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# The Prior Convictions Exception—A Comment

Matthew Engle\*

Ms. Sawyer makes a compelling case that prior convictions should continue to be treated differently than other facts that affect the duration of a criminal sentence and therefore must be treated as elements in a criminal prosecution.<sup>1</sup> As she correctly notes, many judges and prosecutors have argued in favor of upholding the *Almendarez-Torres* exception<sup>2</sup> because requiring the prosecution to prove past convictions to the jury could create prejudice against a recidivist defendant.<sup>3</sup> Some skepticism is merited when the government seeks to lighten its own burden out of supposed concern for the welfare of those defendants whose foolhardy reluctance to waive their constitutional rights might prejudice them. Equally dubious are government protestations that the criminal justice system will grind to a halt if sentencing juries are required to protect the rights of criminal defendants.<sup>4</sup>

Nevertheless, one can support the rule of *Almendarez-Torres* without suspending disbelief about the benevolent nature of

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1. See Meg E. Sawyer, *The Prior Convictions Exception: Examining the Continuing Viability of Almendarez-Torres Under Alleyne*, 72 WASH. & LEE. L. REV. 409, 413 (2015) (arguing that the U.S. Supreme Court should not overturn the prior convictions exception of the Sixth Amendment).

2. See *Almendarez-Torres v. United States*, 523 U.S. 224, 226–27 (1998) (finding that sentence-enhancing factor based on a prior conviction is a penalty provision rather than a separate crime).

3. See, e.g., Sawyer, *supra* note 1, at 455 (“Herein lies one of the inescapable criticisms surrounding habitual-offender systems and consequently, one of the primary reasons to uphold *Almendarez-Torres*—prejudice to the defendant.”); *Shepard v. United States*, 544 U.S. 13, 38 (2005) (“[T]oday’s hint at extending the *Apprendi* rule to the issue of . . . prior crimes surely will do no favors for future defendants . . .”).

4. Cf. Nancy J. King & Susan R. Klein, *Essential Elements*, 54 VAND. L. REV. 1467, 1491–96 (2001) (noting how many state legislatures have redrafted criminal statutes in light of *Apprendi* to reduce the burdens imposed on prosecutors).

prosecutors or the fragility of a justice system that will crumble under its own weight if the tiny fraction of prosecutions that actually go to trial are bifurcated into merits and sentencing phases.<sup>5</sup> The fact remains that prior convictions are fundamentally different than other “sentencing factors” that the *Apprendi* revolution has recast as elements of greater offenses.<sup>6</sup> Unlike other facts, a prior conviction reflects a determination by the criminal justice system that we have arrived at the truth of a matter through adversarial testing. We imbue criminal convictions with finality because we can be confident, absent proof to the contrary, that we arrived at the conclusion that the defendant was guilty of the prior crime despite affording him all of the constitutional safeguards to which he was entitled. In other words, it is unnecessary to require a jury to find a prior conviction beyond a reasonable doubt because either another jury has already done so or the defendant has waived his right to a jury determination of his guilt.<sup>7</sup>

Indeed, it would make little sense to invite subsequent juries to revisit the judicially determined fact of the defendant’s guilt. It is not difficult to imagine the problems that might arise if the prosecution was required to reprove the defendant’s guilt of crimes of which he had already been convicted whenever it wished to enhance a subsequent sentence.<sup>8</sup> What would be the effect of a second jury’s determination that the defendant was not guilty for a crime of which he had previously been convicted?

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5. It is worth noting that, in the death penalty context, bifurcated and even trifurcated trials have become the norm. *See, e.g.*, *United States v. Umaña*, 750 F.3d 320, 333 (4th Cir. 2014) (discussing North Carolina courts’ trifurcated death penalty process). These procedural safeguards do not seem to have caused any massive disruption in the federal government’s efforts to obtain death sentences.

6. *See Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000) (“Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.”).

7. *See Garrus v. Sec’y of Pa. Dept. of Corr.*, 694 F.3d 394, 400 (3d Cir. 2012) (stating that a prior conviction has already been established through procedural safeguards, such as fair notice, reasonable doubt, and jury trial guarantees).

8. *See Sawyer*, *supra* note 1, at 455–56 (discussing two troublesome options prosecutors would face if required to prove prior convictions beyond a reasonable doubt).

Would a second jury's determination of innocence foreclose the government from relying on that same conviction to enhance the penalty in a later prosecution? There is no compelling reason to invite these questions when the prosecution has already been held to its burden of establishing the defendant's guilt beyond a reasonable doubt in an earlier proceeding.<sup>9</sup>

From the defense perspective, the problem with *Almendarez-Torres* arises because the government is rarely satisfied to do what the prior convictions exception permits it to do. That is, the government is almost never content to prove "the fact of a prior conviction." In cases where recidivism is at issue, what the government actually wants to do is provide the sentencer with prejudicial facts regarding the defendant's alleged conduct in committing the prior crime. But to do so, the government frequently must prove facts beyond the judicially determined fact that the defendant was previously convicted of a particular crime.

For example, in *Shepard v. United States*,<sup>10</sup> the government sought to enhance the defendant's sentence under the Armed Career Criminal Act (ACCA),<sup>11</sup> which mandates a fifteen-year minimum sentence for anyone possessing a firearm after three convictions of violent felonies.<sup>12</sup> At issue in *Shepard* was whether the defendant's previous burglary convictions in Massachusetts, entered upon guilty pleas, constituted violent felonies.<sup>13</sup> The Court had previously concluded that only burglaries into buildings or structures (as opposed to vehicles) constituted violent felonies within the meaning of the ACCA.<sup>14</sup> But because Massachusetts permitted burglary convictions for unauthorized entries into buildings, structures, or vehicles, it was not clear

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9. See *Rangel-Reyes v. United States*, 547 U.S. 1201, 1201 (2006) (arguing that judicial determination of a defendant's prior criminal history "will seldom create any significant risk of prejudice to the accused").

10. 544 U.S. 13 (2005).

11. 18 U.S.C. § 924(e) (2012).

12. *Id.*

13. See *Shepard*, 544 U.S. at 15–16 (noting that the ACCA makes burglary a violent felony only if committed in a building or enclosed space).

14. See *Taylor v. United States*, 495 U.S. 575, 599 (1990) ("[A] person has been convicted of burglary for purposes of a § 924(e) enhancement if he is convicted of any crime . . . having the basic elements of unlawful or unprivileged entry into, or remaining in, a building or structure, with intent to commit a crime.").

whether the defendant's prior burglaries qualified.<sup>15</sup> Accordingly, the government argued that the Court should consider police reports related to the prior charges, which allegedly would have shown that the defendant did feloniously enter a building or structure.<sup>16</sup>

The *Shepard* Court rightly rejected this approach, noting that permitting proof of facts at the subsequent trial beyond those that necessarily must have been found to obtain the prior conviction would violate congressional intent and, arguably, the Sixth Amendment.<sup>17</sup> In so holding, the Court relied heavily on its earlier decision in *Taylor v. United States*,<sup>18</sup> where it had held that the government was limited to introducing "conclusive records made or used in adjudicating guilt," including the charging documents and other "recorded judicial acts of the court," such as jury instructions that required specific factual findings to convict.<sup>19</sup> But the Court did not stop there. In a case such as *Shepard*, involving prior guilty pleas, the Court opined that these "conclusive records" could also include a transcript of the prior plea colloquy containing a statement of the factual basis for the charge.<sup>20</sup> Thus, while correctly rejecting the government's attempt to rely on hearsay police reports, the *Shepard* Court, in dicta, appears to have expanded the universe of records on which the government may rely to establish the facts of prior offenses.<sup>21</sup>

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15. See *Shepard*, 544 U.S. at 16 (noting that states often define burglary more broadly than does the ACCA).

16. *Id.* at 17.

17. *Id.* at 19–23.

18. 495 U.S. 575 (1990).

19. *Shepard*, 544 U.S. at 20–21 (citing *Taylor*, 495 U.S. at 602).

20. See *id.* at 16 (holding that prosecution may not rely on police reports to establish that a burglary was a violent felony under the ACCA).

21. Other courts have similarly permitted sentencing courts to consider plea colloquy transcripts and other documents to determine the facts of prior offenses. See, e.g., *United States v. Adams*, 91 F.3d 114, 116 (11th Cir. 1996) (permitting the district court to consider presentence reports to ascertain the facts underlying the defendant's prior guilty pleas in state court); *United States v. Kaplansky*, 42 F.3d 320, 322 (6th Cir. 1994) (en banc) (statutory elements of the crime); *United States v. Harris*, 964 F.2d 1234, 1236 (1st Cir. 1992) (presentence reports); *United States v. Strahl*, 958 F.2d 980, 983 (10th Cir. 1992) (statutory definitions); *United States v. Garza*, 921 F.2d 59, 61 (5th Cir. 1991) (indictments), *cert. denied*, 502 U.S. 825 (1991); *United States v. Taylor*, 932 F.2d 703, 708 (8th Cir. 1991) (statutory elements of the crime), *cert. denied*,

It is difficult to reconcile this expansion with the *Apprendi* line of Sixth Amendment holdings.<sup>22</sup> While upholding *Almendarez-Torres* for the reasons given by Ms. Sawyer, the Court should nevertheless resist the government's efforts to expand that decision to include additional facts beyond the mere fact of a prior conviction. In seeking to enhance sentences based on prior convictions under the *Almendarez-Torres* exception, the government should be limited to the record of conviction and statutory elements of the offense.<sup>23</sup> In particular, the Court should reject the so-called "pragmatic" approach of permitting the government to prove to a judge the facts of a prior crime to which the defendant has pled guilty when those facts have never been found by a jury beyond a reasonable doubt or even been subjected to confrontation by the defendant. Because the overwhelming number of criminal prosecutions are resolved by guilty pleas, inviting the government to end-run the Sixth Amendment in such cases would create a far more burdensome problem than the implementation of sentencing juries if even a small fraction of defendants who would otherwise plead guilty would insist on going to trial. At the very least, fairness would require giving the defendant who wished to enter a guilty plea the opportunity to contest the government's proffer of the factual basis of the charge.

In *United States v. Santiago*,<sup>24</sup> another expansive view of the *Almendarez-Torres* exception was espoused by then-Judge of the Second Circuit Sonia Sotomayor. At issue in *Santiago* was whether the defendant's three prior convictions had occurred on different occasions, such that they could be considered separate offenses for purposes of applying the mandatory minimum

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502 U.S. 882 (1991); *United States v. Sweeten*, 933 F.2d 765, 769–71 (9th Cir. 1991) (statutory definitions); *United States v. Gallman*, 907 F.2d 639, 645 n.7 (7th Cir. 1990) (jury instructions), *cert. denied*, 499 U.S. 908 (1991).

22. Indeed, concurring in the *Shepard* judgment, Justice Thomas urged the Court to seize the next opportunity to overrule *Almendarez-Torres*. *Shepard v. United States*, 544 U.S. 13, 26–28 (2005) (Thomas, J., concurring).

23. See, e.g., *United States v. Maness*, 23 F.3d 1006, 1010 (6th Cir. 1994) (Ryan, J., concurring) (stating that it is "inappropriate . . . to look to the facts underlying the defendant's prior burglary convictions in order to decide whether those crimes are violent felonies for the purpose of enhancing the defendant's sentence under the Armed Career Criminal Act").

24. 268 F.3d 151 (2d Cir. 2001).

sentence codified at 18 U.S.C. § 924(e)(1) (2012).<sup>25</sup> In Judge Sotomayor's view, the prior convictions exception permitted the sentencing judge to make "many subsidiary findings, not the least of which is that the defendant being sentenced is the *same* defendant who was previously convicted."<sup>26</sup> Accordingly, Judge Sotomayor read *Apprendi* as leaving to the sentencing judge not only the task of finding the mere fact of prior convictions but also "other related issues," including the "who, what, when, and where" of the prior conviction.<sup>27</sup> Thus, while declining to state whether the *Almendarez-Torres* exception applied to all issues related to recidivism, Judge Sotomayor held that the separateness of the prior offenses was merely a sentencing factor that could be determined by the court rather than a jury.

The Supreme Court should reject the premise of *Santiago*. In that case, the Second Circuit reasoned that, because a sentencing judge would routinely be required to make "many subsidiary findings" regarding a prior conviction, the *Almendarez-Torres* exception should be applied broadly.<sup>28</sup> But despite this assertion of "many subsidiary findings," the *Santiago* court provided only a single example: that the subsequent sentencing court would be required to find that the defendant was the same person who had actually been convicted in the earlier prosecution.<sup>29</sup> But this cannot seriously be called a "subsidiary fact," if the *Almendarez-Torres* exception means anything, surely it means that any fact, other than the fact of a prior conviction *of this defendant*, must be proven to a jury. It requires quite an analytical leap to conclude that, because the language "the fact of a prior conviction" includes a finding that this was the defendant who was previously convicted, it must also permit judicial determination of the "who, what, when, and where" of the prior conviction. Furthermore, the *Santiago* court made no effort to explain why, if the identity of the defendant as the former convict was contested, the state should not be required to convince a jury beyond a reasonable doubt of this rather significant fact.

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25. *Id.* at 152.

26. *Id.* at 156.

27. *Id.*

28. *Id.*

29. *Id.*

Fortunately, as the rule of *Apprendi* has been reinforced by subsequent Supreme Court decisions, the *Santiago* view—that all facts related to recidivism may be shoe-horned into the *Almendarez-Torres* exception—has been increasingly rejected. Sitting en banc, the Third Circuit recently granted a habeas petition and found Pennsylvania’s application of its own three-strikes law to be an unreasonable application of *Apprendi*. In *Garrus v. Secretary of Pennsylvania Department of Corrections*,<sup>30</sup> the habeas petitioner challenged a judicial determination that his prior offense had involved burglarizing an occupied building when in fact he had pled guilty to second-degree burglary, an offense that under Pennsylvania law necessarily involved burglarizing an *unoccupied* building.<sup>31</sup> In concluding that the defendant had actually entered an occupied building, the sentencing court had relied on police reports and a victim’s statement.<sup>32</sup> Granting the habeas petition and vacating the enhanced sentence, the Third Circuit stated that the prior crimes exception “is not a panacea allowing recidivism-related judicial fact-finding,” and recognized *Almendarez-Torres* as a “‘limited’ and ‘narrow’ exception to the *Apprendi* rule,” which rests at least partially on the procedural safeguards that had already attached to the fact of the prior conviction, including fair notice of the allegations, the right to a jury trial, and the beyond reasonable doubt standard.<sup>33</sup>

Ms. Sawyer’s Note urges the Court to confirm the viability of the *Almendarez-Torres* exception, and I agree with this position. However, the Court should also clarify that the prior crimes exception neither swallows the rule nor opens the door to judicial fact-finding of any recidivism-related issues. If the prosecution wishes to allege facts regarding prior convictions that go beyond the actual fact of conviction and the statutory elements that were necessarily established to obtain that conviction, then those additional facts should be treated as elements. The government must provide notice of those allegations and prove them to a jury beyond a reasonable doubt.

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30. 694 F.3d 394 (2d Cir. 2012) (en banc).

31. *Id.* at 396.

32. *See id.* at 398 (discussing the decision of the sentencing court).

33. *Id.* at 406.