relating to prior convictions are at issue.[110]

Shepard built on the Court's earlier decision in *Taylor v. United States*, which had also turned on the Supreme Court's interpretation of the ACCA. *Taylor* developed what is known as the "modified categorical approach" for determining whether a federal judge may impose a more severe sentence based on a fact about a prior conviction that was not a necessary element of that prior conviction.[111] Because the names and elements of crimes vary by jurisdiction, before applying a statutory enhancement for being a repeat burglary offender, for example, courts must examine whether a defendant actually has committed multiple offenses that would fall within the statute's definition of burglary. *Taylor* provides the framework for this analysis:

> The enhancement statute . . . generally requires the trial court to look only to the fact of conviction and the statutory definition of the prior offense. This categorical approach, however, may permit the sentencing court to go beyond the mere fact of conviction in a narrow range of cases where a jury was actually required to find all the elements of [a generic version of the crime]. For example, in a State whose burglary statutes include entry of an automobile as well as a building, if the indictment or information and jury instructions show that the defendant was charged only with a burglary of a building, and that the jury necessarily had to find entry of a building to convict, then the Government should be allowed to use the conviction for enhancement.[112]

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109. *Shepard*, 544 U.S. at 26 (emphasis added).

110. LAFAVE ET AL., *supra* note 36, § 21.4(i).

111. 495 U.S. 575, 599–602 (1990). Although the Court in *Taylor* did not use the specific phrase "modified categorical approach," numerous commentators and courts have. *See, e.g.*, United States v. Jennings, 515 F.3d 980, 987 (9th Cir. 2007); Sarah French Russell, *Rethinking Recidivist Enhancements: The Role of Prior Drug Convictions in Federal Sentencing*, 43 U.C. DAVIS L. REV. 1135, 1195 (2010) (citing United States v. Savage, 542 F.3d 959, 964 (2d Cir. 2008)); Rebecca Sharpless, *Toward a True Elements Test:* Taylor *and the Categorical Analysis of Crimes in Immigration Law*, 62 U. MIAMI L. REV. 979, 996–99 (2008). Note that *Taylor* will only apply when enhancements are based on a *prior* conviction. (For an explanation of how such enhancements work, see U.S. SENTENCING GUIDELINES MANUAL [hereinafter SENTENCING GUIDELINES], Sentencing Tbl. § 4A1.1 (2009), *available at* http://www.ussc.gov/2007guid/SENTNTAB.pdf (adjusting the length of punishment based on the length of "each prior sentence")). *Taylor* will not apply in situations where the enhancement is based on the defendant's actions in a single case, as in *Apprendi*, for example.

112. *Taylor*, 495 U.S. at 602.

Although the modified categorical approach is only mandatory when courts are presented with a sentencing enhancement under the ACCA, courts have applied it broadly in the context of both criminal law and immigration law.[113] For *Alford* defendants, the limited factual inquiry sometimes permitted by the categorical approach could be crucial if it ends up turning on facts they never admitted.

D. "D" is for "Division": Court Opinions Grappling with Alford *Pleas and* Apprendi

Few federal courts have squarely addressed whether an enhancing fact based on an *Alford* plea can justify a sentencing enhancement, either in the same case or in a later one.[114] The majority of courts that have addressed the issue have been inconsistent in their decisions.

In the federal system, among those courts that have allowed such enhancements are the Third Circuit in *United States v. Mackins*,[115] the Second Circuit in *Abimbola v. Ashcroft*,[116] and the Ninth Circuit in *United States v. Guerrero-Velasquez*.[117] These courts, however, simply held that convictions based on *Alford* pleas have the same legal effect as convictions based on regular guilty pleas. By focusing on this question, these courts ignored the issue of whether the *underlying* conduct would have been a proper basis for an enhancement, effectively determining that such an inquiry is irrelevant.

Some state decisions have also found that *Apprendi* and *Blakely* do not require that defendants explicitly admit underlying conduct before an enhancement may be constitutionally applied.

Other lower court decisions have refused to allow such enhancements. Despite its *Abimbola* decision, the Second Circuit later held in *United States v. Savage* that an enhancement based on a fact that was neither clearly alleged by the government nor admitted by an *Alford* defendant was improper.[118] Also, despite its *Guerrero-Velasquez* decision, the Ninth Circuit later held in *United States v. Vidal*, en banc, that an enhancement based on a fact that was not conclusively

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113. *See* Doug Keller, *Causing Mischief for* Taylor*'s Categorical Approach: Applying 'Legal Imagination' to* Duenas-Alvarez, GEO. MASON L. REV. (forthcoming 2010) (manuscript at 4) (on file with the Vanderbilt Law Review).

114. THOMAS W. HUTCHISON ET AL., FEDERAL SENTENCING LAW & PRACTICE § 4A1.1 (2009).

115. 218 F.3d 263 (3d Cir. 2000).

116. 378 F.3d 173 (2d Cir. 2004).

117. 434 F.3d 1193 (9th Cir. 2006).

118. 542 F.3d 959, 960 (2d Cir. 2008).

established by an *Alford* plea was improper under *Taylor*.[119] Most recently, the Fourth Circuit in *United States v. Alston* vacated a sentence that included an enhancement based on facts that an *Alford* defendant never admitted during his guilty plea.[120] The court explained that such facts could not have been determined "without risking a violation of the Sixth Amendment."[121]

Lastly, the Kansas Supreme Court recently found in *State v. Case* that such an enhancement was improper and explicitly based its ruling on *Apprendi*.[122] Therefore, a uniform application of the *Apprendi* rule to cases in both federal and state courts will best ensure that all defendants' Sixth Amendment rights are protected.

1. A Compatible Duo: Arguments That Enhancements Based on *Alford* Pleas Satisfy *Apprendi*

Lower courts struggling with these issues must follow the decisions in *Apprendi* and *Blakely* and therefore must require that any fact enhancing a defendant's sentence beyond what would otherwise be the maximum sentence be proven to a jury beyond a reasonable doubt or admitted by the defendant. Notwithstanding this rule, several courts of appeals have found that sentencing enhancements based on facts not expressly admitted by an *Alford* defendant may still be proper.

The Third Circuit, for example, has decided that sentencing enhancements based on *Alford* pleas are acceptable. In *United States v. Mackins*, the Third Circuit upheld a two-level enhancement imposed on David Mackins based on his prior conviction pursuant to an *Alford* plea without examining the underlying conduct that supported Mackins's prior conviction.[123] The Third Circuit summarized, "That the defendant asserts his or her innocence . . . does not change the fact that he or she ultimately enters a guilty plea. . . . Accordingly, we accord Mackins's *Alford* plea the same finality we accord any other 'adjudication of guilt, whether by guilty plea, trial, or

119. United States v. Vidal, 504 F.3d 1072, 1090 (9th Cir. 2007) (en banc). The plea at issue was actually one pursuant to *People v. West*, which allows for defendants to plead guilty (as in *Alford*) or nolo contendere without admitting the facts. 477 P.2d 409, 413–17 (Cal. 1970). *People v. West* held that nolo contendere and *Alford* pleas are valid and are not rendered involuntary despite being the product of plea bargaining. *Id.*

120. United States v. Alston, 611 F.3d 219, 228 (4th Cir. 2010).

121. *Id.* at 227.

122. 213 P.3d 429 (Kan. 2009).

123. United States v. Mackins, 218 F.3d 263, 266, 269 (3d Cir. 2000).

plea of *nolo contendere*.' "[124] The Third Circuit did not even mention *Apprendi*, which had been decided just a few weeks before.[125]

In *United States v. Martinez*, the Tenth Circuit rejected the defendant's claim that a sentence enhancement based on a conviction following his *Alford* plea was a violation of *Apprendi*.[126] The court, citing *Mackins*, held that "an *Alford* plea is an adjudication of guilt" under the relevant statute, and therefore rejected Martinez's argument that his prior conviction enhancement was invalid because *Alford* pleas require factual evidence of guilt.[127] After finding that the defendant's *Alford* plea had the same "finality" as a conviction following a plea of guilty or nolo contendere, the Tenth Circuit turned to the defendant's *Apprendi* claim.[128] In a scant, three-sentence paragraph, the court determined that the defendant's enhancements were not "subject to challenge" under *Apprendi*.[129]

In its 2006 decision in *United States v. Guerrero-Velasquez*, the Ninth Circuit held that an *Alford* plea amounted to a guilty plea for purposes of determining that the crime of which the defendant was convicted was a crime of violence.[130] Defendant Adolfo Guerrero-Velasquez pleaded guilty to being an alien in the United States after deportation.[131] At sentencing, the government requested a sixteen-level enhancement based on Guerrero-Velasquez's prior crime of second-degree burglary, which the government argued merited the

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124. *Id.* at 268–69 (quoting SENTENCING GUIDELINES, *supra* note 111, § 4A1.2(a)(1)).

125. The *Mackins* majority clearly held that an enhancement applied to an *Alford* defendant's sentences was proper under the Sentencing Guidelines. *Id.* at 268–69. However, Judge Bright's dissent provides a good summary of the view that *Alford* pleas should not count as convictions for the purpose of sentencing enhancements, which will be discussed more in Part III.C.2. Judge Bright argued that a conviction based on an *Alford* plea should not be used to justify a sentencing enhancement under the Guidelines for a number of reasons. Among the reasons he offered were the facts that *Alford* pleas are explicitly *not* mentioned in the relevant section of the Sentencing Guidelines, and that when defendants' prior convictions are based on *Alford* pleas, "the usual assumptions about prior convictions may not necessarily hold. While an *Alford* plea should require independent proof of guilt to sustain the conviction, there may be instances where that is not the case." *Id.* at 270 (Bright, J., dissenting). However, part of Judge Bright's dissent was premised on the then-mandatory nature of the Sentencing Guidelines. *See id.* at 270, 272. It is quite likely that Judge Bright's concerns would now be alleviated in the wake of *Booker* and *Blakely*. After those cases, sentencing judges have much more discretion. *See* Rita v. United States, 551 U.S. 338, 340 (2007) (holding that courts of appeals may "presume that a sentence imposed within a properly calculated United States Sentencing Guidelines range is a reasonable sentence").

126. 30 F. App'x 900, 905 (10th Cir. 2002).

127. *Id.* at 905.

128. *Id.*

129. *Id.* at 906–07.

130. 434 F.3d 1193, 1194 (9th Cir. 2006).

131. *Id.* Guerrero-Velasquez had previously been deported, so his illegal return to the United States was the basis for this offense. *Id.*

enhancement because it was a "prior crime of violence."[132] The district court declined to do so because it found that "second-degree burglary was not categorically a crime of violence"[133] and that "the government had not submitted any evidence from which the court could conclude that [Guerrero-Velasquez] had been convicted of a crime of violence."[134] The Ninth Circuit disagreed with the district court's holding that there was no basis for such a conclusion and reversed the decision. The Ninth Circuit added that the fact that Guerrero-Velasquez had entered an *Alford* plea was irrelevant.[135] "Whether or not a defendant maintains his innocence, the legal implications of a guilty plea are the same in the context of the modified categorical approach under *Taylor*."[136]

In *Guerrero-Velasquez*, the Ninth Circuit purportedly looked to the defendant's prior *Alford* plea agreement to see if he had pleaded to a "crime of violence." Instead of analyzing whether second-degree burglary was a crime of violence under *Taylor*'s modified categorical approach, however, the Ninth Circuit simply found that because the defendant had signed a plea agreement, he had pleaded guilty to all "factual allegations in the indictment."[137] Under this reasoning, a court may apply an enhancement based on a fact alleged in a prior conviction, even if the defendant never admitted that fact.

This logic indicates that the Ninth Circuit was more interested in whether an *Alford* plea has the same effect as a regular guilty plea: "The question under the sentencing guidelines is whether a defendant has 'a *conviction* for a . . . crime of violence,' not whether the defendant has admitted to being guilty of such a crime."[138] As support for its holding that an *Alford* plea is a guilty plea for purposes of determining sentencing enhancements, the *Guerrero-Velasquez* court noted that it was in agreement with *Abimbola*.[139]

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132. *Id.*

133. *Id.* The district court's first finding was pursuant to *Taylor*'s categorical approach. *Id.*

134. *Id.* at 1194–95. The district court's second finding was pursuant to *Taylor*'s modified categorical approach. *Id.* at 1194.

135. *Id.* at 1197.

136. *Id.* The Kansas Supreme Court would likely disagree. The contrary view is that the legal implications of a guilty plea are the same in the context of *Taylor only if* the indictment or information and jury instructions clearly limit the definition of the crime. If not, then the fact that a defendant entered an *Alford* plea becomes relevant to the analysis. State v. Case, 213 P.3d 429, 469 (Kan. 2009).

137. 434 F.3d at 1197.

138. *Id.* (quoting SENTENCING GUIDELINES, *supra* note 111, § 2L1.2(b)(1)(A)).

139. *Id.* at 1197–98.

Interestingly, *Abimbola* came out of the Second Circuit—the same court that handed down *United States v. Savage*,[140] which is essentially contrary to *Guerrero-Velasquez*. But the Second Circuit in *Abimbola* simply decided that a conviction pursuant to an *Alford* plea counts as a prior conviction. It did not decide whether facts supporting an *Alford* conviction, not admitted by the defendant, could be considered conclusively proven by the conviction based on the defendant's *Alford* plea.[141] Thus, the Ninth Circuit appears to have confused two issues: (1) whether a conviction based on an *Alford* plea counts as a prior conviction when looking to the *fact* of the conviction, and (2) whether a conviction based on an *Alford* plea supports a sentencing enhancement based on a fact that was part of the *underlying nature* of the conviction.

Similar issues appear in state courts as well. In *State v. King*, the Washington Court of Appeals upheld an enhancement based on conduct only admitted through the defendant's *Alford* plea. Defendant Richard King entered an *Alford* plea to one count of first-degree rape and one count of first-degree robbery.[142] The sentencing judge referred to facts that were part of the prosecutor's proffer of a factual basis in order to calculate King's sentence.[143] The court of appeals rejected King's *Blakely* challenge to his sentence, reasoning that "[e]ven though by entering an *Alford* plea he did not admit the truth of the facts, he specifically allowed the trial court to *use* those facts."[144] The defendant's stipulation, in other words, essentially amounted to an admission.

In *State v. Farrell*, the same court upheld a two-year enhancement based on the defendant's *Alford* plea to second-degree murder, despite not having the full record available to review.[145] The original judgment against the defendant and the amended information both apparently included a stipulation that the defendant George Farrell used a deadly weapon during the commission of the crime, but the court of appeals did not have access to the transcript of the actual plea colloquy.[146] This, the court determined, was immaterial. "Mr. Farrell stipulated to the deadly weapon enhancement as part of his

140. 542 F.3d 959 (2d Cir. 2008). For a fuller discussion of *Savage*, see *infra* notes 150–56 and accompanying text.

141. *See* Abimbola v. Ashcroft, 378 F.3d 173, 176–78 (2d Cir. 2004). For a fuller discussion of *Abimbola*, see *infra* notes 157–65 and accompanying text.

142. State v. King, 131 Wash. App. 1034 (2006) (unpublished opinion) (per curiam).

143. *Id.* at *2.

144. *Id.* (emphasis added).

145. State v. Farrell, 138 Wash. App. 1058 (2007) (unpublished opinion).

146. *Id.* at *1.

Alford plea. Thus, this fact did not have to be independently proved prior to the trial court imposing the enhancement."[147] Again, the Washington Court of Appeals focused on the fact that the defendant had *stipulated* to a fact that the government would have attempted to prove at trial, without making a determination that the defendant had actually *admitted it was true*.

2. A Mismatched Pair: Arguments That Enhancements Based on *Alford* Pleas Violate *Apprendi*

The majority opinions by Justice Stevens in *Apprendi* and Justice Scalia in *Blakely* lay out arguments for why the Sixth Amendment prevents enhancements based on facts not proven beyond a reasonable doubt. These same arguments can be applied to enhancements based on *Alford* pleas.[148] This Part reviews the principles in various cases striking down sentences with *Alford*-based enhancements. While some lower federal courts have found enhancements based on facts not proven via *Alford* pleas to be improper, the clearest application of *Apprendi* to such a situation is in *State v. Case*.[149]

The Second Circuit invalidated an enhancement based on an *Alford* plea in *United States v. Savage*.[150] The defendant, Lavon Savage, entered a regular guilty plea to being a felon in possession of ammunition. At sentencing, he received several enhancements, one of which was based on a prior *Alford* conviction for a controlled substance offense.[151] Savage appealed this enhancement, and the Second Circuit agreed that it was inappropriate.[152] The Second Circuit explained that a plea colloquy, as well as a charging instrument,[153] could show that the charge was narrowed.[154] Because Savage had entered an *Alford* plea, his plea colloquy could not show that the

147. *Id.* at *2.

148. Indeed, a distinction based on *Alford* is hardly needed—defendants are entitled to have facts that send them to jail proven beyond a reasonable doubt, even if the defendant pleads not guilty. *See supra* notes 10–11 and accompanying text.

149. 213 P.3d 429, 430 (Kan. 2009).

150. 542 F.3d at 960.

151. *Id.* at 960–61.

152. *Id.* at 960, 967.

153. A charging instrument—namely, an indictment or an information—is a document which contains the formal charge against the defendant. BLACK'S LAW DICTIONARY 266 (9th ed. 2009).

154. *Savage*, 542 F.3d at 966 ("The state judge carefully explained [the principle of an *Alford* plea], by reassuring Savage that the plea would be accepted even though Savage did not agree with the facts. Thus, the government cannot rely on any factual admissions during the plea colloquy to establish the predicate nature of Savage's conviction.") (internal quotation marks omitted).

charge was narrowed, since he did not admit anything at the colloquy.[155] Thus, the court had to look to the charging instrument. It found that it was not sufficiently tailored and vacated Savage's sentence.[156]

The Second Circuit issued a conflicting opinion in *Abimbola v. Ashcroft*, where it upheld an enhancement based on the nature of a conviction after an *Alford* plea. Is *Savage* distinguishable from *Abimbola*? As noted in the previous Part, *Abimbola* (and *Guerrero-Velasquez*, which *Abimbola* cites), was really about whether an *Alford* conviction can count as a prior conviction.[157] It was not about whether the *underlying nature* of an *Alford* conviction can be used to sustain a sentencing enhancement.[158] *Abimbola* merely looked to the *fact* of a prior conviction and held that an *Alford* plea is the same as a regular guilty plea *for that purpose*.[159] *Guerrero-Velasquez* cites it only for this proposition.[160] Thus, in *Guerrero-Velasquez*, the Ninth Circuit viewed *Abimbola* as holding that an *Alford* plea counts as a regular guilty plea.[161] It then found that, because the defendant had entered that regular guilty plea, the plea agreement was an appropriate document to look to when determining the nature of the underlying crime for its *Taylor* analysis.[162]

The Ninth Circuit's view of *Abimbola* indicates that the Second Circuit was only concerned with whether a conviction based on *Alford* plea can be considered as having the same effect as a conviction based on a regular guilty plea. This view is not the full picture, though, because the Second Circuit did not stop at that question in *Abimbola*. It also applied the *Taylor* categorical analysis to the underlying crime.[163] While the Second Circuit in *Savage* examined which specific facts the defendant had or had not admitted in his *Alford* plea colloquy,[164] in *Abimbola* it assumed that a conviction following an

155. *Id.*

156. *Id.* at 967. For a brief summary of *Savage*, see Steve Statsinger, *Savage Love*, SECOND CIRCUIT BLOG (Sept. 27, 2008, 4:03 PM), http://circuit2.blogspot.com/search/label/alford%20plea.

157. Abimbola v. Ashcroft, 378 F.3d 173, 180–81 (2d Cir. 2004).

158. This was the issue in *Savage*, however. *Savage*, 542 F.3d at 962. This is a principal reason that *Abimbola* and *Savage* are distinguishable.

159. *Abimbola*, 378 F.3d at 180–81.

160. *Savage* was not about whether an *Alford* plea has the same effect as a regular guilty plea for purposes of enhancements based on the fact of conviction, but rather about enhancements based on underlying facts included in the prior conviction. *Savage*, 542 F.3d at 964.

161. United States v. Guerrero-Velasquez, 434 F.3d 1193, 1197–98 (9th Cir. 2006).

162. *Id.* at 1198.

163. *Abimbola*, 378 F.3d at 176–78.

164. *Savage*, 542 F.3d at 966–68.

Alford plea is the same as any other conviction following a guilty plea.[165]

The Second Circuit's approach, then, has been inconsistent. The true difference between the Second Circuit's *Savage* and *Abimbola* decisions is that, after applying the *Taylor* categorical analysis, *Savage* examined whether the defendant's earlier *Alford* plea would have any impact on the outcome of the later case, but *Abimbola* did not.

The Ninth Circuit's approach has also been inconsistent. Despite its holding in *Guerrero-Velasquez* that a conviction following an *Alford* plea is the same as any conviction following a regular guilty plea and thus counts as an admission of all facts alleged, the court reached a different conclusion one year later in *United States v. Vidal*.[166] In 1994, Juan Jose Vidal entered a *West* plea, California's equivalent of an *Alford* plea, to "unlawful driving or taking of a vehicle."[167] In 2003, he pleaded guilty to violating a federal statute barring aliens from reentering the United States if they have been previously removed.[168] At sentencing for the 2003 crime, the judge gave Vidal an eight-level enhancement based on his 1994 *Alford* conviction. Because this earlier conviction was based on a *West* plea, his plea colloquy could not support an admission of any underlying facts.[169] As Judge Callahan explained, "unless the record of the plea proceeding reflects that the defendant admitted to facts, a *West* plea, without more, does not establish the requisite factual predicate to support a sentence enhancement."[170] *Vidal*, however, did not address *Apprendi*'s and *Blakely*'s application to the defendant's sentence. The Ninth Circuit noted that Vidal originally raised a *Blakely* challenge to his sentence, but he did not address it in his supplemental brief for en banc consideration.[171] The court stated that because it vacated Vidal's sentence after applying the *Taylor* analysis, a *Blakely* challenge was unnecessary.[172]

The Fourth Circuit recently faced a question that required it to apply *Taylor* when deciding whether an *Alford* defendant had properly

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165. *Abimbola*, 378 F.3d at 180 ("We agree with the district court that Abimbola's [*Alford*] argument is meritless.").

166. United States v. Vidal, 504 F.3d 1072, 1074 (9th Cir. 2007).

167. *Id.* at 1075. Vidal entered a "*People v. West*" plea, which the Ninth Circuit analyzed as an *Alford* plea. *See infra* note 169 and accompanying text.

168. *Vidal*, 504 F.3d at 1074. Vidal pleaded guilty to violating 8 U.S.C. § 1326 (2006). *Id.*

169. *Id.* at 1090; *see also* People v. West, 477 P.2d 409, 420–21 (Cal. 1970).

170. *Vidal*, 504 F.3d at 1089.

171. *Id.* at 1076 n.5.

172. *Id.*

received a sentence enhancement based on a prior conviction. The case was *United States v. Alston*, and Willie Alston's sentence enhancement was pursuant to the ACCA.[173] Alston pleaded guilty to being a felon in possession of a firearm.[174] At sentencing, the district court used Alston's prior convictions as the basis for a sentencing enhancement under the ACCA.[175] One of those convictions was for second-degree felony assault and resulted from an *Alford* plea.[176] To determine whether this conviction could properly count as the basis for the ACCA enhancement, the Fourth Circuit began by noting that *Shepard* authorizes courts to examine transcripts of plea hearings as part of the "limited factual inquiry" into what facts are necessarily entailed by a defendant's conviction. The Fourth Circuit accordingly examined the transcript from Alston's *Alford* plea hearing.[177] In that hearing, "Alston did not adopt or accept facts proffered by the government" to support the factual basis for the plea.[178] The district court, before sentencing Alston for the later felon-in-possession-of-a-weapon charge, relied on the prosecutor's proffer in finding that the second-degree felony assault conviction was a prior crime of violence for purposes of the ACCA. It apparently did not consider the fact that Alston refused to admit that the proffer was true.[179]

The Fourth Circuit held that this was improper and explained that because an *Alford* defendant "waives a trial and accepts punishment, *but [] does not admit guilt*," "the prosecutor's proffer of what the State would have proved at trial does not amount to an admission or acceptance of the facts by the defendant."[180] Rather, the purpose of the *Alford* defendant's plea colloquy is to establish that it comports with the minimum constitutional requirements of being knowing and voluntary.[181] The court concluded by implying that the district court's actions ran afoul of *Apprendi*: "These facts therefore could not be found by a sentencing court without risking a violation of the Sixth Amendment."[182] *Alston*, therefore, went beyond the *Taylor* inquiry and found that an enhancement based on facts not admitted

173. 611 F.3d 219, 220 (4th Cir. 2010).

174. This was a federal offense, in violation of 18 U.S.C. § 922(g)(1) (2006). *Id.*

175. *Id.* at 221–22.

176. *Id.* at 221.

177. *Id.* at 227–28.

178. *Id.* at 223. Recall that a factual basis is required by Federal Rule of Criminal Procedure 11. *See* FED. R. CRIM. P. 11(b)(3); *see also supra* note 35.

179. *Alston*, 611 F.3d at 223.

180. *Id.* at 226.

181. *Id.* at 227; *see also supra* notes 18–21, 28–30.

182. *Alston*, 611 F.3d at 227.

by the defendant, and not within the scope of the generic definition of a crime under the modified categorical approach, would likely violate *Apprendi*.

Because *Taylor* and *Shepard* both turned on questions of statutory interpretation, they are only binding in the federal system. The consequence is that a state court determining whether a defendant has admitted to certain facts in an earlier plea is not obligated to follow a categorical framework to make that determination. For this reason, applying *Apprendi* to situations when a defendant has not admitted certain facts is crucial in state courts, because *Apprendi*'s constitutional decision is binding in state and federal courts alike.[183]

Indeed, noting that it was not bound by *Shepard*, the Minnesota Supreme Court in *State v. Dettman* chose to apply a stricter standard regarding what constitutes an admission in light of *Blakely*.[184] Although the defendant in *Dettman* did not enter an *Alford* plea, it was unclear whether he had admitted the facts necessary to support the particular upward departure from the state sentencing guidelines that he received.[185] Defendant Douglas Dettman pleaded guilty to one count of first-degree criminal sexual conduct. At sentencing, he received an upward departure because the sentencing court found that the offense had been committed with "particular cruelty" and had a "lasting psychological impact on the victim."[186] The Minnesota Supreme Court apparently did not dispute the state's argument that Dettman's admission of the crime during his plea colloquy could have constituted "admissions supporting the district court's finding of particular cruelty."[187] It held, however, that before any admission can be the basis for an enhancement, the defendant must first knowingly and voluntarily waive his *Blakely* rights.

The *Dettman* court was aware that such a holding conflicts with federal court decisions that have held that the Sixth Amendment simply requires enhancements to be based on facts that either the defendant admitted or were proven to a jury beyond a reasonable

183. At least one court, the Fourth Circuit in *Alston*, has suggested that allowing enhancements based on facts not admitted by the defendant or proven to a jury beyond a reasonable doubt can violate not only *Taylor* and *Shepard*, but also the Sixth Amendment. *See supra* notes 180–82.

184. 719 N.W.2d 644 (Minn. 2006).

185. *Id.* at 649. It was not disputed that the defendant did admit facts necessary to support his conviction. *See id.* at 647.

186. *Id.* at 647. The Supreme Court decided *Blakely* after Dettman was sentenced, but before his appeal had become final. *Id.*

187. *Id.* at 649–50.

doubt, even if the defendant did not first waive his *Blakely* rights. Such cases, the Minnesota Supreme Court explained, "simply cite *Blakely* for the proposition that facts admitted by a defendant may be used to enhance a sentence. . . . [O]ur approach more appropriately takes into account long-standing principles regarding a defendant's waiver of his jury-trial rights."[188]

Dettman demonstrates that Minnesota has taken a conservative approach towards deciding when underlying facts may support an enhanced sentence. A contradictory approach can be seen in decisions from Washington.[189]

A strong argument against allowing sentencing enhancements based on facts not admitted in *Alford* pleas comes from Kansas. In August 2009, the Kansas Supreme Court found in *State v. Case* that a sentence enhancement based on a fact that an *Alford* defendant had stipulated to—but not admitted—violated *Apprendi*'s bar against "judicial factfinding [by] increasing the penalty of the crime beyond the prescribed statutory maximum."[190] Christopher Case was charged by indictment with one count of aggravated indecent liberties with a child and one count of lewd and lascivious behavior.[191] He entered an *Alford* plea and was convicted of aggravated endangering of a child.[192] Though the standard punishment for an aggravated offense was seventeen months, Case agreed to an upward departure of an additional ten months in his plea agreement.[193] The level of Case's offense also called for twelve months of postrelease supervision according to a Kansas statute.[194] At sentencing, the judge imposed an enhanced sentence of sixty months of postrelease supervision after finding that Case's offense was "sexually motivated."[195]

The Kansas Supreme Court held that the judge's upward departure to sixty months of postrelease supervision was a violation of *Apprendi*.[196] Its opinion was premised largely on the "fundamental nature"[197] of the defendant's *Alford* plea, which the court repeatedly

188. *Id.* at 653.

189. *See supra* notes 142–47 and accompanying text.

190. State v. Case, 213 P.3d 429, 437 (Kan. 2009).

191. *Id.* at 431.

192. *Id.*

193. *Id.*

194. *Id.*; *see also* KAN. STAT. ANN. § 22-3717(d)(1)(C) (2009) (imposing twelve months of postrelease supervision for nondrug crimes with severity levels between seven and ten).

195. *Case*, 213 P.3d at 431; *see also* KAN. STAT. ANN. §§ 22-3717(d)(1)(D)(i)–(d)(2) (allowing judges to impose up to sixty additional months of parole upon finding that the crime was "sexually motivated").

196. *Case*, 213 P.3d at 437.

197. *Id.* at 433.

distinguished from a regular guilty plea.[198] The court emphatically rejected the state's argument that Case's stipulation to the facts was a "virtual admission that he committed the acts of the crime."[199] The court reasoned that it would be inconsistent to hold that a defendant who had explicitly *not admitted* to the facts of the charge had also somehow admitted them, and explained that "a defendant's *Alford* plea can peacefully coexist with his or her stipulation to the factual basis of the plea—because such a stipulation is not an admission of the truth of those facts."[200] A stipulation, in other words, is not a stipulation that a fact is true, but merely that the government could prove that it is. A defendant can stipulate to the existence of facts that make up the government's case without admitting that those facts are true.[201] This is the very nature of the *Alford* plea, according to the Kansas Supreme Court.[202]

It is noteworthy that under a categorical analysis, the prosecution in *State v. Case* probably could have prevailed on appeal by alleging the enhancing fact—that the crime was "sexually motivated"—in the indictment. The allegation that Case's criminal conduct was "sexually motivated," however, was not explicitly stated anywhere in the charging instrument. The Kansas Supreme Court

198. *See id.* at 432 ("At the heart of both the *Alford* and nolo contendere pleas, however, is a common factor: a defendant does not admit the facts upon which his or her guilt for the crime would be based."); *id.* at 433 (stating that an interpretation of an *Alford* plea as a guilty plea where defendant admitted " 'the truth of the charge and every material fact alleged therein' . . . of course, is directly contrary to the essence of an *Alford* plea" (quoting KAN. STAT. ANN. § 22-3209(1))); *id.* (stating that the lower-court panel "seems to suggest that statements and occurrences at the plea hearing essentially transformed the *Alford* plea into a pure guilty plea"); *id.* at 436 (drawing guidance from a previous case where defendant had pleaded nolo contendere).

199. *Id.* at 433 ("Such an interpretation, of course, is directly contrary to the essence of an *Alford* plea: 'plead[ing] guilty *without* admitting the acts of the crime.' " (quoting State v. Taylor, 975 P.2d 1196, 1204 (Kan. 1999))) (alteration and emphasis in original).

200. *Id.* at 436.

201. An example might help to illustrate this confusing concept. Suppose a defendant is charged with bank robbery and the government has a very strong case against him. Part of the government's evidence is testimony of an eyewitness who claims to have seen the defendant rob the bank. The defendant can stipulate that this piece of evidence exists, without admitting the truth behind it. This could mean, for example, that the defendant agrees that the government has located an eyewitness, and that this witness indeed will testify in a way that makes the defendant look particularly bad. But the defendant may refuse to admit the truth of the testimony. Perhaps the eyewitness did not see the entire series of events, or maybe the defendant believes that the eyewitness is simply wrong but would have difficulty rebutting his testimony. The Fourth Circuit in *United States v. Alston* explains that such stipulations serve the purpose of evaluating the voluntariness of the defendant's plea, as opposed to the truth of the government's account of the incident. *See* United States v. Alston, 611 F.3d 219, 227 (4th Cir. 2010).

202. *Case*, 213 P.3d at 433.

noted that an enhancing fact can support an enhanced sentence, even if a defendant enters an *Alford* plea, but only if the defendant somehow "otherwise admit[s]"[203] the relevant acts. Presumably, this means that Case could have admitted to the "sexually motivated" aspect of the charge, but not to other parts of it. Alternatively, if the crime to which Case pleaded—aggravated endangering of a child—included as an element that it was "sexually motivated,"[204] Case's *Alford* plea would have been grounds for the enhancement, since he would have known he would obtain a conviction for a "sexually motivated" offense.[205]

Thus, two positions have emerged. The first view is that an *Apprendi* and *Blakely* analysis is unnecessary because an *Alford* plea is essentially the same as a regular guilty plea. The Tenth Circuit in *Martinez*[206] and the Third Circuit in *Mackins*[207] have adopted this view, and it appears that the Washington state courts have as well.[208] The dissenting justices from *Apprendi* and *Blakely* would likely agree, because they believed enhancements based on judicial factfinding are constitutional and justified by historical practice. The second view is that any enhancement based on a fact not admitted by an *Alford* defendant is at least improper under a modified categorical approach and possibly a violation of the Sixth Amendment.[209] The Second Circuit in *Savage*,[210] the Ninth Circuit in *Vidal*,[211] the Fourth Circuit in *Alston*,[212] the Kansas Supreme Court in *Case*,[213] and the Minnesota Supreme Court in *Dettman*[214] have adopted this view. This Note argues that the second view is in accordance with the *Apprendi* and

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203. *Id.* at 434.

204. *Id.* at 431.

205. *See id.* at 432 (describing the lower court holding and implying that the lower court was incorrect even though "the panel acknowledged that the elements of aggravated child endangerment do not automatically establish that the crime was sexually motivated").

206. United States v. Martinez, 30 F. App'x 900, 905 (10th Cir. 2002).

207. United States v. Mackins, 218 F.3d 263, 268 (3d Cir. 2000).

208. The Second Circuit's *Abimbola* opinion and the Ninth Circuit's *Guerrero-Velasquez* opinion both arguably support this position as well. However, as discussed above, the approaches of these circuits have been inconsistent, and it is more likely that they would currently fall in line with the Kansas Supreme Court's *Case* decision and the Fourth Circuit's *Alston* decision. *See supra* notes 150–72 and accompanying text.

209. *See, e.g.*, *Case*, 213 P.3d at 433 (holding that facts leading to an enhanced sentence must be either admitted by the defendant or proven beyond a reasonable doubt to a jury).

210. United States v. Savage, 542 F.3d 959, 966 (2d Cir. 2008).

211. United States v. Vidal, 504 F.3d 1072, 1088–89 (9th Cir. 2007).

212. 611 F.3d 219, 222 (4th Cir. 2010).

213. 213 P.3d at 433. *Dettman* is even more protective of defendants' rights than the cases described in notes 209–12.

214. 719 N.W.2d 644 (Minn. 2006).

Blakely majority opinions because it upholds the "two longstanding tenets of common-law criminal jurisprudence"[215] that (1) every accusation should be confirmed by a jury of one's peers, and (2) every accusation must include all particular facts that "the law makes essential to the punishment."[216]

These approaches should be reconciled by a uniform application of *Blakely* to cases that fail *Taylor*'s modified categorical approach. This will result in uniformity not only within federal courts of appeals, but also in state courts, because *Blakely* is a federal constitutional decision. It is especially important for state courts to adhere to *Blakely* in these situations because *Taylor* is not binding in state courts. Simply adhering to *Blakely* when facts have not been expressly admitted by the defendant or otherwise proven by his conviction will prevent Sixth Amendment violations in all courts.

The real divide between the competing points of view appears to center on whether a conviction based on an *Alford* plea counts as an admission of all the facts supporting the elements of the crime. Under the Kansas Supreme Court's *Case* approach and the Second Circuit's *Savage* approach, an *Alford* defendant "by design" does not "confirm the factual basis for his plea."[217] "Thus, if the state statute . . . criminalized conduct that falls exclusively within the federal definition of a predicate offense, or if the charge was narrowed to include only predicate conduct, then an *Alford* plea . . . would constitute a predicate offense."[218] But if the state statute was too broad and the charge was not narrowed, then an *Alford* plea entered in response to the charge would *not* constitute a predicate offense. Under the other approach, apparently adopted by the Third and Tenth Circuits, the fact that a defendant entered an *Alford* plea would be irrelevant. If the charge were not narrowed, the court nevertheless could look to the defendant's plea as an admission of all facts supporting the conviction. However, finding that an *Alford* plea is an admission of the acts of the crime "is directly contrary to the essence of an *Alford* plea: 'plead[ing] guilty *without* admitting the acts of the crime.' "[219] Given that *Alford* defendants do not admit the facts of their crimes, any approach that would allow an enhancement to be imposed based on facts never admitted or never proven beyond a reasonable doubt must violate *Apprendi*. Courts that have held otherwise

215. Blakely v. Washington, 542 U.S. 296, 301 (2004).

216. *Id.*; *see also supra* notes 77–80 and accompanying text.

217. United States v. Savage, 542 F.3d 959, 966 (2d Cir. 2008).

218. *Id.* at 964.

219. *Case*, 213 P.3d at 433 (alteration and emphasis in original) (quoting State v. Taylor, 975 P.2d 1196, 1204 (Kan. 1999)).

apparently have focused on whether an *Alford* plea is a true guilty plea, and not on the crucial issue of whether facts that increase a defendant's maximum sentence were found in a manner that comports with the Sixth Amendment.

IV. SOLUTION: *ALFORD* PLEAS MAY BE UNWISE, BUT THEY DO NOT MERIT ENHANCED SENTENCES

The unresolved state of the current law presents a major problem: defendants who enter *Alford* pleas may later face sentencing enhancements based upon facts that they never admitted and that were never proven to a jury beyond a reasonable doubt. Some opinions have found this to be a violation of *Apprendi*, and this Note argues that those opinions were correct. Because this would be an issue of first impression in many jurisdictions, and because any such decision will often turn on constitutional grounds, courts need to adopt a uniform standard for dealing with *Apprendi* arguments from *Alford* defendants.[220]

This leads to what that standard should be: In a single case, any fact not crucial to a conviction pursuant to a guilty plea must be admitted by the defendant if it is to be the basis for a sentence enhancement. If not, courts should apply *Apprendi* and find that if the enhancement raises the defendant's otherwise possible maximum sentence, it is unconstitutional. If the enhancement is based on a prior *Alford* conviction, courts in the federal system should first apply *Taylor* to determine whether the enhancing fact was essential to the conviction. If it was not, then federal courts should apply *Apprendi* to determine whether the enhancement is constitutional. Likewise, in state courts, where *Taylor* is not binding, sentencing judges should look to *Apprendi*. If a fact is to support a sentencing enhancement, it must have been either necessary to sustain the conviction—thus admitted by virtue of the defendant's *Alford* plea—or expressly admitted by the *Alford* defendant. If not, an enhancement based on that fact will violate *Apprendi*.

The solution advanced in this Note is the most appropriate course of action because it relies only on the Supreme Court's Sixth Amendment jurisprudence. It does not seek to remove any difficulties that might be inherent in *Alford* pleas, and it does not suggest that *Alford* defendants should be given any more leniency at sentencing than any other defendant. It is not desirable for *more* defendants to

220. Specifically implicated are the Sixth Amendment right to jury trial and the Fifth and Fourteenth Amendment rights to due process of law.

have their sentences vacated on appeal. Rather, this Note seeks to establish a standard that will permit defendants to receive equitable and appropriate sentences in a constitutional manner—the first time around—that need not be modified or vacated on appeal.

Apprendi was a constitutional decision about the Sixth Amendment right to a jury trial. *Apprendi* and *Blakely* were both decided on the principle that it is contrary to the goals of criminal justice to permit defendants to be sentenced according to a finding made by a mere preponderance of the evidence.[221] *Apprendi* and *Blakely* describe the Constitution's commitment to providing a jury of one's peers and assure that "an accusation which lacks any particular fact which the law makes *essential to the punishment* is . . . no accusation in reason."[222] Saying, "I will take the deal but I am innocent" certainly cannot mean, "I did it and am guilty beyond a reasonable doubt."

This issue has not been squarely decided in all courts of appeals, although the Fourth Circuit recently came down on the *Case* side.[223] The decisions of various courts of appeals provide support for a uniform application of *Blakely* to cases where, even after a *Taylor* categorical analysis, it is unclear whether an *Alford* defendant actually admitted certain facts.[224] Although some courts have been inconsistent on this point, the better-reasoned decisions lead to this solution.[225] A finding that sentencing enhancements violate *Apprendi* when based on facts only stipulated to, but not admitted, is the conclusion reached definitively by the Kansas Supreme Court in *State v. Case* and by the Fourth Circuit in *United States v. Alston*.[226] *Case* is the most recent state opinion on the issue, but many state courts have not been presented with the question. Similarly, other than the

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221. *See supra* notes 77–80, 93–94 and accompanying text.

222. Blakely v. Washington, 542 U.S. 296, 301–02 (2004) (emphasis added) (quoting 1 J. BISHOP, CRIMINAL PROCEDURE § 87, at 55 (2d ed. 1872)).

223. United States v. Alston, 611 F.3d 219 (4th Cir. 2010). *See also supra* notes 173–80.

224. *See* United States v. Savage, 542 F.3d 959, 966–67 (2d Cir. 2008) (applying Shepard v. United States, 544 U.S. 13 (2005), one of *Taylor*'s progeny, in determining that defendant "did not, by design, confirm the factual basis for his plea"); United States v. Vidal, 504 F.3d 1072, 1086–87 (9th Cir. 2007) (applying *Shepard* and finding that a plea of nolo contendere to burglary did not establish a conviction as a violent crime absent defendant's admission or a judicial record of the case's factual background); *Case*, 213 P.3d at 432 (insisting that a defendant who makes an *Alford* plea does not admit to the facts of the crime).

225. *Compare, e.g.*, *Savage*, 542 F.3d at 966–67 (going beyond the *Taylor* analysis and considering defendant's *Apprendi* challenge), *with* Abimbola v. Ashcroft, 378 F.3d 173, 180–81 (2d Cir. 2004) (rejecting defendant's *Apprendi* challenge after deciding that an *Alford* plea conviction has the same legal effect as one following a regular guilty plea). *See also supra* notes 150–65 and accompanying text.

226. *Case*, 213 P.3d at 431.

Fourth Circuit, every circuit that has addressed the question did so in older opinions[227] or without mention of *Apprendi*.[228]

Taking the approach exemplified in *Case* and *Alston* would not mean that defendants will automatically benefit from their decision to enter an *Alford* plea. *Alford* pleas may have significant advantages for defendants, especially because they should not support certain kinds of enhancements, but they do come with their fair share of drawbacks. First, *Alford* defendants are unable to take advantage of sentencing reductions for acknowledging responsibility or showing remorse, which support a reduction under some state sentencing guidelines regimes.[229] Second, *Alford* defendants may suffer unexpected collateral consequences as a result of their plea. Many defendants may be required to participate in some form of counseling or rehabilitation as part of their sentence.[230] But "an *Alford*-type defendant who refuses to acknowledge his offense during the course of counseling may have his probation revoked and his underlying sentence imposed,"[231] despite the defendant's expectation that he would not have to admit responsibility. Such a consequence is nearly universally viewed as collateral and not one that defense counsel need warn his client about.[232]

Third, when an *Alford* defendant comes up for parole, "the problem is obvious. If defendants consistently profess their innocence . . . they may be denied parole due to their failure to express remorse or failure to possess insight into the offense which led to their incarceration."[233] *Alford* defendants thus take on a number of risks by entering their plea. One commentator even argues that *Alford* defendants do not receive *any* benefit at sentencing compared to regular-guilty-plea defendants, and that they may in fact be worse off.[234] It would hardly be a boon to *Alford* defendants, then, for courts to refuse to impose sentencing enhancements on them based on conduct they never admitted. This practice simply would comport with their constitutional rights as directed by *Apprendi* and *Blakely*.

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227. *E.g.*, United States v. Mackins, 218 F.3d 263, 268 (3d Cir. 2000).

228. *E.g.*, United States v. Guerrero-Velasquez, 434 F.3d 1193, 1197 (9th Cir. 2006).

229. Ward, *supra* note 57, at 921–22.

230. *Id.* at 926–27.

231. *Id.* at 926.

232. 5 LAFAVE ET AL., *supra* note 36, § 21.4(d) (describing collateral consequences of pleas about which defense counsel has no obligation to warn defendant).

233. Ward, *supra* note 57, at 932.

234. *Id.* at 923–24 ("One might fairly ask why a criminal defendant would ever enter an [*Alford*] plea if, as these cases suggest, the possible result is a sentence greater than for a defendant who merely pled guilty.").

A uniform application of the approach taken in *Case* and *Alston* also does not mean that *Alford* pleas are a way to obtain more lenient sentences. This solution does not advocate for lesser sentences for *Alford* defendants merely because they are *Alford* defendants. *Alford* defendants do intend to enter a plea, take a deal, and go to jail. The Sixth Amendment's bar on enhanced sentences is not exactly a free ride for them. In *Case*, for instance, the portion of the defendant's sentence that violated *Apprendi* was the length of his postrelease supervision. Without the enhancement, he would have received between twelve and twenty-four months, but with it he got sixty.[235] Case still was sentenced to twenty-seven months in jail.[236] The point is not that defendants who protest innocence should get lighter sentences.[237] The point is that *any* defendant who receives *any* sentence must receive it in a manner that complies with *Apprendi*.[238]

In order for *Alford* defendants to receive sentence enhancements properly, prosecutors have to be especially precise in *Shepard* documents, especially the charging instrument.[239] Any conduct for which a prosecutor plans to seek an enhancement must not only be in the record, but also must be an element that the defendant's *Alford* plea necessarily established. In other words, it has to be necessary to the conviction. A guilty plea can establish this necessity with respect to facts that are *not* elements, but an *Alford* plea cannot. The entire essence of an *Alford* plea is that a defendant *does not admit the facts supporting guilt*. From this background, it is logically impossible to assume that a defendant *did* admit the facts supporting guilt.

Therefore, to protect these rights, courts should not permit any sentencing enhancement based on conduct which an *Alford* defendant never admitted. The first step, of course, will be to determine what an *Alford* defendant *did* admit. To do this, courts can turn to *Taylor*. If a

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235. State v. Case, 213 P.3d 429, 431, 435 (Kan. 2009).

236. *Id.* at 431.

237. Indeed, often they may not, because they are not eligible for acceptance of responsibility reductions. Some states also offer reductions for a showing of remorse, even if a defendant does not accept responsibility; *Alford* defendants are unlikely to receive these, as well. *See* Ward, *supra* note 57, at 925.

238. *Cf.* Apprendi v. New Jersey, 530 U.S. 466, 476 (2000) ("As a matter of simple justice, it seems obvious that the procedural safeguards designed to protect Apprendi from unwarranted pains should apply equally to the two acts that New Jersey has singled out for punishment. Merely using the label 'sentence enhancement' to describe the latter surely does not provide a principled basis for treating them differently.").

239. *Shepard* materials include statutory elements, charging documents, and jury instructions, *see supra* text accompanying note 109, but prosecutors have most control over the charging documents. They can argue for particular desired jury instructions, although the ultimate decision regarding jury instructions rests with the trial judge.

fact was necessary to obtain a conviction, or was included in a *Shepard* document, then the defendant admitted it by his *Alford* plea; otherwise, he could never have been convicted in the first place. If a fact is not necessary to obtain a conviction, courts may look to the transcript of the plea colloquy to see if the defendant for some reason did admit that fact during the colloquy (although this is highly unlikely). If the *Alford* defendant never admitted the enhancing fact, *Apprendi* should bar any enhancement that increases the maximum sentence the defendant would otherwise face. To allow an enhancement on a fact never admitted or proven beyond a reasonable doubt is to ignore an *Alford* defendant's Sixth Amendment rights.

V. CONCLUSION

Defendants who choose to take advantage of the *Alford* plea option can fairly be expected to be on notice about what rights they may be waiving by entering such a plea. Federal Rule of Criminal Procedure 11 and *North Carolina v. Alford* itself require that a judge accepting an *Alford* plea be satisfied that the plea is "knowing and voluntary." *Alford* also requires judges to ensure there is a "strong factual basis" before accepting the plea.

Courts should be careful to distinguish *Alford* pleas from regular guilty pleas in the narrow circumstances presented in situations like those in *Case* and *Alston*, where a defendant faces an enhancement based on facts not clearly alleged in the indictment and which the defendant has never expressly admitted. In that situation, an enhancement based on such a fact would violate *Apprendi* and *Blakely*. Indeed, this is the very type of situation that brought *Apprendi* and *Blakely* to the Supreme Court.

The law should be resolved to ensure justice across all jurisdictions. If a charge fails under the modified categorical approach, or the charge is before a state court that does not apply that approach, then courts should look to *Apprendi* and *Blakely* to determine whether the defendant otherwise admitted the facts upon which an enhancement is based. If a defendant should decide that an *Alford* plea is in his best interest, *Apprendi*, *Blakely*, and the Sixth Amendment require that any enhancing fact be either admitted or proven beyond a reasonable doubt.

This is not an impossibly high bar because prosecutors can avoid *Apprendi* concerns by making sure that the indictment or information is clear. Legislators can also avoid this problem, should they wish to get involved, by narrowly drafting criminal statutes such that any fact that would be "enhancing" is made to be an element of a

particular crime. Applying sentence enhancements is illogical and unfair when the enhancements are based on conduct never admitted and never proven. The law should be resolved to prevent this from happening. In the meantime, to avoid *Apprendi* problems—and an uncertain resolution of those problems—defendants might be wise to avoid *Alford* pleas altogether.

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