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## Comment on The Prior Convictions Exception: Examining the Continuing Viability of Almendarez-Torres Under Alleyne

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# Comment on The Prior Convictions Exception: Examining the Continuing Viability of *Almendarez-Torres* Under *Alleyne*

Kevin Flynn\*

I am a career prosecutor with the U.S. Department of Justice, and I have been instructed to begin by stating that I am submitting this comment in my personal and not my professional capacity. My Department certainly knows the virtue of starting off a piece with a compelling opening line.

For more than twenty-five years, I have been a violent crime prosecutor in a city that has suffered more than its share of street tragedy. The caseloads that I once maintained as a line attorney and now supervise as a manager are dauntingly high: the average misdemeanor prosecutor handles as many as 150 cases at a time, the average felony prosecutor as many as 50 to 75, even the average homicide prosecutor in excess of 15 or 20. The motions practice is very high-volume but predominantly centers on defense evidentiary challengers under the Fourth and Fifth Amendments, and the subject matters can be repetitive. I would not say that the practice on a day-to-day basis involves an array of refined legal issues. In fact, it could probably be summed up in two words: boilerplate responses. So I am not necessarily the best qualified person to address the acuity of this Note's analysis or the rigorousness of its research. On that point, I can at least say that, even though it has been many years since I reviewed a piece of legal scholarship, I do know good writing when I see it, and this is not good but excellent writing: cogent, well-phrased, well-argued across the board, and a joy to read. I never thought I

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would write the last four words of the previous sentence about a law review article.

Having said that, if I can make a useful contribution to this publication it is not as a sophisticated legal commentator but rather—channeling here my inner David Foster Wallace—as an emissary from the real world. Mine is a world where the issues that the Note discusses have very real potential consequences for defendants, victims, and the public servants who labor (more than the public we serve has any idea) to achieve justice in every case that comes before us.

Let me start by recounting an anecdote about the first time that a significant case of mine was affected by the case, *Apprendi v. New Jersey*,<sup>1</sup> that started the movement discussed in the Note.<sup>2</sup> Twenty-one years ago, I took to trial a defendant who had committed a double homicide almost unimaginable in its brutality. Following his conviction, the defendant was sentenced to two terms of life without parole based on the aggravating factor of the unique atrociousness of his crimes. Without exploring the garish details, suffice it to say that the murders were of such a nature that any reasonable person would believe it important in a civilized society for the sentence of that defendant to state unequivocally that he would spend the rest of his days in jail. The atrociousness of the murders was never questioned by the defense at trial, which simply argued before the jury that, however horrific they were, they were committed by someone other than the defendant. On appeal, the defendant's convictions were affirmed, but his sentence was ultimately reduced because the Court of Appeals retroactively found an *Apprendi* violation in that the grand jury had not been asked to consider and specifically find in its indictment the aggravating factor of atrociousness—notwithstanding that that matter was never debated and was always conceded by the defense at trial. While the defendant still received a lengthy term of incarceration at his post-appeal resentencing, he retains the hope, albeit slight, of one day knowing freedom again. The Note refers several times to “the

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1. 530 U.S. 466 (2000).

2. See Meg E. Sawyer, Note, *The Prior Convictions Exception: Examining the Continuing Viability of Almendarez-Torres Under Alleyne*, 72 WASH. & LEE L. REV. 409, 410–13 (2015) (explaining *Apprendi* and its effect on modern sentencing procedure).

*Apprendi* Revolution.”<sup>3</sup> To carry the metaphor one step further, it might be said in retrospect that, in at least this case, the cause of just and appropriate sentencing was hit by a stray jurisprudential Molotov cocktail in that revolution.

Looking at the more narrow issue discussed in the Note, if it is not ultimately resolved in the manner endorsed by the author—with the survival of the prior conviction exception<sup>4</sup>—the implications for countless criminal prosecutions in every state in the nation would be vast. By way of example, one only has to examine the interplay between this issue and another Supreme Court case, *Crawford v. Washington*.<sup>5</sup> *Crawford* held that out-of-court statements that are “testimonial” in nature—defined as “made with an eye toward court”—constitute inadmissible hearsay;<sup>6</sup> it fundamentally changed the practices of prosecutors across the country by, among other things, requiring them to produce live witnesses to establish facts that heretofore could be adduced by documentary evidence. The practical applications of *Crawford* are still being sorted out. It is a live question, for instance, whether an autopsy report in a homicide case—scientific in nature but commonly prepared by forensic pathologists who later testify in court about their findings—are testimonial in nature, such that a prosecutor handling a decades-old murder case in which the original forensic pathologist has become unavailable could be barred from admitting the report to establish the cause and manner of the decedent’s death.

How do *Crawford*, *Apprendi*, *Almendarez-Torres* and *Alleyne* come together here? In just this way: Were the prior conviction exception to be eliminated, the government’s ability to prove a defendant’s recidivist status by way of criminal history documents would be severely hampered if not destroyed, possibly requiring live appearances by records clerks in every case. Given

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3. See *id.* at Introduction (introducing the *Apprendi* revolution).

4. See *id.* at Part IV (arguing the prior convictions exception is sustainable on constitutional grounds and that overturning *Almendarez-Torres* would impose severe costs on the judicial system).

5. 541 U.S. 36 (2004).

6. See *id.* at 51 (explaining that, unless there is an opportunity for cross-examination, the Confrontation Clause bars testimonial statements, which are “solemn declaration[s] or affirmation[s] made for the purpose of establishing or proving some fact” (citation omitted)).

the fact that repeat offenders cannot be relied on to confine their criminality to one particular county, state, or even region, it is by no means hysterical to contemplate that the end result could be that in a given case the government would have to transport multiple records custodians from multiple jurisdictions simply to establish something that can be presently (and appropriately) proven on paper.

Now, the reader might be thinking that, if a defendant's constitutional rights are at issue, no amount of governmental inconvenience is too burdensome. That is a proposition that I am prone to agree with, and one that prosecutors in my office act on every day. Case in point: a federal judge recently issued an opinion in a civil case finding one of the District of Columbia's firearms laws unconstitutional and enjoining the city from continuing to enforce it. The order has been stayed and the city is considering its appeal rights, but our office has already undertaken the laborious task of identifying pending and prior cases that would be affected if the order prevails, and have taken steps to change the bond conditions of certain defendants awaiting trial on the disputed charge. I do not write about my office's actions in a spirit of self-congratulation—ethical prosecutors are trained that, where a legitimate right of a criminal defendant stands in the balance, convenience falls by the wayside.

The key word above, of course, is legitimate. The burdens discussed above (e.g., having to transport records clerks into a courtroom from all over the country and lining them in the anteroom to testify about the essentially self-evident) would be borne by the government in the service of protecting a right that most defendants will not choose to exercise. If there is one thing that I have learned over a quarter century of trying criminal cases it is this: Defendants do not want their juries to find out bad things about them if they do not have to. The details of a defendant's criminal past—the exact nature of the charges of which he has previously been convicted—are bad facts for him, and faced with the choice of having them come out in all their ugliness, as opposed to in sanitized form, a defendant will opt for the latter every time. And so how will my hypothetical almost always resolve itself? With the government spending time, money, and resources to marshal live witnesses on the

defendant's recidivist record only to have his lawyer stand up in court and say, "My client stipulates to the fact that he has X number of felony convictions."

In sum, as a legal treatise Meg's Note is impressive. But it is in its appreciation for and exploration of the practical, real-world implications of this issue that it really shines. At the end of the day, it demonstrates how sound legal scholarship does not exist in a vacuum. From my perspective, when it is written in the field in which I labor and it balances erudition and common sense, the abstract and the concrete, it serves the public very well.