Prior "Convictions" Under Apprendi: Why Juvenile Adjudications May Not Be Used to Increase an Offender's Sentence Exposure if They Have Not First Been Proven to a Jury Beyond a Reasonable Doubt

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PRIOR “CONVICTIONS” UNDER APPRENDI: WHY JUVENILE ADJUDICATIONS MAY NOT BE USED TO INCREASE AN OFFENDER’S SENTENCE EXPOSURE IF THEY HAVE NOT FIRST BEEN PROVEN TO A JURY BEYOND A REASONABLE DOUBT

I. INTRODUCTION

The Supreme Court’s decision in Apprendi v. New Jersey\(^1\) spawned a plethora of litigation regarding the process due a criminal defendant under the United States Constitution.\(^2\) While the Court’s recent decision in Ring v. Arizona\(^3\) answered one of the major uncertainties clouding over the Apprendi holding, one more major issue still remains.\(^4\) This Comment will address that issue, namely, whether juvenile adjudications may be used to increase\(^5\) an offender’s sentence beyond a crime’s finitely prescribed penalty range.

The holding in Apprendi is deceivingly simple: “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.”\(^6\) These words seem plain enough—the determination of facts necessary to satisfy every element of a crime rests with

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1. 530 U.S. 466 (2000).
2. At the time this Comment went to press, Apprendi had already unofficially been cited 6364 times in just under four years. See id., available at http://www.westlaw.com (last visited Feb. 23, 2004). This amount dwarfs the number of citations made to Brown v. Bd. of Educ., 349 U.S. 294 (1955), over the course of Brown’s storied forty-nine year history. See id., available at http://www.westlaw.com (last visited Feb. 23, 2004) (showing 881 citations); see also, e.g., Owens v. United States, 236 F. Supp. 2d 122, 129 (D. Mass. 2002) (“Considerable litigation has ensued as litigants seek to define the contours of Apprendi” (citing a case from each of the twelve United States Circuit Courts)).
5. Although not determinative to the Supreme Court’s holding in Almendarez-Torres v. United States, 523 U.S. 224 (1998), Justice Breyer noted the possible distinction between increasing a statutory maximum and imposing a statutory minimum. See id. at 244-45 (1998). Justice Breyer’s distinction seems tenuous at best, and this Comment declines to examine any potential differences between the two. Both scenarios involve the deprivation of liberty (either an initial deprivation or an extended deprivation) without proof of facts to a jury; accordingly, increasing a maximum sentence and imposing a minimum sentence will be treated identically for the purposes of this discussion.
6. 530 U.S. at 490.
the jury, not the judge; the government must prove these facts beyond a reasonable doubt; simply forcing an offender higher within a specific penalty range is not enough due to the discretion retained by sentencing judges; the only exception to this rule is a prior conviction. However, what constitutes a prior "conviction"? One scholar observes that judicial proceedings can vary from felony and misdemeanor crimes to juvenile delinquency and sexual commitments or even municipal violations.\(^7\) While most jurisdictions allow judges to consider juvenile adjudications and civil commitments during sentencing, using an adjudication to move an offender upward within a sentencing range is radically different from using that same adjudication to increase the maximum penalty the offender faces for a charge.\(^8\)

This Comment will address the issue of whether prior civil or quasi-criminal\(^9\) proceedings, specifically juvenile adjudications, may be used to increase an offender's sentence without presenting those "facts"\(^10\) to a jury for proof beyond a reasonable doubt. Part II of this Comment describes state and federal court holdings addressing this issue, specifically examining the current divergence between the Third, Eighth, and Ninth Circuit Courts of Appeals.\(^11\) Part III scrutinizes these cases' rationale by considering the historical treatment of juvenile adjudications, the context of Apprendi and its forerunners, and any practical concerns. Finally, Part IV provides a proposal for using juvenile adjudications to increase the maximum penalty an offender faces that is not repugnant to the Due Process Clause of the United States Constitution.\(^12\)

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7. WAYNE R. LAFAVE, CRIMINAL LAW §§ 1.6-1.7 (4th ed. 2003); see also State v. Benenati, 52 P.3d 804, 808-11 (Ariz. Ct. App. 2002) (finding that an offender's release status was a fact other than a fact of prior conviction).

8. See United States v. Tighe, 266 F.3d 1187, 1192 (9th Cir. 2001) ("A fact that is used to increase the maximum statutory penalty to which a defendant is exposed raises an entirely different set of constitutional concerns than a fact that merely affects where a sentence is fixed within an undisputed statutorily mandated range.").

9. See LAFAVE, supra note 7, § 1.7 (referring to juvenile delinquency, sexual psychopathy, municipal ordinance violations, statutory penalties, and contempt of court proceedings as "perhaps quasi-criminal").

10. See Apprendi, 530 U.S. at 488 (recognizing implicitly that a defendant's prior criminal conviction is sufficient evidence to treat that same defendant's prior alleged criminal conduct as a historical "fact").


12. U.S. CONST. amend. VI. The Sixth Amendment reads:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the
II. “TWO SCHOOLS OF THOUGHT”

Defining the opposing viewpoints in this argument is not complicated. Quite simply, “there are two schools of thought” regarding the use of juvenile adjudications to increase the potential maximum sentence facing an offender. The first school includes those courts that claim juvenile contacts may not be used to increase an offender’s sentence beyond the statutory maximum without first being proven to a jury beyond a reasonable doubt. The second school of thought finds juvenile adjudications so reliable that using them does not violate due process.

A. The Ninth Circuit’s Strict Interpretation

When the Ninth Circuit Court of Appeals decided United States v. Tighe, it became the first court in Apprendi’s wake to report a published decision on this issue. The government sought to increase Shannon Tighe’s ten-year maximum sentence to a minimum fifteen-year sentence under the Armed Career Criminal Act (ACCA) because Tighe had been convicted of three prior violent felonies. However, one of the convictions the government

nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

These rights have also been held to apply to the individual states by virtue of the Fourteenth Amendment of the United States Constitution. Duncan v. Louisiana, 391 U.S. 145, 148 (1968); see also U.S. CONST. amend. XIV, § 1. The relevant portion of the Fourteenth Amendments provides that:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

16. 266 F.3d 1187 (9th Cir. 2001).
17. Although the Ninth Circuit rendered the Tighe decision less than a year after the Supreme Court announced its holding in Apprendi, the Tighe court was technically not the first to address this issue. At least one pre-Apprendi case also decided the issue of whether juvenile adjudications could raise the potential penalty facing an offender. See People v. Fowler, 84 Cal. Rptr. 2d 874, 877-78 (Cal. Ct. App. 1999). Since Apprendi, California courts have alluded that Fowler’s holding is nonetheless consonant with Supreme Court caselaw, and the seminal case maintains its vitality today. Bowden, 125 Cal. Rptr. 2d at 518 (dictum).
18. See Tighe, 266 F.3d at 1189 (citing 18 U.S.C. § 924(e) (2001)). Title 18 U.S.C. § 924(e) provides that any combination of three prior violent felonies and “serious drug offense[s]” qualifies an offender for the minimum of a fifteen-year sentence.
19. Tighe, 266 F.3d at 1190-91. Tighe pled guilty, inter alia, to felon in possession of a
relied upon to qualify Tighe for the fifteen-year minimum sentence was a juvenile adjudication from when he was fourteen years old. In deciding that Tighe's juvenile adjudication could not be used as a predicate offense for the penalty increase under ACCA, the Ninth Circuit adopted a very literal and narrow reading of the Supreme Court's holding in *Apprendi*.21

Indeed, the plain language of *Apprendi* is compelling. The single exception to the Court's holding was "[a] fact of a prior conviction."22 The Ninth Circuit felt this exact wording was significant enough to emphasize it when the *Tighe* majority quoted *Apprendi*.23 The *Tighe* court supported this reading by pointing out that there are "significant constitutional differences between adult convictions and juvenile adjudications."24 Thus, the *Tighe* majority seemed to imply that if the Supreme Court meant to use a word other than "conviction" in its holding, the Court would have done so.

The *Tighe* majority bolstered its interpretation of *Apprendi* by examining *Apprendi*'s "companion" cases from the previous two Terms, *Almendarez-Torres v. United States*25 and *Jones v. United States*.26 In *Almendarez-Torres*, the Supreme Court held that a prior conviction was merely a sentencing factor, not a separate element of a wholly distinct offense.27 The Court then explained this conclusion the next year in *Jones* when it reasoned that the fact of a prior conviction is "constitutionally distinct" from other sentence-enhancing facts.28 It stated, "a prior conviction must itself have been established through procedures satisfying the fair notice, reasonable doubt and jury trial guarantees" of due process and the Sixth Amendment to the United States Constitution.29 However, this creates a problem because not all adjudications, statutorily defined as "convictions" in many states, guarantee the right to trial by jury.30 In fact, the main difference between juvenile

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20. *Id.* at 1190. It was this charge that qualified him for the increased minimum sentence mandated by ACCA. *Id.* at 1191.
21. *Id.*
22. But see, United States v. Smalley, 294 F.3d 1030, 1032-33 (8th Cir. 2002) ("conclud[ing] that the question of whether juvenile adjudications should be exempt from *Apprendi*'s general rule should not turn on the narrow parsing of words").
23. *Apprendi*, 530 U.S. at 490 (emphasis added).
24. *Id.* at 1192 (comparing McKeiver v. Pennsylvania, 403 U.S. 528 (1971) (plurality opinion), with Duncan v. Louisiana, 391 U.S. 145 (1968)).
27. *Tighe*, 266 F.3d at 1193 (citing *Almendarez-Torres*, 523 U.S. at 243).
28. *Id.*
29. *Id.* (quoting *Jones*, 526 U.S. at 249) (emphasis partially omitted).
adjudications and adult convictions is "the lack of a right to a jury trial in most juvenile adjudications." Not only has the Supreme Court held that the presence of a jury for juvenile adjudications is not required, but the Court has recognized that the presence of a jury would be detrimental because the jurors "would most likely be disruptive of the unique nature of the juvenile process." Without one of the members of the "fundamental triumvirate" of procedural protections guaranteeing the reliability of prior convictions, the Ninth Circuit was unwilling to extend the definition of "conviction" to include juvenile adjudications.

Finally, the Tighe majority noted that the prior conviction exception the Supreme Court carved out of its holding in Apprendi was only a "narrow" one, and treatment of juvenile adjudications as prior convictions would require extending this narrow exception. The Ninth Circuit was unwilling to make this extension for two reasons. First, as the Supreme Court explained in Jones, "Almendarez-Torres represents at best an exceptional departure from the historical practice that we have described" and is a case with, in the Court's own words, "unique facts." Second, the Court itself expressed "serious reservations" about the vitality of Almendarez-Torres's holding in Apprendi. The Ninth Circuit was correct; the main reason why the Court decided not to revisit the decision was because Apprendi did not challenge the continuing precedence of that decision on appeal. Accordingly, Almendarez-Torres's "holding regarding prior convictions should remain a 'narrow exception' to Apprendi that does not extend to nonjury juvenile adjudications."

31. Tighe, 266 F.3d at 1193.
33. See Tighe, 266 F.3d at 1193 (defining the "fundamental triumvirate of procedural protections" as "fair notice, reasonable doubt and the right to a jury trial").
34. Id. at 1194; see also Apprendi v. New Jersey, 530 U.S. 466, 490 (2000) (characterizing its own decision in Almendarez-Torres "as a narrow exception to the general rule we recalled at the outset").
35. Tighe, 266 F.3d at 1194.
36. Id. (quoting Apprendi, 530 U.S. at 487).
37. Apprendi, 530 U.S. at 490.
38. Tighe, 266 F.3d at 1194 (quoting Apprendi, 530 U.S. at 489 ("[I]t is arguable that Almendarez-Torres was incorrectly decided.")
39. Apprendi, 530 U.S. at 490.
40. Tighe, 266 F.3d at 1194.
Nine months later, the Eighth Circuit Court of Appeals weighed in on the issue of whether juvenile adjudications could be used to increase a convicted offender’s sentence beyond the statutory maximum.  Unanimously, but “respectfully disagree[ing] with the Tighe court’s conclusion,” United States v. Smalley created a rift in the federal circuits on this issue. Almost as interesting as the Eighth Circuit’s actual conclusion, though, was the court’s decision-making process. Judge Brunetti authored a persuasive dissenting opinion in Tighe, a dissenting opinion that has since been cited several times. Ironically, the Smalley majority declined to cite Judge Brunetti’s dissent even once. Rather, the Smalley court engaged in its own analysis of the Almendarez-Torres/Jones/Apprendi trilogy.

The Smalley court began the explanation of its holding by raising a “two poles” argument. Although not directly citing the dissenting opinion in

41. See United States v. Smalley, 294 F.3d 1030 (8th Cir. 2002).
42. Id. at 1032.
43. Id.
46. See Smalley, 294 F.3d 1030.
47. One explanation for the Smalley majority’s failure to adopt the reasoning of the dissenting opinion in Tighe could be Judge Brunetti’s heavy reliance upon the Ninth Circuit’s decision in United States v. Williams, 891 F.2d 212 (9th Cir. 1989). See Tighe, 266 F.3d at 1198-99, 1200 (Brunetti, J., dissenting). Judge Brunetti purportedly used Williams merely for the concept that “where a juvenile received all the process constitutionally due at the delinquency proceeding stage, . . . the later use of the juvenile adjudication [is] constitutionally sound because ‘the conviction was constitutionally valid.’” See id. at 1198 (Brunetti, J., dissenting). However, the use of Williams as good precedent in Tighe’s dissent is dubious for two major reasons. See Williams, 891 F.2d at 214-15.

First, Williams’s sentence was increased only within the proscribed statutory boundaries, not beyond them. Compare Williams, 891 F.2d at 214 (raising the offender’s sentencing range from thirty to thirty-seven months without juvenile adjudications to forty-six to fifty-seven months with juvenile adjudications), with 18 U.S.C. § 2113(a) (providing that the maximum sentence for bank robbery is twenty years, or 240 months, well past the fifty-seven month maximum). “[The Supreme Court has] often noted that judges in this country have long exercised discretion of this nature in imposing sentence[s ]within statutory limits in the individual case.” Apprendi v. New Jersey, 530 U.S. 466, 481 (2000). Thus, Williams never addressed the very crux of the Apprendi holding: extending a sentence beyond statutory limits. Second, the Ninth Circuit decided Williams over fifteen years before Apprendi. Compare Apprendi, 530 U.S. 466 (2000), with Williams, 891 F.2d 212. Even if the Williams court could have reached a decision regarding the increase of an offender’s sentence beyond the statutory maximum, that court did not have the benefit of considering the rationale behind Apprendi’s holding.
48. Smalley, 294 F.3d at 1032.
Tighe, this argument is actually quite similar to Judge Brunetti’s “quantum leap” theory. The two arguments begin by conceding: “The Supreme Court stated in Apprendi that prior convictions are excluded from the general rule because of the ‘certainty that procedural safeguards,’ such as trial by jury and proof beyond a reasonable doubt, undergird them.” At first blush this statement seems to admit the very conclusion the Eighth Circuit is attempting to disprove—that a right to a jury trial is necessary to qualify a prior conviction under the exception to Apprendi’s holding. However, “Smalley cites these precedents in large part to distinguish their discussions of the jury trial right from its own conclusions.”

True, the Smalley court recognizes that the “fundamental triumvirate” of notice, proof beyond a reasonable doubt, and a jury are sufficient protections to satisfy Apprendi’s prior conviction exception. On the other hand, the Eighth Circuit also recognizes that judge-made findings of fact by a preponderance of the evidence are insufficient to trigger that exception. This list of acceptable procedures that trigger the prior conviction exception is not exhaustive, though. Rather, a spectrum of possibilities exists between acceptable and unacceptable sentencing alternatives. Juvenile adjudications fall somewhere in between those two examples, so using them to increase statutory maximums is not per se violative of Apprendi. “We think that while the Court established what constitutes sufficient procedural safeguards . . . and what does not . . . the Court did not take a position on possibilities that lie in between these two poles.” Of course, implicit in the Eighth Circuit’s argument is the premise that juvenile adjudications are not prior convictions. Therefore, while the Supreme Court held that notice, proof beyond a reasonable doubt, and a jury are required for prior convictions to qualify under Apprendi’s exception, the Supreme Court never held that those same safeguards are required for juvenile adjudications, too. In Judge Brunetti’s

49. See Tighe, 266 F.3d at 1200 (Brunetti, J., dissenting).
50. Smalley, 294 F.3d at 1032 (quoting Apprendi, 530 U.S. at 488) (emphasis added); see also Tighe, 266 F.3d at 1200 (quoting Jones v. United States, 526 U.S. 227, 249 (1999)) (“One basis for that constitutional distinctiveness is not hard to see: unlike virtually any other consideration used to enlarge the possible penalty for an offense . . . a prior conviction must itself have been established through procedures satisfying the fair notice, reasonable doubt and jury trial guarantees.”) (emphasis added) (brackets omitted) (omission in original).
52. Smalley, 294 F.3d at 1032; see also supra note 33 and accompanying text.
53. Smalley, 294 F.3d at 1032.
54. Id.
55. Id.
56. See id. at 1032-33.
opinion, making such an assumption would be a "quantum leap." The language from *Jones* regarding criminal proceedings cannot be "plucked" to categorically create three due process requirements for all judicial proceedings. After all, "*Apprendi* does not even refer to this language in *Jones*." Moreover, the Ninth Circuit's conclusion seems to controvert over thirty years of Supreme Court doctrine beginning with *McKeiver v. Pennsylvania*. Even though a plurality opinion, five justices from the *McKeiver* Court in no uncertain terms held that juveniles do not have a constitutional due process right to trial by jury. The dissenters failed to muster enough votes to require a right to trial by jury for juveniles in 1971, and *McKeiver*’s plurality opinion has controlled juvenile jurisprudence ever since. Thus, according to the Eighth Circuit's logic, if a judicial proceeding is reliable enough to not offend an individual's due process rights as a juvenile, that same proceeding should also be reliable enough to not offend that same individual's due process rights as an adult.

### C. Other Jurisdictions

Only one other federal circuit court has addressed the issue of whether juvenile adjudications may be used as prior convictions to raise the statutory maximum or minimum sentence facing an offender. In *United States v. Jones*, the Third Circuit agreed with the *Smalley* court that "[a] prior nonjury

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57. United States v. Tighe, 266 F.3d 1187, 1200 (9th Cir. 2001) (Brunetti, J., dissenting).
58. Id.
59. See Recent Cases, supra note 51, at 707 (referring to the Ninth Circuit's approach to due process as "categorical").
60. *Smalley*, 294 F.3d at 1032.
62. Id. at 545 (Burger, C.J., Stewart, White, & Blackmun, JJ.), 553 (Harlan, J., concurring). Justice Harlan concurred with the plurality under the premise that neither juveniles nor adults are guaranteed jury trials, because the plurality failed to demonstrate an individual's Sixth Amendment right to trial by jury should apply to the states, as incorporated by the Fourteenth Amendment. *Id.* at 553 (Harlan, J., concurring) (discussing Duncan v. Louisiana, 391 U.S. 145 (1968)).
63. See *id.* at 553-54 (Brennan, J., concurring in part, dissenting in part), 557 (Black, Douglas, & Marshall, JJ., dissenting). Justice Brennan noted that the Constitution guarantees the right to a public trial. *Id.* at 556 (Brennan, J., concurring in part, dissenting in part). While Justice Brennan agreed that *McKeiver*’s due process rights were adequately safeguarded by Pennsylvania law, Brennan reached a different conclusion regarding *McKeiver*’s companion case from North Carolina, *In re Burrus*. *Id.* at 553-57. Because North Carolina law allowed for the exclusion of the general public from juvenile trials, a juvenile’s due process right to a fair trial could not be guaranteed under this regime. *Id.* at 556-57.
64. See *Smalley*, 294 F.3d at 1033; see also United States v. Jones, 332 F.3d 688, 696 (3d Cir. 2003).
juvenile adjudication that was afforded all constitutionally-required procedural safeguards can properly be characterized as a prior conviction for Apprendi purposes.\footnote{66} Although the Jones decision throws the balance of power in the federal circuit courts of appeals in favor of the Eighth Circuit's school of thought, state court decisions may ultimately play a key role in deciding which side is correct.

California's two and three strikes laws have provided an abundance of opportunities to visit this issue.\footnote{67} The California Court of Appeals actually decided the issue on state grounds during a case occurring after Almendarez-Torres, but before Apprendi—People v. Fowler.\footnote{68} In numerous state cases following both Apprendi and Tighe, the California appellate courts have alluded to the continued vitality of their decision in Fowler.\footnote{69} The issue has also surfaced in at least one other Ninth Circuit decision not arising out of California.\footnote{70}

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\item[66] Id. at 696.
\item[68] 84 Cal. Rptr. 2d 874, 877-78 (Cal. Ct. App. 1999).
\item[70] United States v. Summers, 268 F.3d 683, 688-89 (9th Cir. 2001) (affirming the decision of
Kansas is another state experiencing a boom in litigation over the treatment of juvenile adjudications in the context of Apprendi. In a span of less than five months, the Court of Appeals of Kansas decided no less than three cases holding that, even considering Apprendi, juvenile adjudications may be used to increase an offender's sentence beyond the statutory maximum. The fate of these cases finally culminated in State v. Hitt when the Supreme Court of Kansas chose to reject the Ninth Circuit's reasoning in Tighe, three months before the Eighth Circuit delivered its opinion in Smalley. Revisiting the same issue two months later, the Supreme Court of Kansas reiterated its approval of Hitt in State v. Jones.

Unfortunately, the issue simply does not seem to have arisen in many other courts yet. While this area of the law has emerged very rapidly, it is still emerging. The Supreme Court decided Apprendi v. New Jersey only about four years ago. The amount of time it takes to file an appeal, compile the lower court record, write the briefs, prepare for oral argument, write a decision, and wait for publication of that decision could alone take up to three years. Moreover, because criminal appeals flood virtually every appellate docket in this nation, courts have to be very selective about which cases they decide to hear. Adding the Supreme Court's recent clarification of Apprendi in Ring and the confusion created by the Court's admitted discomfort over holdings from the past several Terms, it is no wonder many courts readily

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74. 47 P.3d 783 (Kan. 2002).
75. See supra note 2 and accompanying text.
76. 530 U.S. 466 (2000).
77. See, e.g., Honorable Carl West Anderson, Are the American Bar Association's Time Standards Relevant for California Courts of Appeal?, 27 U.S.F. L. REV. 301, 329 (1993) (noting that the average briefing period in California criminal cases is almost a year-and-a-half); see also Preface to Expedited Appeals in Selected State Appellate Courts, 4 J. APP. PRAC. & PROCESS 191, 191 (2002) (noting that many state and federal appellate courts are still experiencing "gridlock").
78. Michael Pinard, Limitations on Judicial Activism in Criminal Trials, 33 CONN. L. REV. 243, 280 (2000) (terming the amount of pressure that criminal cases apply to judicial dockets as "overwhelming").
80. Apprendi, 530 U.S. at 489-90 ("[I]t is arguable that Almendarez-Torres was incorrectly decided . . . ."); see also Greenhouse, supra note 4, at A23 (noting the Court taking the "somewhat
and unapologetically balk at the opportunity to address this issue.  

III. ANALYSIS

A. Distinguishing Juvenile Adjudications from Criminal Convictions

1. Historical Treatment and Background

In order to properly put the issues surrounding a court’s use of juvenile adjudications to increase a sentence into context, a brief summary of juvenile jurisprudence is necessary. Prior to the twentieth century, children were either tried as adults or not tried at all for alleged criminal offenses. Finding merit in at least some form of discipline for these matters, but not wishing to expose children to the full-blown wrath of the criminal justice process, reformers in Illinois responded by creating the first juvenile justice system in 1899. This new system was premised on the idea that because of their young age, children were either less culpable for their wayward actions or not culpable at all. With the proper resources and guidance, progressives believed children were still young and impressionable enough to reform before they turned toward a life of crime. However, to accomplish this end, the state, as parens patriae, needed to commence a civil action against the juvenile’s parents to gain superior custody rights. Because it was a civil proceeding, custody, not liberty, was at issue. Children could not be found guilty or innocent; they could only be found delinquent. The main function of the proceeding was not to frame the state and the child as adversaries, but “to feel that [the child] is the object of [the state’s] care and solicitude.”

unusual” course of action of requesting the federal government’s view on whether Apprendi was correctly decided).

81. See, e.g., United States v. Richardson, 313 F.3d 121, 125 (3d Cir. 2002) (unpublished table decision) (failing to reach the question of “whether a juvenile adjudication can be characterized as a ‘prior conviction’ under Apprendi”); United States v. Little, No. 02-4060, 2002 U.S. App. LEXIS 16614, at *2-3 (10th Cir. Aug. 16, 2002) (unpublished table decision) (finding that the petitioner failed to properly raise the issue at the district court level, thus barring consideration of his argument at the appellate level). But see United States v. Jones, 332 F.3d 688, 694 (eventually “answer[ing] this specific question”).


83. See id. at 16-17.

84. Id. at 17. The state assumes the role of parens patriae when it acts “in its capacity as provider of protection to those unable to care for themselves.” BLACK’S LAW DICTIONARY 1137 (7th ed. 1999).

85. Id.

86. See id. at 15, 17.

Finally, the purpose of sanctions would be for therapeutic and rehabilitative purposes, not for retribution or incapacitation. 88

However, the juvenile justice system never quite accomplished the laudable goals its founders envisioned. 89 First, the juvenile system never received the long-term commitment of resources necessary to succeed. 90 At the time the Supreme Court decided In re Gault, about one-third of judges did not have a single probation or social worker on their staff, and between eighty and ninety percent did not have a psychologist. 91 Second, according to the Court, “there have been abuses” of children’s rights potentially to the point of “constitutional dimension,” despite the allegedly benevolent intentions of judges, juvenile officers, and law enforcement officers. 92 Finally, the juvenile justice system’s idyllic goals were simply outrunning reality. 93 As the Supreme Court grew increasingly more sensitive toward high recidivism rates among juveniles, it finally reached its breaking point. 94 “Under our Constitution, the condition of being a boy does not justify a kangaroo court.” 95 While the Court remained committed to the rehabilitation of this nation’s youth, the Court would not allow itself to become preoccupied with it. 96

After nearly fifty years of silence, the Supreme Court finally spoke out in Haley v. Ohio. 97 John Harvey Haley was a fifteen-year-old boy who was convicted of first-degree murder and sentenced to life. 98 To secure the conviction, the police questioned the boy for five straight hours, coercing him into finally supplying a confession at five a.m. 99 Noting the boy was denied the right to counsel, and thus the ability to make a voluntary and knowledgeable waiver of his constitutional rights, the Court threw out the boy’s confession. 100

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92. McKeiver, 403 U.S. at 547-48; see also Gault, 387 U.S. at 18 (noting that “unbridled discretion . . . is frequently a poor substitute for principle and procedure”).
93. McKeiver, 403 U.S. at 546 n.6.
94. Gault, 387 U.S. at 22.
95. Id. at 28.
96. McKeiver, 403 U.S. at 546 n.6.
97. 332 U.S. 596 (1948).
98. Id. at 597.
99. Id. at 597-98.
100. Id. at 600-01.
We do not think the methods used in obtaining this confession can be squared with that due process of law which the Fourteenth Amendment commands.

The age of petitioner, the hours when he was grilled, the duration of his quizzing, the fact that he had no friend or counsel to advise him, the callous attitude of the police towards his rights combine to convince us that this was a confession wrung from a child by means which the law should not sanction. Neither man nor child can be allowed to stand condemned by methods which flout constitutional requirements of due process of law.101

Following this abrupt and uncertain holding, the Supreme Court refrained from taking another juvenile case for another eighteen years. However, beginning in 1966, the Court embarked upon a nine-year journey that carried juvenile law virtually to the point where it stands today. In Kent v. United States,102 the Court reiterated that juveniles are entitled to some form of due process of law.103 While the Court did not hold that the process due juveniles “must conform with all of the requirements of a criminal trial or even of the usual administrative hearing,” it did “hold that the hearing must measure up to the essentials of due process and fair treatment.”104 Then, in a comparatively rapid series of four cases, the Court granted juveniles the rights to notice, counsel, not incriminate one’s self, confrontation and cross-examination of witnesses,105 a reasonable doubt standard of proof,106 and the protection of the Double Jeopardy Clause.107 The only case to deny juveniles a due process right afforded to adults in criminal trials was McKeiver v. Pennsylvania.108 There, the Supreme Court concluded that “fundamental fairness” does not mandate a juvenile court to provide a right to a trial by jury for the accused during the adjudicative stage.109

101. Id. at 599-601 (emphasis added).
103. Id.
104. Id. at 562.
107. Breed v. Jones, 421 U.S. 519, 531 (1975); see also U.S. CONST. amend. V (“[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb.”).
108. 403 U.S. 528 (1971) (plurality opinion).
109. Id. at 543, 545.
2. A Critical Examination of McKeiver v. Pennsylvania

It is arguable that McKeiver was incorrectly decided. Indeed, one way of looking at the issue "is almost absurdly simple: Duncan held that the right to a jury is part of due process; Gault held that juveniles are entitled to due process; therefore, juveniles are entitled to a jury trial." The Sixth Amendment explicitly lists these "essentials" of due process: a speedy and public trial; an impartial jury; notice of the charge; confrontation and cross-examination of witnesses; and counsel. Similarly, the Court has also held that adult sentence enhancements triggered by prior convictions in violation of a "specific federal right" are invalid. Again, the Constitution specifically enumerates the right to an impartial jury in the Sixth Amendment. Given this background, is the right to trial by jury "a right which is surely one of the fundamental aspects of criminal justice in the English-speaking world," or simply an "[un]necessary component of accurate factfinding" as the McKeiver Court characterizes it? Synthesizing the rationale from the Kent and Burgett holdings with the Constitution's perfect enunciation of the right to trial by jury, extending juveniles the right to trial by jury seems inescapable.

However, the Court supported its conclusion in McKeiver that juries are not an essential component of due process by noting that Williams v. Florida found "no particular magic in a 12-man jury for a criminal case." True, the Court in Williams found no "magic" in a twelve-man jury, but the Court did find magic in a jury. While "jury concepts [within] themselves are not inflexible," granting the accused a jury in the first place is. The

110. See generally Kropf, supra note 32.
111. Id. at 2178 (citations omitted).
113. See supra note 12 and accompanying text.
116. Id. at 543.
118. McKeiver, 403 U.S. at 543 (citing Williams, 399 U.S. 78).
119. See Williams, 399 U.S. at 91 (noting the Constitution's inclusion of the word "jury").
120. McKeiver, 403 U.S. at 543.
121. Williams, 399 U.S. at 100 (describing the purpose of the jury trial).
The issue in *Williams* was not whether the accused was entitled to a jury; the issue was whether the accused was entitled to a twelve-man jury. The Supreme Court’s use of the *Williams* holding as support for its plurality holding in *McKeiver* is a strain.

Regardless, the *McKeiver* opinion is muddled with inconsistencies, most of them internal. To further justify stripping juveniles of the right to a jury trial, the Court likened juvenile proceedings to equity, worker’s compensation, probate, deportation, and military trials. This line of reasoning is patently erroneous. In every case, the only difference between qualifying for a juvenile court adjudication and an adult criminal proceeding is age. A single day might be the sum difference between how and where an offender will be tried for his or her offense. The Court itself recognized the continuing convergence between the two systems. To acknowledge these similarities with the adult system but to continue to liken juvenile adjudications to deportation and military proceedings simply makes no sense; it seems particularly arbitrary where a change in systems ultimately depends on a single day in time.

Next, the *McKeiver* Court devoted a significant portion of its plurality opinion to discussing the shortcomings of juvenile justice judges. Justice Blackmun complained that “too often the juvenile court judge falls far short of that stalwart, protective, and communicating figure the system envisaged.” Half of these judges do not have undergraduate degrees; twenty percent do not have any college education; and another twenty percent are not members of the bar. If the juvenile justice system was so littered with incompetent judges, why then was the Court so eager to have these judges retain more responsibility? This lack of faith in juvenile judges’ abilities to effectively operate should have been the only reason the Court needed to relieve them of their fact-finding duties.

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122. *Id.* at 86.
123. *McKeiver*, 403 U.S. at 543.
124. *Cf. In re Gault*, 387 U.S. 1, 29 (1967) (noting the defendant’s rights and the possible penalties he faced would have been different if he was eighteen-years-old).
125. *See McKeiver*, 403 U.S. at 544 n.5; *see also* *Breed v. Jones* 421 U.S. 519, 530 (1975) (“Thus, in terms of potential consequences, there is little to distinguish an adjudicatory hearing such as was held in this case from a traditional criminal prosecution.”).
127. *Id.*
128. *Id.* at 544 n.4.
129. While the overall education of juvenile court judges has almost certainly improved during the thirty-three years since *McKeiver*, that increase does not necessarily help resolve the problems observed by Justice Blackmun in *McKeiver*. Education is not assurance of ability to craft a unique solution fitting the best interests of a juvenile; nor can education always ensure a fair and impartial
Coupling these internal inconsistencies with the fact that the Court’s opinion in *McKeiver* was joined only by a plurality of justices would probably be enough to question the decision’s vitality today. Developments in the juvenile justice system and Supreme Court caselaw since *McKeiver* strengthen this idea. The great majority of courts around the nation are moving toward treatment of youthful offenders as adults, and there do not appear to be any exceptions for rare cases. United States circuit courts have summarily rejected young juveniles’ proportionality arguments attempting to avoid life sentences imposed by the adult criminal system while the offender was still of juvenile age. Moreover, the Court has also begun to cite with approval scientific research recognizing the importance and fairness resulting from larger groups of factfinders. “Thus it appears that the *McKeiver* plurality’s assertion that the use of a jury ‘would not strengthen greatly, if at all, the factfinding function’—a claim Judge Arnold invokes to justify the *Smalley* result—is belied by empirical evidence the Court itself has accepted.” Were the Supreme Court to revisit *McKeiver*’s holding today, the result might very well be different.

3. The Future of the Juvenile Justice System

“Juvenile justice policies are cyclical in nature . . .” While the media might paint a perception that juvenile crime is running rampant, it is not. Juveniles committing violent crimes may “capture headlines,” but most juvenile court cases remain nonviolent offenses, usually involving property. Why then, do recent policies seem to be “shaped directly by changing social responses to juvenile crimes and rhetoric about juvenile delinquency, rather

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footnotes:


131. The Seventh, Ninth, and Tenth Circuits have rejected proportionality arguments from juveniles in *Rice v. Cooper*, 148 F.3d 747 (7th Cir. 1998) (upholding sentence of life without possibility for parole for sixteen-year-old mentally retarded child), *Harris v. Wright*, 93 F.3d 581 (9th Cir. 1996) (upholding sentence without possibility for parole for fifteen-year-old), and *Hawkins v. Hargett*, 200 F.3d 1279 (10th Cir. 1999) (upholding one hundred-year sentence for thirteen-year-old because he still had the possibility of parole). See Dupont, *supra* note 88, at 265-67. The Fourth, Sixth, and Eighth Circuits foreclose proportionality review to all offenders, regardless of age. *Id.* at 267 n.117 (citing United States v. Lockhart, 58 F.3d 86 (4th Cir. 1995); United States v. Organek, 65 F.3d 60 (6th Cir. 1995); United States v. Meirovitz, 918 F.2d 1376 (8th Cir. 1990)).


133. *Id.* at 710 (quoting *McKeiver*, 403 U.S. at 547, and citing United States v. *Smalley*, 294 F.3d 1030, 1033 (8th Cir. 2002)).


135. *Id.*

136. *Id.*
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than by actual increases in criminality?"  Legislatures are becoming increasingly and unnecessarily reactive. Instead of reacting to sensational stories by the fickle media, policymakers should turn their attention to the statistics. In at least two comprehensive studies, results have shown that recidivism among juveniles waived into adult court actually increases after a young offender's exposure to the adult criminal system.

However, despite its technical shortcomings, the Supreme Court correctly decided *McKeiver v. Pennsylvania*. Not even considering the cost to implement this system, the infusion of a twelve-person jury into juvenile court would simply be too much of an intrusion upon the paternal-like (or maternal-like) proceedings that the juvenile system strives to assume. Simply reducing the number of jurors to six does not solve the problem of this intrusion, either. An empanelled jury of twelve adults does not represent a group of the juvenile’s peers whom he or she trusts. Rather, the jury would probably appear to the juvenile as twelve parents or school principals seeking to punish him or her more. Furthermore, while the six-person jury may reduce the delay and costs associated with extending the right of trial by jury to juveniles, the addition of a jury in general plainly adds to the clamor and formality of the proceedings. Moreover, the addition of six staring adults would only enhance a juvenile’s already inherent tendency to not tell the truth.

A more constructive solution might be for juvenile courts to retain jurisdiction over all young offenders and impose blended sentences. This way the court could impose both a juvenile and an adult sentence, but stay the adult sentence indefinitely unless the offender violates a condition of the

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138. *See id.* at 269.


140. *See Kropf, supra* note 32, at 2177 (suggesting six-person juries as a potential solution for extending the right to trial by jury in all juvenile cases); *see also Williams v. Florida*, 399 U.S. 78, 86 (1970) (allowing a jury with as few as six people).

141. *McKeiver*, 403 U.S. at 550. While Kropf suggests the six-person jury as a potential solution to the delay and cost inherent in extending this right to all juveniles, she simultaneously neglects to consider the other two major concerns the *McKeiver* Court had with the adversary system—formality and clamor in the courtroom. *See Kropf, supra* note 32, at 2176-77.


143. *Dupont, supra* note 88, at 270.
juvenile disposition. At least two commentators have even suggested an intermediary court between the adult and juvenile systems for more serious juvenile offenders.

The Supreme Court justified its holding in *McKeiver* inelegantly but satisfactorily. However, even if *McKeiver* remains binding precedent, a narrow interpretation of “prior conviction” under the *Apprendi* holding is still possible. Therefore, this Comment attempts to resolve the issue of increasing an offender’s sentence exposure with a juvenile adjudication in a manner consistent with the Supreme Court’s holding in *McKeiver v. Pennsylvania*.

**B. Apprendi v. New Jersey, its Predecessors, and its Progeny**

It would be very convenient to simply transfer the rationale behind using juvenile adjudications to increase penalties within a prescribed statutory range to the issue of using those same adjudications to increase the penalty exposure facing an offender. Indeed, this is the very approach the Eighth Circuit employed in *Smalley* to support its decision. However, much like the constitutionality of basing an enhanced sentence on racial bias was not relevant to the Court’s analysis in *Apprendi*, the substantive constitutionality of using juvenile adjudications is “not relevant to the narrow issue that we must resolve.” Because the Supreme Court took great pains to define what *Apprendi* was not about, inadvertent deviations such as the one in *Smalley* make it even more important to refocus on the singular issue presented by the *Smalley* and *Tighe* decisions: May a court use a prior juvenile adjudication—a “fact” that has never been proven to a jury beyond a reasonable doubt—to change the sentence exposure facing a defendant? Inter alia, the plain language of Supreme Court’s holding in *Apprendi* compels one to answer this question “no.”

The Eighth Circuit’s analysis in *Smalley* is unconvincing for several reasons. The first is that the *Smalley* court apparently purports to be able to step into the Supreme Court Justices’ shoes and read their minds.

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144. *See id.*
146. “This conclusion finds at least some support in those cases, in both our circuit and the Ninth Circuit, that hold that juvenile sentences may be used to enhance a defendant's sentence within a prescribed statutory range.” United States v. Smalley, 294 F.3d 1030, 1033 (8th Cir. 2002) (citing United States v. Early, 77 F.3d 242, 244-45 (8th Cir. 1996) (per curium); United States v. Williams, 891 F.2d 212, 214-15 (9th Cir. 1989)).
148. *Id.* at 474.
149. *Id.* at 474-76.
We do not think, moreover, that *Jones* meant to define the term “prior conviction” for constitutional purposes as a conviction “that has been established through procedures satisfying fair notice, reasonable doubt and jury trial guarantees.” We read *Jones* instead to mean that if prior convictions result from proceedings outfitted with these safeguards, then they can constitutionally be used to increase the penalty for a crime without those convictions being submitted and proved to a jury.\(^{150}\)

The problem with the Eighth Circuit’s claim is that *Jones*’s language completely refutes this theory. “[A] prior conviction must itself have been established through procedures satisfying the fair notice, reasonable doubt, and jury trial guarantees.”\(^{151}\) The Court’s language is not permissive; it is mandatory. Combining this mandate with the fact the Court used the word “conviction”—the very same word the Court used once during its holding in *Jones*\(^{152}\) and twice in *Apprendi*\(^{153}\)—proves the Court did not make an unintentional error. Moreover, by attempting to divine what it thought the Supreme Court meant in *Jones*, the Eighth Circuit proceeded to ignore what the Supreme Court actually did say in *Apprendi*.

Before examining the recent caselaw that preceded its holding in *Apprendi*, the Supreme Court recited a litany of over eight pages explaining the historical importance of each one of a criminal defendant’s due process rights.\(^{154}\) One of those rights the Court specifically mentioned was the right to trial by jury. For instance, the Court noted that the Sixth and Fourteenth Amendments “indisputably entitle a criminal defendant to ‘a jury determination that he is guilty of every element of the crime with which he is charged, beyond a reasonable doubt.”\(^{155}\) Also, “trial by jury has been understood to require that ‘the truth of every accusation . . . should afterwards be confirmed by the unanimous suffrage of twelve of the defendant’s equals

\(^{150}\) *Smalley*, 294 F.3d at 1032 (quoting *Jones* v. United States, 526 U.S. 227, 249 (1999)). Perhaps demonstrable of the Eighth Circuit’s injudicious consideration of the Supreme Court’s holding in *Jones*, the *Smalley* opinion incorrectly quotes this particular passage. The language in *Jones* the Eighth Circuit refers to actually reads: “a prior conviction must itself have been established through procedures satisfying the fair notice, reasonable doubt, and jury trial guarantees.” 526 U.S. at 249 (emphasis added).

\(^{151}\) *Jones*, 526 U.S. at 249 (emphasis added).

\(^{152}\) *Id.* at 243 n.6.

\(^{153}\) *Apprendi*, 530 U.S. at 476 (quoting *Jones*, 526 U.S. at 243 n.6), 490.

\(^{154}\) *Id.* at 476-84.

\(^{155}\) *Id.* at 477 (quoting United States v. Gaudin, 515 U.S. 506, 510 (1995) (emphasis added) (brackets and remaining citations omitted)).
and neighbours . . ."156 This right is as "[e]qually well founded" as the right to proof beyond a reasonable doubt.157 Similar language resurfaces in Jones no less than seven times.158 These explicit and repeated references to a criminal defendant’s right to a trial by jury are not a "narrow parsing of words" as the Smalley court would like to characterize them,159 nor are these accounts mere surplusage that should be discounted or disregarded. They are clear directives from the current Supreme Court of the United States voicing concern over a jury’s correspondingly shrinking role,160 not vague abstractions from the Court’s potentially obsolete decision thirty-three years ago in McKeiver v. Pennsylvania.

Advocates of the Eighth Circuit’s broad interpretation of “conviction” support the argument by pointing to the fact that the Supreme Court seemed to use the concepts of recidivism and prior convictions interchangeably throughout its opinion in Almendarez-Torres.161 After all, Apprendi’s exception for prior convictions did first originate from that case.162 In fact, the Supreme Court later clarified in Jones that Almendarez-Torres’s “precise holding” was “that recidivism increasing the maximum penalty need not be so charged.”163

However, since Almendarez-Torres, the Court has expressed serious reservations with its holding in that case.164 “[I]t is arguable that Almendarez-Torres was incorrectly decided . . . .”165 This concern is well founded. First, the Court found that not only was the government able to use Almendarez-

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156. Id. (brackets and citations omitted) (emphasis partially omitted).
157. Id. at 478.
158. See, e.g., Jones, 526 U.S. at 232 (All elements constituting or changing an offense “must be charged in the indictment, submitted to a jury, and proven by the Government beyond a reasonable doubt.”); id. at 240 (citing cases “dealing with due process and the guarantee of trial by jury”) (emphasis added); id. at 242 (recognizing the question before the Court implicates “both the Due Process Clause of the Fourteenth Amendment and the jury guarantee of the Sixth”) (emphasis added); id. at 243 n.6 (“The constitutional safeguards that figure in our analysis . . . . are the safeguards going to the formality of the notice, the identity of the factfinder, and the burden of proof.”); id. at 244 (recognizing that “the tension between jury powers and powers exclusively judicial would likely have been very much to the fore in the Framers’ conception of the jury right”); id. at 246 (“[T]rial by jury [is] ‘the grand bulwark’ of English liberties . . . .”) (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 342 (1769)); id. at 249 (“[A] prior conviction must itself have been established through procedures satisfying the fair notice, reasonable doubt, and jury trial guarantees.”).
159. United States v. Smalley, 294 F.3d 1030, 1033 (8th Cir. 2002).
160. Jones, 526 U.S. at 243-44.
162. United States v. Tighe, 266 F.3d 1187, 1193 (9th Cir. 2001).
163. 526 U.S. at 248.
164. See supra notes 38-40 and accompanying text.
Torres’ prior conviction against him because of “the certainty that procedural safeguards attached to any ‘fact’ of prior conviction,” but also because of “the reality that Almendarez-Torres did not challenge the accuracy of that ‘fact’ in his case.”\(^\text{166}\) Therefore, the Smalley court’s characterization and assessment of Apprendi are not completely accurate.\(^\text{167}\)

Second, even considering the continuously shrinking gap between their meanings,\(^\text{168}\) a “conviction” and an “adjudication” are indisputably two different concepts. Even California and Kansas, who have repeatedly held that juvenile adjudications may be used to increase an offender’s sentence beyond its statutory bounds,\(^\text{169}\) recognize the concrete distinction between the two terms.\(^\text{170}\) Accepting the Eighth Circuit’s interpretation has both the undesirable and uncertain effects of allowing due process to slide down the proverbial slippery slope.\(^\text{171}\) If juvenile adjudications have “safeguards [that] are more than sufficient to ensure the reliability that Apprendi requires,”\(^\text{172}\) what about municipal violations or other indicators of recidivism? Recidivism has a potentially expansive meaning. One way of defining recidivism is: “A tendency to relapse into a habit of criminal activity or behavior.”\(^\text{173}\) As one commentator notes, this definition could range from characteristics such as incidence of prior arrest to personal or socioeconomic background data.\(^\text{174}\) Surely the Supreme Court did not intend to expose offenders to greater sentences simply because of where a person decides to

\(^{166}\) Id. at 488. Almendarez-Torres “admitted [to] the three earlier convictions.” Id.

\(^{167}\) See United States v. Smalley, 294 F.3d 1030, 1032 (8th Cir. 2002) (considering only the Supreme Court’s reference to “the ‘certainty that procedural safeguards’ such as trial by jury and proof beyond a reasonable doubt, undergird [prior convictions]” and quoting Apprendi, 530 U.S. at 488).

\(^{168}\) See sources cited infra note 180.

\(^{169}\) See sources cited supra notes 68-69, 71, 74.

\(^{170}\) See, e.g., People v. Fowler, 84 Cal. Rptr. 2d 874, 876 (Cal. Ct. App. 1999) (“[T]here is a well-understood distinction between a juvenile wardship adjudication on the one hand, and adult criminal proceedings leading to a ‘felony conviction.’” (quoting People v. Lucky, 753 P.2d 1052, 1075 (Cal. 1988))); State v. Spates, 36 P.3d 839, 843 (Kan. Ct. App. 2001) (“It is well established that a juvenile adjudication is not a ‘criminal conviction.’” (quoting State v. LaMunyon, 911 P.2d 151, 155 (Kan. 1996))); Amanda K. Packel, Comment, Juvenile Justice and the Punishment of Recidivists Under California’s Three Strikes Law, 90 CAL. L. REV. 1157, 1164-65 (2002) (quoting extensively from In re Myresheia, 72 Cal. Rptr. 2d 65, 68-69 (Cal. Ct. App. 1998), and noting that “despite acknowledging punitive goals, the jurisprudence of juvenile justice in California has not abandoned the notion that juvenile offenders are distinguishable from adult criminals”).


\(^{172}\) Smalley, 294 F.3d at 1033.

\(^{173}\) BLACK’S LAW DICTIONARY 1276 (7th ed. 1999).

live or the amount of money he or she earns. Such an interpretation plainly violates the basic tenets of the Equal Protection Clause.\footnote{175} Furthermore, this interpretation is consonant with \textit{Apprendi}'s mandate that the exception remain a narrow one. \textit{Almendarez-Torres} was "a narrow exception to the general rule we recalled at the outset. Given its unique facts, it surely does not warrant rejection of the otherwise uniform course of decision during the entire history of our jurisprudence."\footnote{176} "[A]s we made plain in \textit{Jones} last Term, \textit{Almendarez-Torres v. United States} represents at best an exceptional departure from the historic practice that we have described."\footnote{177}

Supreme Court caselaw semantics aside, those adhering to a broad definition of conviction fail for yet another reason. Specifically, the Third Circuit and Supreme Court of Kansas reasoned that because an offender received all the process due him or her as a juvenile, that same offender must have also received all the process due him or her as an adult.\footnote{178} However, this type of reasoning completely begs the real question at issue. The \textit{Apprendi} Court was concerned with what process \textit{is} due adults, not what process \textit{was} due juveniles. The mere fact an adjudication was not proven to a jury beyond a reasonable doubt when the offender was a juvenile, does not now give courts and the government an excuse to strip an offender of his constitutional rights as an adult. To take away an adult's guaranteed due process rights simply because of the dubious "fact" of a juvenile adjudication seems to constitute an illegal form of quasi-collateral estoppel. Ergo, a juvenile adjudication cannot somehow transform post hoc into a criminal conviction as the Third Circuit seems to suggest.\footnote{179} Moreover, accepting that rationale produces an anomalous and unfair result, as illustrated by the following example.

Despite the imminent convergence of the juvenile and adult criminal

\footnotesize{\begin{itemize}
\item \footnote{175} See, e.g., \textit{Holden v. Hardy}, 169 U.S. 366, 382-83 (1898) (finding that the Equal Protection Clause's protection extends beyond securing the rights of the recently emancipated colored race to "alleged discriminations in matters entirely outside of the political relations of the parties aggrieved"); see also \textit{Griffin v. Illinois}, 351 U.S. 12, 17-18 (1956) (finding that a defendant's ability to pay court costs in a criminal trial is not a rational reason to deprive a defendant of his or her constitutional right to a fair trial).
\item \footnote{176} \textit{Apprendi v. New Jersey}, 530 U.S. 466, 490 (2000).
\item \footnote{177} \textit{Id.} at 487 (citation omitted).
\item \footnote{179} \textit{Jones}, 332 F.3d at 696 ("It follows... [that] the adjudication \textit{should be counted as a conviction.}") (emphasis added).
\end{itemize}}
justice systems,\textsuperscript{180} it seems beyond dispute that, ideally, the purpose of the juvenile justice system remains to rehabilitate young offenders before they become hardened by the more rigid standards of the adult criminal system.\textsuperscript{181} In order to accomplish this goal, treatment and punishment of young offenders in the juvenile system is indisputably more lenient than that of adult systems.\textsuperscript{182} Therefore, from a young offender’s perspective, it would be far more advantageous to remain in the juvenile justice system than to be removed to the adult system. However, the young offender is not guaranteed the right to trial by jury as a juvenile.\textsuperscript{183} Knowing that some day a juvenile adjudication could be used to double his or her sentence without a jury determination, would a young offender be tempted to opt into an adult court instead? The answer to that question is almost certainly “no.” Nonetheless, a less serious juvenile offender should not suffer the same penalty as an adult when the more serious young criminal offender has not been afforded the same procedural protections as the adult.\textsuperscript{184} The opposite result—the result compelled by a broad definition of “prior conviction”—subjects the child to “the worst of both worlds.”\textsuperscript{185}

C. Cost, Other Practical Problems, and Public Policy

Admittedly, a narrow interpretation of the Supreme Court’s ruling in \textit{Apprendi} raises some significant practical issues. Scores of practitioners and academics debated the wisdom of the \textit{Apprendi} holding simply because of the potentially dramatic effect on convicts’ sentences if the holding was applied retroactively. United States federal courts have gradually eased those concerns by systematically and almost unanimously agreeing that \textit{Apprendi}’s

\begin{itemize}
  \item \textsuperscript{180} Dupont, \textit{supra} note 88, at 259; Recent Cases, \textit{supra} note 51, at 711.
  \item \textsuperscript{181} \textit{But see} Kropf, \textit{supra} note 32, at 2174 (noting that the stated goals of only two state legislatures are solely to meet the traditional juvenile justice objectives of child welfare and rehabilitation, whereas two states actually state a goal to punish juveniles, forty-three seek a compromise between punishment and rehabilitation, and four have no stated goal at all).
  \item \textsuperscript{182} See, \textit{e.g.}, Deborah L. Mills, Note, United States v. Johnson: Acknowledging the Shift in the Juvenile Court System From Rehabilitation to Punishment, 45 DEPAUL L. REV. 903, 909 (1996) (noting that Progressives started the juvenile justice system because “they were ‘appalled’ by the idea that children might be given harsh penalties or subjected to the brutal procedures of the adult court system.”) (quoting \textit{In re Gault}, 387 U.S. 1, 15 (1967)).
  \item \textsuperscript{183} McKeiver v. Pennsylvania, 403 U.S. 528 (1971) (plurality opinion).
  \item \textsuperscript{184} \textit{But see} Dupont, \textit{supra} note 88, at 281 (quoting Julian V. Roberts, \textit{The Role of Criminal Record in the Sentencing Process}, 22 CRIME & JUST. 303, 327 (1997) (noting that some scholars feel the result is an unfair “double discount” when an adult offender receives both a break during the previous juvenile adjudication and again as an adult when the weight of the juvenile proceeding is diminished).
  \item \textsuperscript{185} Kent v. United States, 383 U.S. 541, 556 (1966).
\end{itemize}
holding does not apply retroactively.\textsuperscript{186} However, \textit{Apprendi}'s precise holding announced a broad, new constitutional rule.\textsuperscript{187} That rule is not an issue for the purposes of this discussion; rather, an \textit{interpretation} of that rule is. Moreover, retroactivity also applies when the Court creates “a fundamental rule that ensures accuracy in the outcome of the trial”,\textsuperscript{188} trial by jury is such a fundamental rule.\textsuperscript{189} For these two reasons it is possible that a decision interpreting the Supreme Court’s holding in \textit{Apprendi} could apply retroactively.

Regardless, any modification of \textit{Apprendi}'s holding would apply prospectively to those criminals currently in the sentencing “pipeline.”\textsuperscript{190} As the Supreme Court of Kansas noted in \textit{State v. Hitt}, “[a] decision to exclude nonjury juvenile adjudications from the criminal history score, even limited to a prospective application, would have an unprecedented effect on the sentences of an untold number of criminal defendants.”\textsuperscript{191} However, considering the nature of the rights at stake in this issue, the possible administrative difficulties seem to be more of an annoyance rather than an unbearable burden upon the judicial system. Making a dramatic change in constitutional jurisprudence has not deterred the Supreme Court from announcing new rules before;\textsuperscript{192} it would not for the purposes of this analysis, either.

A more important difficulty with a narrow interpretation of \textit{Apprendi}'s holding is the Hobson’s dilemma facing a defendant if he or she seeks to attack the validity of a prior juvenile adjudication. Because this “element” would need to be proven to a jury beyond a reasonable doubt, the offender could attack the adjudication, but would run the risk of “parading” it before the jury while simultaneously suffering substantial prejudice.\textsuperscript{193} The alternative decision, simply accepting the validity of the prior adjudication, is

\begin{itemize}
  \item \textsuperscript{186} \textit{See} Standen, \textit{supra} note 174, at 792 n.90 (citing United States v. Sanders, 247 F.3d 139 (4th Cir. 2001), Dukes v. United States, 255 F.3d 912 (8th Cir. 2001), Jones v. Smith, 231 F.3d 1227 (9th Cir. 2000)); Owens v. United States, 236 F. Supp. 2d 122 (D. Mass. 2002); Cf. Kyron Huigens, \textit{Solving the Apprendi Puzzle}, 90 GEO. L.J. 387, 456-59 (2002) (urging a non-retroactive application of \textit{Apprendi}'s holding, but also “a sharp departure from a consensus view”).
  \item \textsuperscript{187} \textit{See} Huigens, \textit{supra} note 186, at 456 (impliedly referring to \textit{Apprendi} as “a newly created or newly adopted rule of constitutional law”).
  \item \textsuperscript{188} \textit{Id.} at 457.
  \item \textsuperscript{189} \textit{Id.}
  \item \textsuperscript{190} \textit{State v. Hitt}, 42 P.3d 732, 740 (Kan. 2002) (using the phrase “in the pipeline”).
  \item \textsuperscript{191} \textit{Id.}
  \item \textsuperscript{192} \textit{See, e.g.}, \textit{Apprendi v. New Jersey}, 530 U.S. 466 (2000). The Court adopted its holding in \textit{Apprendi} despite concerns from the dissent that “special postverdict sentencing juries . . . have seemed . . . not worth their administrative costs.” \textit{Id.} at 557 (Breyer, J., dissenting).
  \item \textsuperscript{193} United States v. Tighe, 266 F.3d 1187, 1200-01 (9th Cir. 2001) (Brunetti, J., dissenting).
\end{itemize}
equally unpalatable because of the possible consequences facing the offender after conviction at sentencing. However, critics of this scenario have previously litigated this issue to the Supreme Court to no avail. These concerns can be cured by either stipulation or sentencing juries.

Alternatively, a broad definition of prior “conviction” under the exception to Apprendi’s holding could compel some disturbing results. Under some three strikes regimes, “an offender with two prior juvenile adjudications could face life in prison for a first appearance in adult criminal court.” To follow the Eighth Circuit’s decision in Smalley would allow this result to occur without ever proving to a jury the “fact” a juvenile adjudication occurred, either at the juvenile level or at the adult criminal level. Therefore, an offender could be sentenced to life in prison for a minor property crime after two juvenile contacts that may have never occurred. Even employing the diluted “fundamental fairness” standard used by the Supreme Court in McKeiver v. Pennsylvania, this result reeks of public policy problems that fail to pass the “smell test.”

Regardless, a rule disallowing the use of juvenile adjudications to raise an offender’s penalty beyond the statutory maximum does not exactly tie the hands of judges or prosecutors, either. Apprendi v. New Jersey held only that “[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.” Judges may still freely exercise their discretion within a prescribed statutory range to sentence offenders for longer periods. Also, prosecutors still have the opportunity to use their discretion to charge an offender with additional crimes, if applicable. Even if the prosecutor does not have the option of levying additional charges against the defendant, all hope is not lost. The offender may still receive the exact same sentence he or she would have received if

194. See generally Apprendi, 530 U.S. 466.
196. See supra note 192 and accompanying text; infra note 202 and accompanying text (pointing out that the Supreme Court has rejected any notion that a defendant's constitutional rights may be compromised for the sake of administrative convenience or cost).
198. 403 U.S. 528, 543 (1971) (“All litigants here agree that the applicable due process standard in juvenile proceedings, as developed by Gault and Winship, is fundamental fairness.”).
199. 530 U.S. at 490 (emphasis added).
200. Id. at 481 (“We should be clear that nothing in this history suggests that it is impermissible for judges to exercise discretion . . . in imposing a judgment within the range prescribed by statute.”).
201. But see Standen, supra note 174, at 792 (noting the possibly undesirable effect of further increasing the importance of the prosecutor’s discretion at the expense of judges and the Sentencing Commission itself).
Apprendi's prior conviction exception did not apply to juvenile adjudications. The government is then simply put on notice that it must charge in the indictment and prove to the jury beyond a reasonable doubt the fact of the prior juvenile adjudication.

A rule including juvenile adjudications in the definition of prior conviction would make questions of proof for prosecutors and criminal administration in general more convenient. However, convenience for one party invariably comes at the expense of another.\(^2\) The modest convenience the government gains from a rule including juvenile adjudications in the definition of prior conviction is greatly outweighed by the individual defendant's competing liberty interests at stake during the criminal proceeding. As the Supreme Court has recently acknowledged, "however convenient [new and arbitrary methods of trial] may appear at first . . . let it be again remembered, that delays, and little inconveniences in the forms of justice, are the price that all free nations must pay for their liberty in more substantial matters."\(^203\)

IV. PROPOSAL

Just as defining the opposing viewpoints for this issue was not complicated,\(^204\) the proposal urged in this Comment is not complicated, either. The Supreme Court should simply hold that juvenile adjudications not previously proven to a jury beyond a reasonable doubt may not be used to increase an offender's sentence beyond the statutory maximum or minimum of the crime he or she is charged with. Despite the recent grumblings of some dissatisfied academics and the Court's own discomfort with Apprendi's holding, this proposal provides a constitutionally sound and harmonious resolution consistent with previous Supreme Court precedent. For the reasons stated in Parts II and III of this Comment, this proposal can be reconciled with the Court's previous holdings in both Apprendi v. New Jersey and McKeiver v. Pennsylvania; and this proposal does not ask for an unreasonably exceptional departure from current Supreme Court caselaw.\(^205\)

An alternative holding may be to prohibit the use of any juvenile adjudications to increase an offender's sentence beyond the statutory boundaries for an offense that actually results in imprisonment. This proposal

\(^{202}\) Cf., State v. Johnson, 516 N.W.2d 463, 468 (Wis. Ct. App. 1994) (noting that virtually all evidence offered by one party will come at the expense of the other).


\(^{204}\) See supra notes 13-15 and accompanying text.

\(^{205}\) See Huigens, supra note 186, at 457-59.
rests on the theory that imprisonment may not result from a conviction that
was predicated upon a proceeding flawed with one or more constitutional
infirmities. But even then, an offender's sentence may be subjected to a
harmless error review. However, this review is no worse than the quasi-
harmless error review already employed by courts when they use "good
enough" standards toward the reliability of juvenile adjudications.
Unfortunately, the highly punitive nature of recidivist statutes makes this
caveat not very useful. Although no empirical study has been pursued that
examines the penalties of recidivist statutes, one would think each and every
one of those statutes provides for at least some period of confinement. While
this distinction may prove to be in effect meaningless, it is yet another reason
why a narrow reading of Apprendi is constitutionally sound in theory.

Because "recidivism 'does not relate to the commission of the offense, but
goes to the punishment only and therefore... may be subsequently
decided," the only reasonable alternative seems to be a sentencing jury for
offenders seeking to collaterally attack juvenile adjudications or
constitutionally infirm convictions. Administrative cost could easily be
controlled, for instance, by limiting these challenges to instances where the
defendant must make an initial showing of probability of success on the
merits to warrant a sentencing jury. As far as juvenile convictions are
concerned, this solution will not have as far-reaching effects as some
commentators might suggest. Because some states already afford juveniles
the opportunity to trial by jury, prior juvenile adjudications from those
states would not have to be proven to a jury beyond a reasonable doubt again.

"[I]t would be extraordinary if our Constitution did not require the
procedural regularity and the exercise of care implied in the phrase 'due
process.' At some point, an alleged offender must receive this process; the
government cannot deprive an alleged offender of his or her due process
rights both as a juvenile and again as an adult. Thus, "'[i]f a sentence was
imposed under the guise of therapy, it should remain a therapeutic sentence; it

suspended sentence that could result in actual deprivation of a defendant's liberty without having the
benefit of counsel as a constitutional infirmity).

207. For a general explanation of what constitutional errors may be subjected to harmless error
review, see the Supreme Court's decision in Chapman v. California, 386 U.S. 18, 23-24 (1967).

208. See United States v. Smalley, 294 F.3d 1030, 1033 (8th Cir. 2002) (finding that juvenile
adjudications are so sufficiently "reliable that due process of law is not offended by such an
exemption").

Virginia, 224 U.S. 616, 629 (1912) (emphasis omitted) (omissions in original)).

210. See United States v. Tighe, 266 F.3d 1187, 1194 n.4 (9th Cir. 2001).

should not be allowed to metamorphosize [sic] into a criminal conviction at
the prosecution’s convenience.” However, proponents of a broad reading
of Apprendi v. New Jersey seem to use this same method of altering the issue
when they change their criticisms of and frustration with Apprendi into
justifications for a new holding contrary to the Court’s plain language. By
retaliating against the Apprendi decision, though, courts supporting a broad
meaning of Apprendi’s prior conviction exception attack an innocent
bystander—the juvenile who “receives the worst of both worlds.” These
courts should not be allowed to simply take the convenient way out.

V. CONCLUSION

The issue of increasing the criminal exposure facing an offender is a much
different question than simply moving an offender up within a restricted
sentencing range. While a lowered standard of fact-finding may have
satisfied a child’s expectations of due process at the juvenile adjudication
stage because he had no rights at all, that young offender has now turned
the age of majority or has been involuntarily waived into the adult criminal
system. The Supreme Court has long recognized that every offender must be
granted all of the due process protections afforded by the United States
Constitution. Because the framers of this nation’s Constitution specifically
enumerated the right to trial by jury, the right to a jury trial is one of these due
process protections.

Through its recent interpretation of the Supreme Court’s decision in
Apprendi, though, the Eighth Circuit attempts to create a judicial exception to
the United States Constitution and further erode “the grand bulwark” of
English liberties. Following the Eighth Circuit’s interpretation would
allow prosecutors to simply change a sentence by many years, but for the
occurrence of a single dubious “fact.” Ironically, by instilling more discretion
in judges at the adjudicatory stage, a broad interpretation of Apprendi creates
the ill-conceived effect of misappropriating even more discretion from district

212. Dupont, supra note 88, at 280 (quoting David Dormont, For the Good of the Adult: An
Examination of the Constitutionality of Using Prior Juvenile Adjudications to Enhance Adult
Sentences, 75 MINN. L. REV. 1769, 1794 (1991)).
215. Gault, 387 U.S. at 17 (The government cannot “deprive the child of any rights, because he
has none.”).
216. See supra note 112 and accompanying text.
SPEECH AND PRESS IN EARLY AMERICAN HISTORY 133 (1963) (“It is... beyond question that
Americans of that period perfectly well understood the lesson that the jury right could be lost not
only by gross denial, but by erosion.”) and quoting 4 BLACKSTONE, supra note 158, at 342).
and circuit court judges—judges whose authority has already been weakened by modern innovations such as sentencing guidelines—into the hands of potentially under-qualified juvenile judges\textsuperscript{218} and individual prosecutors who remain unaccountable to the electorate.\textsuperscript{219}

In light of the Supreme Court’s holding in \textit{Apprendi} and the potentially devastating effects to one of the fundamental liberties afforded to the people of the United States under the Constitution, courts should heed the Supreme Court’s warning and continue to view the exception created in \textit{Almendarez-Torres} as a narrow one.\textsuperscript{220} For all of these reasons, juvenile adjudications, in which a juvenile was not afforded the right to a jury, should not be used to increase an offender’s penalty beyond the statutory maximum or minimum without first being proven to a jury beyond a reasonable doubt.

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\textsuperscript{218} See supra note 128 and accompanying text.
\textsuperscript{219} See supra note 201 and accompanying text.
\textsuperscript{220} \textit{Apprendi} v. New Jersey, 530 U.S. 466, 490 (2000).