NONJURY JUVENILE ADJUDICATIONS AS PRIOR CONVICTIONS UNDER *APPRENDI*

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Under the recent Supreme Court decision of Apprendi v. New Jersey*, a fact that potentially increases the punishment for a crime above the statutorily prescribed maximum must be proved beyond a reasonable doubt to the jury. However, the* Apprendi *Court crafted an exception to this rule for prior convictions. This note analyzes conflicting case law regarding the proper scope of the "prior conviction" exception and, specifically, whether nonjury juvenile adjudications should be covered by the exception.*

In doing this, the note first examines the "flexible" nature of procedural due process as applicable to criminal trials and juvenile adjudications. The note then reviews Apprendi *along with two other Supreme Court decisions as a means of understanding the policies underlying the "prior conviction" exception. The author ultimately argues that both the policies behind the prior conviction exception and a faithful interpretation of Supreme Court precedent weigh in favor of nonjury juvenile adjudications falling within the exception.*

I. INTRODUCTION

The separation of the trial and sentencing phases of a criminal prosecution, and the maintenance of distinct standards of proof in each is a common practice. At the trial stage, the Sixth Amendment and the due process clauses of the Fifth and Fourteenth Amendments require the government to prove to a jury that the defendant is guilty beyond a reasonable doubt of every element of the charged offense.[1] Holding the government to this high burden of proof gives life to one of the "cornerstone objectives" of the American criminal justice system: the prevention of erroneous convictions.[2] At the sentencing stage, however, the government usually does not have to establish the existence of so-called sentencing factors, facts that bear solely on the extent of punishment, to

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1. *See* United States v. Gaudin, 515 U.S. 506, 509–10 (1995).
2. WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 1.4(e) (3d ed. 2000).

a jury beyond a reasonable doubt.[3] In the federal system, sentencing is a judicial function and the government often times is held only to a preponderance of the evidence standard of proof.[4] Sentencing factors, it is argued, are not relevant to the question of guilt or innocence; rather, they are considered in determining the length or severity of the sentence. Since these facts do not factor in establishing guilt, a lesser standard of proof is permissible.[5]

Sentencing judges or juries also have access to a broader spectrum of information than is allowed at trial. Indeed, in some instances, information that would be inadmissible at trial can be considered at sentencing.[6] In *Williams v. New York*,[7] the Supreme Court justified these relaxed standards on the theory that the sentencing process requires that "the fullest information possible concerning the defendant's life and characteristics" be available so that the sentence imposed accurately responds to the offense and the offender.[8] Trial procedures and rules of evidence erect barriers that prevent sentencing judges or juries from considering a wide range of the offender's background information.[9] After noting the different purposes served by the adjudicative and sentencing phases, the Court in *Williams* concluded that the due process clause should not be viewed as "a uniform command that courts throughout the Nation abandon their age-old practice of seeking information from out-of-court sources to guide their judgment toward a more enlightened and just sentence."[10]

Against this background, a recent Supreme Court decision has bulldozed some of the constitutional wall separating the trial and sentencing

3. Benjamin J. Priester, *Sentenced for a "Crime" the Government Did Not Prove:* Jones v. United States *and the Constitutional Limitations on Factfinding by Sentencing Factors Rather Than Elements of the Offense*, 61 LAW & CONTEMP. PROBS. 249, 250 (1998).

4. *See* Jack H. McCall, Jr., *The Emperor's New Clothes: Due Process Considerations Under the Federal Sentencing Guidelines*, 60 TENN. L. REV. 467, 500 (1993).

5. Priester, *supra* note 3, at 250.

6. The absence of rules of evidence in federal sentencing means that sentence determinations can be made on the basis of, among other things, "multi-level hearsay." Edward R. Becker, *Insuring Reliable Fact Finding in Guidelines Sentencing: Must the Guarantees of the Confrontation and Due Process Clauses Be Applied?*, 22 CAP. U. L. REV. 1, 2 (1993) (arguing that the admission of hearsay, a preponderance standard of proof, and the unavailability of compulsory process and cross-examination combine to undermine reliable fact-finding at sentencing). Indeed, one might wonder whether there are any external standards for ensuring the reliability of information considered at sentencing. 18 U.S.C. § 3661 (2003) provides that "[n]o limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court . . . may receive and consider for the purpose of imposing an appropriate sentence." Moreover, in *Nichols v. United States,* the Supreme Court highlighted the tradition of a sentencing court considering "a defendant's past criminal behavior, even if no conviction resulted from that behavior." 511 U.S. 738, 747 (1994). Sentencing judges, however, remain free, and in all likelihood constitutionally obligated, to disregard information they consider to be unreliable.

7. 337 U.S. 241 (1949).

8. *Id*. at 247.

9. *Id.* ("[M]odern concepts individualizing punishment have made it all the more necessary that a sentencing judge not be denied an opportunity to obtain pertinent information by a requirement of rigid adherence to restrictive rules of evidence properly applicable to the trial.").

10. *Id.* at 250–51.

phases. In 2000, the Court issued its decision in *Apprendi v. New Jersey*,[11] striking down a New Jersey "hate crime" statute that authorized a judge to impose a sentence above the maximum allowable by statute for certain offenses if the judge found, by a preponderance of the evidence, that the defendant's conduct was motivated by a desire to intimidate the victim on the basis of race.[12] Specifically, the Court held 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."[13] The ruling required the jury to find the existence of racial bias beyond a reasonable doubt for the "hate crime" enhancement to be triggered.[14]

Described by one scholar as "by any measure a landmark case,"[15] *Apprendi* is still a jurisprudential infant—lower courts are unsure of its scope, and the Supreme Court has revisited the decision in only a handful of cases.[16] Moreover, most of the scholarship surrounding *Apprendi* has focused on the parameters of the rule and its effects on legislative bodies and criminal sentencing schemes.[17] By contrast, the implications

11. 530 U.S. 466 (2000).
12. *Id.* at 491.
13. *Id.* at 490.
14. *See id.*
15. Kyron Huigens, *Solving the* Apprendi *Puzzle*, 90 GEO. L.J. 387, 388 (2002). The *Apprendi* decision has received special attention, in part because of the unusual composition of the majority and dissenting coalitions. Justice Stevens delivered the majority opinion. Justices Scalia, Souter, Thomas, and Ginsburg joined Stevens in the majority, with Justices Scalia and Thomas each filing concurring opinions. Justice O'Connor wrote a dissenting opinion joined by Chief Justice Rehnquist, Justice Kennedy and Justice Breyer. Justice Breyer also wrote a dissenting opinion that was joined by Chief Justice Rehnquist. *Apprendi*, 530 U.S. at 468.
16. Since the *Apprendi* decision was handed down, the Court has vacated over fifty judgments without opinion and remanded the cases for reconsideration in light of *Apprendi*. *See e.g.,* Sallis v. United States, 531 U.S. 1135 (2001). The Court has more substantially considered the rationale and implications of *Apprendi* in only four cases. *See* Sattazahn v. Pennsylvania, 537 U.S. 101 (2003) (discussing *Apprendi*'s impact on the definition of an element of an offense); Ring v. Arizona, 536 U.S. 584 (2002) (examining the impact of *Apprendi* on Arizona's capital sentencing scheme); Harris v. United States, 536 U.S. 545 (2002) (applying *Apprendi*'s rationale to sentencing scheme in which judicial fact-finding results in imposition of mandatory minimum sentence); United States v. Cotton, 535 U.S. 625 (2002) (holding that failure to allege quantity of cocaine in indictment, a violation of *Apprendi*, did not warrant vacation of sentence in light of overwhelming evidence that defendant had participated in conspiracy involving minimum amount of cocaine necessary to trigger enhanced penalties).
17. Taking their cue from the *Apprendi* decision itself, some commentators have offered opinions on the effect the decision will have on the power of state legislatures and Congress to assign to certain facts the "sentencing factor" label, thereby removing them from consideration by a jury. *Compare* Patrick Costello, Jr., Comment, Apprendi v. New Jersey*: "Who Decides What Constitutes a Crime?" An Analysis of Whether a Legislature is Constitutionally Free to "Allocate" an Element of an Offense to an Affirmative Defense or a Sentencing Factor Without Judicial Review*, 77 NOTRE DAME L. REV. 1205, 1245–47 (2002) (arguing that legislatures will be able to redraft statutes with expanded sentencing ranges and continue to allow judges to find certain facts that increase a defendant's sentence within the newly enlarged range), *with* Douglas J. McCarty, Case Note, *Refining Constitutional Limits in Criminal Procedure:* Apprendi v. New Jersey, 120 S.Ct. 2348, 26 S. ILL. U. L.J. 149, 176–81 (2001) (arguing that potential for active judicial review of statutory redrafting in the wake of *Apprendi* will discourage legislatures from attempting to circumvent *Apprendi*'s jury trial and proof beyond a reasonable doubt requirements).

and rationale behind the "prior conviction" exception have received little attention.[18]

Recently, however, a split has developed among several courts over the scope of the prior conviction exception. The Third, Eighth, and Ninth Circuits and several state courts have recently addressed the issue of whether an adult defendant's prior juvenile delinquency adjudication,[19] at which the defendant was not afforded the right to a jury trial, falls within the prior conviction exception.[20] In *United States v. Tighe*,[21] a divided panel of the Court of Appeals for the Ninth Circuit held that a nonjury juvenile adjudication did not fall within the prior conviction exception.[22] The *Tighe* majority interpreted *Apprendi* and several predecessor cases to limit the prior conviction exception to proceedings at which the defendant had the rights to trial by jury and proof beyond a reasonable doubt.[23] Nine months later, the Court of Appeals for the Eighth Circuit came to the opposite conclusion in *United States v. Smalley*,[24] holding that a defendant's prior nonjury juvenile adjudication fell within the prior conviction exception.[25] The Court of Appeals for the Third Circuit, as well as state courts in California and Kansas, subsequently agreed with the reasoning and conclusion of *Smalley*.[26] In January 2003, the Supreme Court passed on an opportunity to examine this issue, leaving state and federal courts to continue the debate.[27]

18. One recent article addressing the "prior conviction" exception is Recent Case, *Eighth Circuit Holds an Adjudication of Juvenile Delinquency to Be a "Prior Conviction" for the Purpose of Sentence Enhancement at a Subsequent Criminal Proceeding*—United States v. Smalley, 294 F.3d 1030 (8th Cir. 2002), 116 HARV. L. REV. 705 (2002) [hereinafter *Eighth Circuit*].

19. This note only considers the question of whether juvenile *delinquency* adjudications should fall within the "prior conviction" exception. Thus, "juvenile adjudication" as used in this note refers only to delinquency adjudications. The defendants in both *United States v. Tighe* and *United States v. Smalley* were sentenced pursuant to the Armed Career Criminal Act (ACCA), which mandates increased prison sentences for offenders with three prior convictions for violent felonies. 18 U.S.C. § 924(e) (2000). According to the ACCA, the term "conviction" encompasses "a finding that a person has committed an act of juvenile delinquency involving a violent felony." § 924(e)(2)(C). "Violent felony" is defined, in part, as "any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for [one year] if committed by an adult . . . ." § 924(e)(2)(B). Thus, this note does not consider whether other juvenile adjudications, such as adjudications for "status offenses" (offenses that are only violations of law for juveniles) should fall within *Apprendi*'s prior conviction exception. For further information on status offenders, see MARY CLEMENT, THE JUVENILE JUSTICE SYSTEM: LAW AND PROCESS 80 (1997).

20. The United States Court of Appeals for the Third Circuit raised but did not decide the issue of whether a defendant's nonjury juvenile adjudication can be considered a "prior conviction" for purposes of *Apprendi*. *See* United States v. Richardson, 313 F.3d 121, 125 (3d Cir. 2002).

21. 266 F.3d 1187 (9th Cir. 2001).

22. *Id.* at 1197.

23. *Id.* at 1194–95.

24. 294 F.3d 1030 (8th Cir. 2002), *cert. denied*, 537 U.S. 1114 (2003).

25. *Id.* at 1033.

26. United States v. Jones, 332 F.3d 688 (3d Cir. 2003); People v. Bowden, 125 Cal. Rptr. 2d 513 (Cal. Ct. App. 2002); State v. Hitt, 42 P.3d 732 (Kan. 2002), *cert. denied*, 537 U.S. 1104 (2003).

27. On January 13, 2003, the Court declined to hear arguments in *Smalley* and *Hitt*. Linda Greenhouse, *Justices Won't Hear Sentencing Issue*, N.Y. TIMES, Jan. 14, 2003, at A22.

The disagreement over the scope of the prior conviction exception to the *Apprendi* rule stems from conflicting interpretations of the language in the *Apprendi* decision and several Supreme Court cases that preceded it. This note argues that the Eighth Circuit's interpretation of the scope of the prior conviction exception is more faithful to the Supreme Court's reasoning in the cases leading up to *Apprendi,* as well as *Apprendi* itself. Part II examines the contours of procedural due process as it applies to criminal trials and juvenile adjudications.[28] This examination focuses on the rights to trial by jury and proof beyond a reasonable doubt, the two safeguards implicated in *Apprendi*. It also highlights the "flexible" nature of due process protection.[29] Part III contains an examination of the *Apprendi* decision and two Supreme Court decisions that immediately preceded it.[30] The evolution of the prior conviction exception will be traced through these three cases. I argue that the exception is based on three considerations: the traditional use of prior convictions (also known as recidivism) as sentence enhancers, the fact that prior convictions are "offender-related" rather than "offense-related" facts, and the fact that prior convictions are presumed reliable because they are obtained in accordance with due process.

In Part IV, I analyze the *Tighe* and *Smalley* approaches to determining the scope of the prior conviction exception.[31] I contend that the *Tighe* court incorrectly interpreted the rationale behind the prior conviction exception because it equated the reliability of a prior conviction or adjudication with the presence of a "fundamental triumvirate" of procedural protections: fair notice, proof beyond a reasonable doubt, and trial by jury. I also argue that a logical extension of the reasoning of *Tighe* calls into question the reliability of nonjury juvenile adjudications. Part V endorses the *Smalley* approach as more faithful to both case law and the goal of ensuring criminal defendants a fair and impartial trial.[32] I also argue that the *Tighe* approach risks two negative consequences. First, by requiring nonjury adjudications to be placed before a jury, the *Tighe* decision risks unfairly and unnecessarily prejudicing defendants. Second, this risk of prejudice is heightened given the fact that the *Tighe* decision can be read to question the reliability of nonjury adjudications. In sum, I argue that both precedent and policy considerations suggest that nonjury juvenile adjudications should fall within the prior conviction exception. Part VI briefly concludes this note.[33]

28. *See infra* notes 34–83 and accompanying text.
29. *See* Sanford H. Kadish, *Methodology and Criteria in Due Process Adjudication—A Survey and Criticism*, 66 YALE L.J. 319 (1957).
30. *See infra* notes 84–154 and accompanying text.
31. *See infra* notes 155–240 and accompanying text.
32. *See infra* notes 241–46 and accompanying text.
33. *See infra* note 247 and accompanying text.

II. THE ROLE OF DUE PROCESS IN ENSURING THE RELIABILITY OF CRIMINAL CONVICTIONS AND JUVENILE ADJUDICATIONS

The Fifth and Fourteenth Amendments prevent the federal government and state governments from depriving "any person of life, liberty, or property, without due process of law."[34] Throughout its history, the Supreme Court has characterized "due process of law" as a nebulous concept, one that cannot be limited to a fixed definition applicable to all government actions.[35] For example, the Court in *Morrisey v. Brewer*[36] stated:

> It has been said so often by this Court and others as not to require citation of authority that due process is flexible and calls for such procedural protections as the particular situation demands. . . . Its flexibility is in its scope once it has been determined that some process is due; it is a recognition that not all situations calling for procedural safeguards call for the same kind of procedure.[37]

This part tracks the Supreme Court's characterization of due process in the context of criminal prosecutions and in the context of juvenile adjudications. In particular, I focus on the rights to trial by jury and proof beyond a reasonable doubt because they are the protections implicated in the *Apprendi* rule. The goal of this part is to demonstrate that while one of the objectives of due process is to ensure the reliability of a criminal conviction or juvenile adjudication,[38] Supreme Court case law indicates that this reliability can be achieved without strict adherence to a fixed litany of procedural protections.

A. The Right to Trial by Jury and Proof Beyond a Reasonable Doubt in Criminal Prosecutions

The Supreme Court has interpreted the Due Process Clause of the Fourteenth Amendment to require that defendants in criminal trials be accorded certain procedural protections. In *Duncan v. Louisiana*,[39] the Court held that the right to trial by jury applied to state prosecutions under Fourteenth Amendment due process in situations where the right would attach under Fifth Amendment due process.[40] Calling the right to trial by jury in criminal prosecutions "fundamental to the American

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34. U.S. CONST. amend. V, XIV, § 1.

35. *See generally* LAFAVE ET AL., *supra* note 2, §§ 2.3–.7 (discussing the total incorporation, fundamental fairness, and selective incorporation doctrines that have guided interpretation of Fourteenth Amendment due process).

36. 408 U.S. 471 (1972).

37. *Id.* at 481 (examining requirements of due process in the context of parole revocation).

38. Kadish, *supra* note 29, at 346 (arguing that one goal of procedural due process is "insuring the reliability of the guilt-determining process—reducing to a minimum the possibility that any innocent individual will be punished").

39. 391 U.S. 145 (1968).

40. *Id.* at 147–49.

scheme of justice,"[41] the Court framed the jury's role as that of a citizen-buffer between the government and the accused whose primary purpose was to prevent governmental oppression.[42] With respect to the reliability and accuracy of jury verdicts, the Court acknowledged that opinion was divided as to whether jury verdicts were more reliable than bench verdicts.[43]

Two years later, the Court handed down *In re Winship*.[44] Although the case involved the standard of proof that applied to the adjudicative phase of a juvenile delinquency proceeding, the Court held that due process protected criminal defendants "against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."[45] The *Winship* Court recognized that the standard served the interests of both the accused and the government.[46] Holding the government to such a high burden of proof protected the accused against "the risk of convictions resting on factual error,"[47] and protected the defendant's interests in avoiding undue deprivation of liberty and the stigmatization that accompanies a criminal conviction.[48] Moreover, the standard served the governmental interest of ensuring the "respect and confidence of the community in applications of the criminal law."[49]

Above all, the *Winship* Court was concerned with the reliability of a criminal conviction.[50] Requiring the government to establish guilt beyond a reasonable doubt enabled society to be confident a criminal conviction was a reliable indication that the defendant had in fact committed a crime. Thus, as one scholar noted, *Winship* "constitutionalized a demand for reasonable certainty about the reliability of a criminal conviction."[51] Having examined the rights to a jury trial and proof beyond a reasonable doubt as they apply at a criminal trial, I now examine the contours of due process in the context of juvenile adjudications.

41. *Id.* at 149.

42. *Id.* at 156. The jury does fulfill other functions aside from the prevention of governmental oppression. Juries infuse a trial with the standards and conscience of the affected community, and jury service provides jurors with an education in good citizenship. Benjamin E. Rosenberg, *Criminal Acts and Sentencing Facts: Two Constitutional Limits on Criminal Sentencing*, 23 SETON HALL L. REV. 459, 474–75 (1993) (discussing the general absence of the jury in criminal sentencing).

43. *Duncan*, 391 U.S. at 156–57.

44. 397 U.S. 358 (1970).

45. *Id.* at 364.

46. *Id*. at 363–64.

47. *Id*. at 363.

48. *Id*. at 363–64.

49. *Id.* at 364.

50. D. Craig Lewis, *Proof and Prejudice: A Constitutional Challenge to the Treatment of Prejudicial Evidence in Federal Criminal Cases*, 64 WASH L. REV. 289, 296 (1989).

51. *Id*. at 301.

B. Due Process in Juvenile Adjudications: Different Rights, Same Result

Until the end of the nineteenth century, juvenile offenders in the United States were processed through the same criminal justice system as adult offenders.[52] In 1899, Illinois became the first state to pass legislation establishing a separate juvenile court.[53] A movement supporting the separation of adult and juvenile criminal justice systems quickly gained momentum, spurred by social reformers concerned about the treatment and confinement conditions of juvenile offenders.[54] The separate existence of juvenile systems was premised on the idea that rehabilitative treatment, not retributive punishment, was the most effective way to combat delinquent behavior.[55]

Though the adult and juvenile systems remain distinct, and their goals somewhat divergent,[56] the idea of extending due process protec-

52. Korine L. Larsen, Comment, *With Liberty and Justice for All: Extending the Right to a Jury Trial to the Juvenile Courts*, 20 WM. MITCHELL L. REV. 835, 839–40 (1994).

53. *Id.* at 841.

54. This momentum resulted in the creation of a juvenile court system in every state by 1932. *Id.* at 843. Underlying the creation of separate juvenile systems was the philosophy that delinquent behavior was more the product of a wayward child's environment than deliberate choice. *See id.* at 841; *see also* 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, 907–08 (1996).

55. SAMUEL M. DAVIS, RIGHTS OF JUVENILES: THE JUVENILE JUSTICE SYSTEM § 1.2 (2d ed. 1998 & Supp. 2002) (discussing evolution of American juvenile courts from English notion of *parens patriae*, under which a wayward child was declared a ward of the State, which then assumed responsibility for reforming the child's conduct). As a result of this shift in thinking about the problem of juvenile delinquency, juvenile courts in the early twentieth century looked and functioned differently than criminal courts. *See* Sara E. Kropf, Note, *Overturning* McKeiver v. Pennsylvania: *The Unconstitutionality of Using Prior Convictions to Enhance Adult Sentences Under the Sentencing Guidelines*, 87 GEO. L.J. 2149, 2159 (1999). Informality and flexibility permeated juvenile proceedings, which were structured to facilitate the development of a parent-child bond between judge and juvenile. *In re Gault*, 387 U.S. 1, 25–26 (1967) ("[T]he early conception of the Juvenile Court proceeding was one in which a fatherly judge touched the heart and conscience of the erring youth by talking over his problems . . . ."). Juvenile proceedings were not open to the public, records were sealed, and judges retained significant flexibility in fashioning remedies for delinquent conduct. Larsen, *supra* note 52, at 843; Mills, *supra* note 54, at 909. Indeed, because juvenile systems were thought of in terms of rehabilitation and separation from adult systems, little thought was given to extending due process procedural protections to juvenile offenders. Tonya K. Cole, Note, *Counting Juvenile Adjudications As Strikes Under California's 'Three Strikes' Law: An Undermining of the Separateness of the Adult and Juvenile Systems*, 19 J. JUV. L. 335, 337 (1998).

56. Over the course of the twentieth century, the philosophy underlying juvenile justice systems shifted, moving away from a focus on rehabilitation of the misled, but ultimately innocent child, to an approach characterized by more punitive considerations. Kropf, *supra* note 55, at 2160. The steady rise in the number and violent character of juvenile offenses, along with the prevalence of recidivists in juvenile systems, has led some to argue that the juvenile and adult systems today share more similarities than differences. *See id*. (setting forth statistics from 1986–95 showing dramatic increases in the number of cases heard by juvenile courts and in the number of violent crimes committed by juveniles); *see also* Larsen, *supra* note 52, at 846. For a more recent compilation of statistics concerning juvenile crime and juvenile offenders, see HOWARD N. SNYDER & MELISSA SICKMUND, U.S. DEP'T OF JUSTICE, JUVENILE OFFENDERS AND VICTIMS: 1999 NATIONAL REPORT (1999), *available at* http://ojjdp.ncjrs.org/ojstatbb/index.html (last modified Apr. 12, 2002). *But see* Michael Kennedy Burke, Comment, *This Old Court: Abolitionists Once Again Line up the Wrecking Ball on the Juvenile Court When All It Needs Is a Few Minor Alterations*, 26 U. TOL. L. REV. 1027, 1027 (1995) (arguing, among other things, that juveniles constitute a small percentage of total criminal offenders). This shift in emphasis from rehabilitation to retribution has also led some states to redraft their juvenile court statutes to

tions to juvenile offenders in adjudication proceedings gained momentum in the second half of the twentieth century. Presently, juvenile adjudication proceedings feature many of the same protections accorded to adult defendants. For example, in a 1967 case, *In re Gault*, the Supreme Court extended several procedural protections to juveniles in delinquency adjudication proceedings.[57] Specifically, the Court held that due process required that juveniles in delinquency adjudication proceedings be extended the right to adequate notice of charges, the right to counsel, and the rights to refrain from self-incrimination and to confront and cross-examine witnesses.[58] In extending these rights, the Court was careful to preserve and encourage the continued existence of separate juvenile systems.[59]

Three years later, in *In re Winship,*[60] the Court ruled that criminal prosecutions constitutionally required the beyond a reasonable doubt standard of proof.[61] The Court then extended that protection to the delinquency adjudication context, noting that the same interests served by the standard in the adult system were present in the juvenile system.[62] Juvenile offenders, like criminal defendants, faced possible deprivation of liberty and a lesser, yet still significant, degree of stigmatization if they were found delinquent.[63] The presence of these interests made the need for reliability in delinquency adjudications a matter of constitutional importance. Also, as it had in *Gault*, the Court in *Winship* noted that the imposition of the reasonable doubt standard of proof would not adversely impact the supposed benefits of the juvenile system—flexibility, informality, and confidentiality.[64] Foreshadowing future events, Justice Harlan stated in his concurrence that "there is no automatic congruence between the procedural requirements imposed by due process in a criminal case, and those imposed by due process in juvenile cases."[65]

reflect the idea that one of the purposes of the state's juvenile courts is to punish juvenile offenders and hold them accountable for their actions. *See* Mills, *supra* note 54, at 911 & n.63 (listing state statutes that have been redrafted to incorporate punitive purpose). Thus, while juvenile systems still maintain rehabilitative aspirations, the realities of increasing juvenile crime have led to the recognition that juvenile courts must punish as well as guide juvenile offenders. Against this background of shifting underlying assumptions, the Supreme Court has faced the question of what, if any, due process procedural protections should be grafted onto the juvenile systems.

57. *In re* Gault, 387 U.S. 1 (1967).

58. *Id.* at 33–34, 41, 55, 57. In extending these rights, the Court noted that the lack of procedural standards in the juvenile system had not always been offset by the supposed benefits of flexible and compassionate treatment, resulting in a situation in which "'the child receives the worst of both worlds . . . he gets neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children.'" *Id.* at 18 n.23 (citing Kent v. United States, 383 U.S. 541, 556 (1966) (internal citations omitted)).

59. *Id.* at 22 ("We do not mean . . . to denigrate the juvenile court process or to suggest that there are not aspects of the juvenile system relating to offenders which are valuable.").

60. 397 U.S. 358 (1970).

61. *Id.* at 364.

62. *Id.* at 365–66.

63. *Id*. at 366 (citing *Gault*, 387 U.S. at 36).

64. *Id.*

65. *Id.* at 374–75 (Harlan, J., concurring).

Yet, after the decisions in *Gault* and *Winship*, it appeared that the Court was leaning towards an interpretation of due process in the juvenile adjudication context that included the same procedural protections accorded to adult defendants. This trend abruptly ended with the Court's 1971 decision in *McKeiver v. Pennsylvania*.[66] At issue in *McKeiver* was a juvenile's right to a jury trial in a delinquency proceeding.[67] Justice Blackmun's plurality opinion began by summarizing its past decisions concerning the rights accorded to juveniles in delinquency proceedings.[68] From its prior cases, the Court distilled the overarching principle that some due process protections applied equally in the juvenile and adult contexts, but not every right guaranteed to a criminal defendant applied to a juvenile in delinquency proceedings.[69] This interpretation of due process as a flexible concept allowed for the possibility that not all of the procedures required for a fundamentally fair criminal trial were necessarily required for a fundamentally fair juvenile adjudication.

After recognizing the applicable due process standard to be one of fundamental fairness,[70] Justice Blackmun stated that in *Gault* and *Winship*, the due process inquiry had centered on "factfinding procedures."[71] That is, the protections extended to juveniles in those cases were prompted by a concern for ensuring reliable fact-finding. Justice Blackmun then stated that the jury was not "a necessary component of accurate factfinding."[72] From this, it followed for the plurality that "trial by jury in the juvenile court's adjudicative stage is not a constitutional requirement."[73]

66. 403 U.S. 528 (1971).

67. *Id.* at 530. Two cases, one from Pennsylvania and one from North Carolina, were consolidated and disposed of in the *McKeiver* opinion. *Id*. at 534–38.

68. *Id*. at 531–34.

69. *Id.* at 533.

70. *Id*. at 543. *But see* CHRISTOPHER P. MANFREDI, THE SUPREME COURT AND JUVENILE JUSTICE 150–55 (1998). Manfredi argues that the Court in *McKeiver* and later cases dealing with the rights of juveniles engaged in "historical revisionism" by denoting fundamental fairness as the due process standard applicable in juvenile adjudications, when the *Gault* and *Winship* decisions had been based on the selective incorporation doctrine. *Id.* at 155. By framing the issue in terms of fundamental fairness, Manfredi maintains that the Court was able to deny juveniles the jury trial right through a balancing approach, weighing the importance of the jury to fact-finding against the impact of the jury on the "desirable features of juvenile proceedings." *Id*. at 151. For a comparison of the selective incorporation and fundamental fairness theories of interpretation pertaining to Fourteenth Amendment due process, see LAFAVE ET AL., *supra* note 2, §§ 2.4–.6.

71. *McKeiver*, 403 U.S. at 543.

72. *Id.* In support of this assertion, Justice Blackmun cited the absence of juries in a variety of proceedings, such as worker's compensation cases and probate cases. *Id.* It is also noteworthy that Justice Brennan, concurring in the Pennsylvania case and dissenting in the North Carolina case, emphasized the jury's role as a shield against governmental oppression in resolving the question of whether juries were required in juvenile adjudications. *Id.* at 554 (Brennan, J., concurring and dissenting). He made no mention of the jury as a necessary component of accurate fact-finding.

73. *Id.* at 545. After *McKeiver* was handed down, several states extended juveniles the jury trial right on state constitutional or statutory grounds. The majority of states, however, continue to deny juveniles the jury trial right. See DAVIS, *supra* note 55, § 5.3. *But see* INST. OF JUDICIAL ADMIN., AM. BAR ASS'N, JUVENILE JUSTICE STANDARDS ANNOTATED 8 (Robert E. Shepard, Jr. ed., 1996) (rec-

A number of reasons were given in support of the refusal to extend the jury trial right to juvenile adjudications. First, Justice Blackmun expressed concern that juries might disrupt the informal nature of juvenile proceedings and transform them into fully adversarial proceedings.[74] The plurality wanted to preserve the informal character of juvenile proceedings in the hope that this would facilitate accomplishment of the system's rehabilitative goals.[75] The plurality also referred to dictum in *Duncan* that "a jury is not a necessary part even of every criminal process that is fair and equitable."[76] In addition, the plurality repeated its conviction that juries would not improve the fact-finding aspect of juvenile proceedings.[77] Finally, the plurality reiterated the primary theme of its opinion, that of the separate and distinct nature of the criminal and juvenile systems and the different consequences and implications flowing from criminal convictions and juvenile adjudications.[78] In sum, *McKeiver* reiterated the *Duncan* Court's focus on the role of the jury as a barrier protecting criminal defendants from governmental oppression and specifically rejected the notion of a jury being a more accurate fact finder than a judge.[79] The Court appeared confident in the accuracy of the delinquency adjudication process.

After examining the Court's treatment of procedural due process in the criminal and juvenile contexts, the Court's conception of due process as a flexible concept becomes readily apparent. In *Duncan*, the Court ruled that due process required jury trials in most criminal prosecutions.[80] In *Winship*, the Court ruled that due process required the government to establish guilt beyond a reasonable doubt in criminal trials and juvenile adjudications.[81] In *McKeiver*, the Court ruled that due process did not require juveniles to be afforded the jury trial right.[82] But, the Court

ommending that juveniles be afforded right to demand jury trial where allegations in adjudicative proceedings are contested).

74. *McKeiver*, 403 U.S. at 545.

75. *Id.* at 547.

76. *Id.*

77. *Id.* In his concurring opinion, Justice White emphasized that juries were "not necessarily or even probably better at the job" of reliable fact-finding than "the conscientious judge." *Id.* at 551 (White, J., concurring). Justice White also echoed the *Duncan* Court's emphasis on the role of the jury as a shield for defendants "against corrupt, biased, or political justice." *Id.* (White, J., concurring).

78. *Id.* at 550.

79. *Id*. at 547 ("The imposition of the jury trial of the juvenile court system would not strengthen greatly, if at all, the fact-finding function . . . .").

80. Duncan v. Louisiana, 391 U.S. 145, 149–50 (1968).

81. *In re* Winship, 397 U.S. 358, 364 (1970).

82. Despite calls for the reconsideration or overturning of *McKeiver*, *see, e.g.*, *Eighth Circuit*, *supra* note 18, at 712; Kropf, *supra* note 55, at 2168, both the reasoning and holding of the decision have been upheld in recent years by lower courts. *See, e.g.,* United States v. Juvenile Male C.L.O., 77 F.3d 1075, 1077 (8th Cir. 1996) ("We . . . find not only the holding but also the reasoning of *McKeiver* to be authoritative."); *In re* Charles C., 284 Cal. Rptr. 4, 6 (Cal. Ct. App. 1991) ("[T]he reasoning of the *McKeiver* Court remains persuasive"); *In re* J.F., 714 A.2d 467, 473 (Pa. Super. Ct. 1998) ("Much of the reasoning of the plurality in *McKeiver*, despite the changes in society and the juvenile system in the intervening twenty-seven years, remains valid and compelling in reference to the juvenile court system of today."). Moreover, while the Federal Juvenile Delinquency Act (FJDA), 18 U.S.C.

made it clear that denying juveniles the right to trial by jury did not frustrate one of the objectives of due process: the assurance of accurate fact-finding that would support reliable adjudications of guilt or delinquency.[83] Having discussed the rationale and application of the jury trial and proof beyond a reasonable doubt guarantees, on which the *Apprendi* decision rests, I now switch the focus to the evolution and rationale of *Apprendi*'s prior conviction exception.

III. THE EVOLUTION OF THE PRIOR CONVICTION EXCEPTION

This part examines three recent Supreme Court cases, *Almendarez-Torres v. United States*,[84] *Jones v. United States*,[85] and *Apprendi v. New Jersey*.[86] Examining these cases will illustrate the legal and policy justifications for the prior conviction exception. I argue that there are three reasons why the *Apprendi* Court exempted the fact of prior convictions from the jury and reasonable doubt requirements: the historical practice of using prior convictions as sentence enhancers, the fact that prior convictions are rarely elements of an offense, and the fact that prior convictions carry a presumption of reliability that stems from the fact that they were presumably obtained in accordance with due process. An understanding of the nature of and rationale underlying the prior conviction exception will provide a framework for analyzing the *Tighe* and *Smalley* approaches to the question of whether nonjury juvenile adjudications are prior convictions for *Apprendi* purposes.

A. Almendarez-Torres v. United States*: Recidivism As a Sentencing Factor*

In *Almendarez-Torres v. United States*,[87] the Supreme Court reviewed a federal statute criminalizing an alien's reentry into the United States after deportation absent special permission.[88] For the mere offense of reentry, the statute provided a maximum punishment of two years imprisonment, but a subsection in the statute increased the maxi-

§§ 5031–5042 (2000), does not explicitly extend or deny juveniles the right to trial by jury, it has been consistently interpreted as not extending the jury trial right to juvenile offenders in federal court. *See Juvenile Male C.L.O.*, 77 F.3d at 1077; United States v. Doe, 627 F.2d 181, 183 (9th Cir. 1980); United States v. Duboise, 604 F.2d 648, 648 (10th Cir. 1979); United States v. Doe, 385 F. Supp. 902, 905–07 (D. Ariz. 1974) (discussing then-recent amendment to FJDA requiring a juvenile coming before federal courts to be processed under the statute unless the juvenile filed a written request to be treated as an adult).

83. Several commentators disagree with this aspect of the *McKeiver* decision and argue that the presence of juries in juvenile adjudications increases fact-finding accuracy. *See* sources cited *infra* note 182.

84. 523 U.S. 224 (1998).

85. 526 U.S. 227 (1999).

86. 530 U.S. 466 (2000).

87. 523 U.S. 224 (1998).

88. 8 U.S.C. § 1326 (2000).

mum available punishment to twenty years imprisonment if the alien had been deported pursuant to a conviction for an aggravated felony.[89] The government did not list Almendarez-Torres's prior aggravated felony convictions in the indictment, but he pleaded guilty to the charge, admitting that he had been deported after being convicted three times for aggravated felonies.[90] At his sentencing hearing, Almendarez-Torres argued that his prior aggravated felony convictions could not be used to increase his sentence because they were not set forth in the indictment.[91] The court rejected this argument and sentenced him to approximately seven years imprisonment.[92] On appeal, Almendarez-Torres argued that recidivism had to be treated as an element of the offense as it was defined in the subsection, and, consequently, that it had to be stated in an indictment and proved to a jury beyond a reasonable doubt.[93]

The Court held that the subsection under which Almendarez-Torres was sentenced was a "penalty provision" and, therefore, did not define a separate offense.[94] As such, the fact that he had prior convictions did not have to be included in the indictment and proven to a jury beyond a reasonable doubt.[95] In ruling that the prior aggravated felony conviction was merely a sentencing factor, the Court made several observations regarding the use of a prior conviction as a sentence enhancer.[96] First, the Court cited historical practice, describing recidivism as "a traditional, if not the most traditional, basis for a sentencing court's increasing an offender's sentence."[97] Second, the Court noted that the prior convictions in this case did not relate to the conduct for which Almendarez-Torres was indicted; the existence of a prior conviction was relevant to the ques-

89. § 1326(b)(2).

90. *Almendarez-Torres*, 523 U.S. at 227.

91. *Id.*

92. *Id.* Almendarez-Torres's actual sentence was eighty-five months imprisonment.

93. *Id.* at 239.

94. *Id.* at 226.

95. *Id.* at 239. After concluding that § 1326(b)(2) was a penalty provision, the Court then found that the Constitution did not require that recidivism be charged in an indictment as an element of the offense and proven to a jury beyond a reasonable doubt. The Court arrived at this conclusion after examining a series of its previous cases containing an evolving discussion of the constitutional limitations on a legislature's ability to define a criminal offense. *See* McMillan v. Pennsylvania, 477 U.S. 79, 91 (1986) (upholding Pennsylvania statute that allowed sentencing judge to impose mandatory minimum sentence after finding, by a preponderance of the evidence, that a defendant "visibly possessed a firearm" during the commission of specified felonies); Patterson v. New York, 432 U.S. 197, 201 (1977) (upholding New York homicide statute that required defendant to prove extreme emotional disturbance to reduce conviction from murder to manslaughter where proof of extreme emotional disturbance would not automatically negate an element of the offense of murder); Mullaney v. Wilbur, 421 U.S. 684, 688, 703 (1975) (striking down Maine homicide statute that presumed proof of "malice aforethought" from proof of other elements and required defendant to prove "heat of passion" in order to reduce conviction from murder to manslaughter); *In re* Winship, 397 U.S. 358, 364 (1970) (requiring government to establish guilt as to all elements of a criminal offense beyond a reasonable doubt).

96. *Almendarez-Torres*, 523 U.S. at 226.

97. *Id.* at 243.

tion of punishment, not to the question of guilt or innocence.[98] Third, the majority argued that a contrary holding, requiring proof of a defendant's prior convictions to a jury, would risk "significant prejudice" to the defendant in that his prior criminal behavior would be placed before a jury.[99] At the end of its opinion, the Court noted that Almendarez-Torres had admitted the existence of his prior aggravated felony convictions; thus, the existence or accuracy of the prior conviction was not at issue.[100]

Writing for three other Justices in dissent, Justice Scalia foreshadowed *Apprendi* by stating that *Almendarez-Torres* involved the question of whether a fact that "substantially increases the maximum possible punishment for a crime" had to be treated as an element of that crime, and, therefore, charged in an indictment and proven beyond a reasonable doubt to a jury.[101] Because the answer to this question was "far from obvious," he argued that the statute should be interpreted in a way that avoided this constitutional question.[102] This interpretation would require that the subsection authorizing the enhanced sentence be treated as a separate offense, and that the presence of a prior conviction be treated as an element of that offense.[103]

Justice Scalia also disagreed with the majority's conclusion regarding the historical use of recidivism in sentencing. He argued that, with respect to statutes that allowed increased sentences for recidivists, "[a]t common law, the fact of [a] prior conviction[] *had* to be charged in the same indictment charging the underlying crime, and submitted to the jury for determination along with that crime."[104] This historical practice suggested that recidivism was "an element of a separate offense," not merely a aggravating factor pertaining only to punishment.[105] The dissenters, however, did not go so far as to embrace the position that "the Constitution requires the recidivism finding in this case to be made by a jury beyond a reasonable doubt . . . ."[106]

98. *Id.* at 244 (citing Graham v. West Virginia, 224 U.S. 616, 629 (1912)). The majority did admit that on occasion the existence of a prior conviction is relevant to the determination of guilt or innocence, as when a statute criminalizes conduct that, without the presence of a prior conviction, is otherwise lawful. *Id.* at 244.

99. *Id.* at 235 (citing Spencer v. Texas, 385 U.S. 554, 560 (1967)).

100. *Id.* at 248.

101. *Id.* at 248 (Scalia, J., dissenting). Indeed, the dissenters in *Almendarez-Torres* became the *Apprendi* majority due to the switch of Justice Thomas.

102. *Id.* at 249 (Scalia, J., dissenting).

103. *Id.* (Scalia, J., dissenting).

104. *Id.* at 261 (Scalia, J., dissenting).

105. *Id.* (Scalia, J., dissenting).

106. *Id.* at 260 (Scalia, J., dissenting) ("I do not endorse that position as necessarily correct. . . . [A]ll that I need to establish . . . is that on the basis of our jurisprudence to date, the answer to the constitutional question is not clear.").

For competing views on the wisdom of the Court's decision in *Almendarez-Torres*, compare Bindu Jacob, Note, *Immigration Law: Criminal Penalties for Deported Aliens Who Illegally Reenter the United States*—Almendarez-Torres v. United States, *118 S. Ct. 1219 (1998)*, 14 TEMP. INT'L & COMP. L.J. 401 (2000) (arguing majority's interpretation of statute at issue in Almendarez-Torres was correct)

B. Jones v. United States*: Interpreting the Past and Predicting the Future*

Exactly one year later, the Supreme Court decided *Jones v. United States*.[107] In *Jones*, the Court reviewed a federal carjacking statute that provided increasing maximum prison sentences as the level of bodily injury accompanying the carjacking or attempted carjacking increased.[108] Nathaniel Jones was indicted under the statute pursuant to an incident in which he and two accomplices held up two men and later escaped in the car of one of the victims.[109] Again, no mention was made in his indictment of the special circumstances allowing an increased sentence.[110] Jones pled guilty and was informed that he faced a possible fifteen-year sentence.[111] The sentencing judge, however, determined by a preponderance of the evidence that one of the victims had incurred serious bodily injury during the incident and, therefore, sentenced Jones to twenty-five years imprisonment.[112] Again the Court was faced with the question of whether the statute defined separate offenses, each with its own required level of physical injury and corresponding maximum sentence, or whether the statute proscribed a single offense and left the level of physical injury as a factor bearing only on the extent of punishment.[113]

The dissenters from *Almendarez-Torres* plus Justice Thomas formed a majority of five in *Jones* that interpreted the carjacking statute to set forth three separate offenses.[114] The majority justified its interpretation on the grounds that it avoided the constitutional doubt raised by the interpretation that assigned "sentence factor" status to the level of bodily injury.[115] The majority felt that the interpretation advocated by the dissenters was in potential conflict with the principle, submerged in prior cases,[116] that

> under the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty

with Todd Meadow, Note, Almendarez-Torres v. United States: *Constitutional Limitations on Government's Power to Define Crimes*, 31 CONN. L. REV. 1583 (1999) (contending that *Almendarez-Torres* endangers criminal defendants' due process rights and arguing that any fact that substantially increases the maximum punishment should be proved to a jury beyond a reasonable doubt).

107. 526 U.S. 227 (1999).

108. *Id.* at 230. Under the statute, the default maximum sentence was fifteen years imprisonment; however, the maximum sentence was increased to twenty-five years imprisonment if the offense resulted in serious bodily harm, and to life imprisonment if death resulted. *Id.* (citing 18 U.S.C. § 2119 (Supp. V 1993)).

109. *Id.* at 229.

110. *Id.* at 231.

111. *Id.*

112. *Id.*

113. *Id.* at 229.

114. *Id*.

115. McCarty, *supra* note 17, at 157.

116. *See Jones*, 526 U.S. at 240–43.

> for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt.[117]

While *Jones* was not a case dealing with recidivism, the decision firmly limited *Almendarez-Torres* to situations where recidivism was the basis for imposing a sentence beyond the statutory maximum.[118] More importantly for purposes of this note, the *Jones* Court's comments regarding the *Almendarez-Torres* decision are crucial to understanding the debate over the scope of the prior conviction exception. In discussing *Almendarez-Torres*, the Court in *Jones* noted that

> the holding last Term [in *Almendarez-Torres*] rested in substantial part on the tradition of regarding recidivism as a sentencing factor, not as an element to be set out in the indictment. The Court's repeated emphasis on the distinctive significance of recidivism leaves no question that the Court regarded that fact as potentially distinguishable for constitutional purposes from other facts that might extend the range of possible sentencing. . . . One basis for that possible constitutional distinctiveness is not hard to see: unlike virtually any other consideration used to enlarge the possible penalty for an offense, and certainly unlike the factor before us in this case, a prior conviction must itself have been established through procedures satisfying the fair notice, reasonable doubt, and jury trial guarantees.[119]

Thus, with *Apprendi* on the horizon, a majority of the Court was clearly concerned that statutes authorizing judges to make factual determinations on less than proof beyond a reasonable doubt and impose sentences beyond statutory maximums raised possible Due Process and Sixth Amendment concerns. Yet, in explaining why the decision in *Almendarez-Torres* did not control the issue presented in *Jones*, the Court was careful to emphasize both that the sentence enhancer at issue in *Almendarez-Torres* was recidivism, and that this was of potentially constitutional significance because prior convictions had presumably been obtained according to the requirements of due process: fair notice and proof to a jury beyond a reasonable doubt.

C. Apprendi v. New Jersey*: Creation of the Prior Conviction Exception*

In *Apprendi v. New Jersey*,[120] the Supreme Court transformed the wet cement poured in *Jones* into concrete. The case arose out of a December 1994 incident in which Charles Apprendi fired several bullets into the home of an African American family that had recently moved

117. *Id.* at 243 n.6. This principle would later serve as the basis for the rule promulgated in *Apprendi*. *See* Apprendi v. New Jersey, 530 U.S. 466, 490 (2000).

118. *Jones,* 526 U.S. at 248; Analisa Swan, Note, Apprendi v. New Jersey*: The Scaling Back of the Sentencing Factor Revolution and the Resurrection of Criminal Defendant Rights, How Far Is Too Far?*, 29 PEPP. L. REV. 729, 744 (2002).

119. *Jones*, 526 U.S. at 249.

120. 530 U.S. 466 (2000).

into his neighborhood.[121] During his interrogation, Apprendi made a statement, which he later retracted, that he did not want the family in his neighborhood because of their race.[122] A grand jury returned a twenty-three count indictment against him.[123] The New Jersey "hate crime" statute was not mentioned.[124] This statute authorized a judge to increase a defendant's sentence if the judge found, by a preponderance of the evidence, that the defendant's conduct had been motivated by a purpose to intimidate on the basis of race.[125]

Apprendi ultimately pleaded guilty to two counts of second-degree unlawful possession of a firearm, only one of which related to the shooting in question.[126] The maximum sentence Apprendi could have faced for the count relating to the shooting in question was ten years imprisonment.[127] The state requested that the hate crime enhancement be applied.[128] At an evidentiary hearing, a police officer testified as to Apprendi's statement that he had shot at the house because African Americans lived there.[129] Apprendi denied this motive and testified that he had shot at the house while under the influence of alcohol and drugs.[130] In addition, a psychologist testified that Apprendi suffered from a number of mental disorders, and that his personality type was such that he would "say or do almost anything, including lie, to get out of a police interrogation."[131] The trial judge, however, determined that Apprendi's conduct had been motivated by a purpose to intimidate on the basis of race, and consequently imposed a sentence of twelve years imprisonment on the count concerning the shooting.[132] The sentence was upheld both by a divided New Jersey appellate court and by a divided New Jersey Supreme Court.[133]

Before the Supreme Court, Apprendi did not challenge the failure of the indictment to list a possible sentence enhancement.[134] He chal-

121. *Id.* at 469.

122. *Id.*

123. The indictment contained counts stemming from shootings on four distinct dates, but none of the counts referred to the New Jersey hate crime statute. Costello, *supra* note 17, at 1227–28.

124. *Apprendi,* 530 U.S. at 469.

125. N.J. STAT. ANN. § 2C:44-3(e) (West 1995).

126. *Apprendi*, 530 U.S. at 469–70. Apprendi also pleaded guilty to a third-degree offense of unlawful possession of an antipersonnel bomb, but the sentence for this count did not factor into the Court's analysis because it ran concurrently with the sentence for the two second-degree offenses. *Id.* at 470.

127. *Id.* at 470. In the plea agreement, the prosecution reserved the right to move for an increased sentence pursuant to the hate crime statute. *Id.*

128. State v. Apprendi, 698 A.2d 1265, 1267 (N.J. Super. Ct. App. Div. 1997), *aff'd*, 731 A.2d 485 (N.J. 1999), *rev'd*, 530 U.S. 466 (2000).

129. *Id*.

130. *Id.*

131. *Id.*

132. *Apprendi*, 530 U.S. at 471–72.

133. State v. Apprendi, 698 A.2d 1265 (N.J. Super. Ct. App. Div. 1997), *aff'd* 731 A.2d 485 (N.J. 1999), *rev'd* 530 U.S. 466 (2000).

134. *Apprendi*, 530 U.S. at 477 n.3.

lenged the power of the trial judge to impose a sentence greater than that allowed by statute by finding, under a preponderance standard, that his actions had been motivated by racial bias.[135] The Supreme Court invalidated Apprendi's sentence, holding 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."[136] As applied, this rule signaled the death of New Jersey's hate crime statute because the statute prevented a jury from finding a fact that authorized a punishment beyond the maximum allowable pursuant to a conviction of second-degree unlawful possession.[137] This statutory scheme conflicted with Apprendi's right to have every element of the charged offense submitted to a jury and proved beyond a reasonable doubt.[138]

In laying down the *Apprendi* rule, the Court expressed concern over the reliability of fact-finding at sentencing under the New Jersey scheme. The Court refused to follow a presumption of the New Jersey Supreme Court and instead argued "that . . . the purpose of the offender . . . will sometimes be hotly disputed, and that the outcome may well depend in some cases on the standard of proof and the identity of the factfinder."[139] Precisely because Apprendi had contested the existence of racial bias in the lower courts, the Court was unwilling to accept as reliable the sentencing judge's finding under a preponderance of the evidence standard.

The Court took care, however, to carve out an exception to the presentation and standard of proof requirements for prior convictions. Describing *Almendarez-Torres* as "at best an exceptional departure from the historic practice we have described," the Court distinguished the case from *Apprendi* on several grounds.[140] First, while the judge in *Almendarez-Torres* was allowed to make the factual findings regarding the defendant's prior convictions necessary to impose the increased sentence, Almendarez-Torres had not contested the fact of his prior convictions, whereas in *Apprendi* the defendant had contested the racial bias question.[141] Thus, in *Almendarez-Torres*, there was no issue as to the reliability of the judge's determination that Almendarez-Torres had been previously convicted of a prior aggravated felony.[142] Second, the *Apprendi* majority noted that recidivism usually does not "'relate to the commission of the offense' itself," while the existence of racial bias was an issue intimately intertwined with the conduct for which Apprendi was con-

135. *Id*.
136. *Id.* at 490.
137. *Id.* at 491–92.
138. *Id.* at 477 (quoting United States v. Gaudin, 515 U.S. 506, 510 (1995)). Apprendi's case was remanded and his original twelve-year prison sentence was reduced to seven years. Karen DeMasters, *Hate Crime Resentencing*, N.Y. TIMES, July 23, 2000, § 14NJ, at 5.
139. *Apprendi*, 530 U.S. at 475.
140. *Id.* at 487.
141. *Id.* at 488.
142. *Id.*

victed and sentenced.[143] Third, and perhaps most importantly, the Court cited "the certainty that procedural safeguards attached to any 'fact' of prior conviction" as "mitigat[ing] the due process . . . concerns otherwise implicated in allowing a judge to determine a 'fact' increasing punishment beyond the maximum of the statutory range."[144] In rejecting New Jersey's reliance on *Almendarez-Torres*, the Court concluded its discussion of the case's inapplicability to the facts in *Apprendi* by stating:

> [T]here is a vast difference between accepting the validity of a prior judgment of conviction entered in a proceeding in which the defendant had the right to a jury trial and the right to require the prosecutor to prove guilt beyond a reasonable doubt, and allowing the judge to find the required fact under a lesser standard of proof.[145]

D. *The Exception: Creation of Chance or Deliberate Choice?*

There appear to be two practical explanations for the *Apprendi* Court's willingness to exempt the fact of a prior conviction from the jury trial and proof beyond a reasonable doubt requirements now applicable to other sentence-enhancing facts. On the one hand, the creation of the exception for prior convictions can be viewed as a function of nothing more than the specific facts in *Apprendi*. Prior convictions were not at issue in *Apprendi*; thus, the Court did not have to affirm or overrule *Almendarez-Torres* to reach its decision.[146] Under this view, the exception for prior convictions has no legal justification, and will probably be discarded as soon as a case dealing with prior convictions comes before the Court.[147] Support for this view comes from statements by the majority in *Apprendi* questioning the continued validity of *Almendarez-Torres*[148] and

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143. *Id.* at 496 (quoting Almendarez-Torres v. United States, 523 U.S. 224, 244 (1998)).

144. *Id.* at 488.

145. *Id.* at 496.

146. *Id.* at 490 ("Apprendi does not contest [*Almendarez-Torres*]'s validity and we need not revisit it for purposes of our decision today . . . .").

147. Huigens, *supra* note 15, at 389 ("Neither of the two limitations set by *Apprendi*, pertaining to criminal history and statutory maxima, respectively, can stand much scrutiny. Each . . . is vulnerable to elimination once an appropriate vehicle for overturning its supporting precedent arrives at the Court . . . .").

At least with respect to statutory maxima, Huigens's prediction has been proven wrong. In arguing that the requirement that a fact increase a sentence beyond the statutory maximum is tenuous and likely to be abandoned, Huigens cited to a footnote in *Apprendi* in which the majority rejected the contention of the dissenters that *Apprendi* overruled *McMillan v. Pennsylvania*, a case that upheld a statute allowing judges to find facts under a preponderance standard that would result in the imposition of mandatory minimum sentences. *Apprendi*, 530 U.S. at 487 n.13. Although Huigens believed *McMillan* to be in danger of being overruled, the Court recently reaffirmed its holding in *McMillan* that *Apprendi*'s jury trial and proof beyond a reasonable doubt requirements do not apply where a fact, if determined to exist, will only require the imposition of a mandatory minimum sentence within the statutory range. Harris v. United States, 536 U.S. 545, 546–47 (2002). In this situation, the jury's verdict has authorized the judge to impose the mandatory minimum with or without the extra finding because it is within the statutory range for the offense. *Id.*

148. *Apprendi*, 530 U.S. at 489 ("[I]t is arguable that *Almendarez-Torres* was incorrectly decided . . . .").

by the fact that there are currently five Justices on record as believing that the case was wrongly decided.[149]

On the other hand, there is the possibility that the exception was not merely an accident, but rather a deliberate creation. As previously noted, the reliability of information used at sentencing was a concern percolating beneath the surface in *Apprendi*.[150] With this in mind, the Court's creation of the exception can be seen as an attempt to make a constitutional distinction between the fact of a prior conviction and other facts that are considered in determining a defendant's sentence.[151] Three bases for this distinction are suggested in *Apprendi*. First, there is the tradition of using prior convictions to increase an offender's sentence.[152] Second, prior convictions are by their nature offender-related rather than offense-related facts. While offense-related facts must usually be proved to a jury beyond a reasonable doubt, offender-related facts (aspects of a defendant's background and indications of character) are usually left for sentencing judges to find. A defendant's status as a repeat offender is less likely to be disputed by the defendant than offense-related facts, like the existence of racial bias in *Apprendi*.[153] Third, the distinction also rests on the Court's assumption that prior convictions, having been obtained through due process of law, are inherently more reliable indicators of past conduct than, say, a court's finding under a preponderance standard.[154]

IV. NONJURY JUVENILE ADJUDICATIONS IN THE WAKE OF *APPRENDI*: A DISAGREEMENT ABOUT RELIABILITY

This part analyzes the conflicting approaches courts have taken in answering the question of whether nonjury juvenile adjudications fall within *Apprendi*'s prior conviction exception. First, the approaches of the *Tighe* and *Smalley* courts will be discussed. Then, the three justifications for the "prior conviction" exception will be applied in the context of nonjury juvenile adjudications. I argue that the core of the disagreement between the *Tighe* and *Smalley* approaches stems from conflicting

149. *See id.* at 501, 520–21 (Thomas, J., concurring) (arguing that any fact, the finding of which increases the punishment for a crime, including the fact of a prior conviction, must be treated as an element of the crime); Almendarez-Torres v. United States, 523 U.S. 224, 248 (1998) (Scalia, J., dissenting, joined by Justices Stevens, Souter, and Ginsburg).

150. *See supra* note 142 and accompanying text.

151. *See* Jason Ferguson, Note, Apprendi v. New Jersey: *Should Any Factual Determination Authorizing an Increase in a Criminal Defendant's Sentence Be Proven to a Jury Beyond a Reasonable Doubt?*, 52 MERCER L. REV. 1531, 1541–42 (2001).

152. *Apprendi*, 530 U.S. at 488 (citing *Almendarez-Torres*, 523 U.S. at 243).

153. *Id.* at 496. *But see* Huigens, *supra* note 15, at 408 (arguing that the question of whether a defendant is in fact the same person who suffered prior convictions is disputed often enough to require "due process and other trial rights" to attach to the determination of this issue).

154. *Apprendi*, 530 U.S. at 488.

interpretations of language in *Apprendi* concerning the reliability of prior convictions.

Lower federal courts, wary of simply assuming *Almendarez-Torres*'s impending death in the absence of an explicit overrule, have proceeded under the theory that the prior conviction exception was deliberately crafted by the Court and is justified by the aforementioned constitutionally distinguishing features of recidivism.[155] Moreover, some courts have already exhibited a willingness to expand *Apprendi*'s "other than the fact of a prior conviction" language.[156] With this in mind, I now turn to the disagreement over whether nonjury juvenile adjudications fall within the exception.

A. *The Ninth Circuit View:* United States v. Tighe

In *United States v. Tighe*,[157] the Court of Appeals for the Ninth Circuit stated the issue with precision: "[D]o prior juvenile adjudications, which do not afford the right to a jury trial, fall within the 'prior conviction' exception to *Apprendi*'s general rule that a fact used to increase a defendant's maximum penalty must be submitted to a jury and proved beyond a reasonable doubt?"[158] In *Tighe*, the defendant pleaded guilty to counts of bank robbery, being a felon in possession of a firearm, and interstate transportation of a stolen vehicle.[159] The felon in possession charge, absent any prior convictions, carries a maximum sentence of ten years imprisonment under the Armed Career Criminal Act (ACCA).[160] The existence of three prior convictions for violent felonies or serious drug offenses, however, increases an offender's sentence from a maximum of ten years imprisonment to a minimum of fifteen years imprisonment.[161] Tighe was sentenced under this provision, the trial judge having

155. *See* United States v. Sterling, 283 F.3d 216, 219–20 (4th Cir. 2002), *cert. denied*, 536 U.S. 931 (2002); United States v. Reyes-Maya, 305 F.3d 362, 365–66 (5th Cir. 2002), *cert. denied*, 557 U.S. 1145 (2003); United States v. Aparco-Centeno, 280 F.3d 1084, 1088 (6th Cir. 2002), *cert. denied*, 536 U.S. 948 (2002); United States v. Morris, 293 F.3d 1010, 1012 (7th Cir. 2002), *cert. denied*, 537 U.S. 987 (2002); United States v. Kempis-Bonola, 287 F.3d 699, 702 (8th Cir. 2002), *cert. denied*, 537 U.S. 914 (2002); United States v. Pacheco-Zepeda, 234 F.3d 411, 414–15 (9th Cir. 2001); United States v. Gomez-Estrada, 273 F.3d 400, 401–02 (1st Cir. 2001); United States v. Santiago, 268 F.3d 151, 155 n.6 (2d Cir. 2001), *cert. denied*, 535 U.S. 1070 (2002); United States v. Weaver, 267 F.3d 231, 250–51 (3d Cir. 2001), *cert. denied*, 534 U.S. 1152 (2002); United States v. Thomas, 242 F.3d 1028, 1034–35 (11th Cir. 2001); United States v. Villalva, 232 F.3d 1329, 1331–32 (10th Cir. 2000).

156. *See Morris*, 293 F.3d at 1012 (holding that *Apprendi*'s exception for prior convictions includes determination that convictions resulted from offenses that occurred on separate occasions); *Santiago*, 268 F.3d at 155 (holding same as *Morris*); State v. Cox, 37 P.3d 437, 443 (Ariz. Ct. App. 2002) (Barker, J., concurring) (arguing that "a finding of being on parole . . . has the same underlying foundation as the finding of a prior conviction"); State v. Stewart, 791 A.2d 143, 151–52 (Md. 2002) (stating that the prior conviction exception includes the fact of a previous term of incarceration).

157. 266 F.3d 1187 (9th Cir. 2001).

158. *Id*. at 1193.

159. *Id*. at 1190.

160. 18 U.S.C. § 924(a)(2) (2000).

161. *Id.* § 924(e)(1).

found the existence of three prior violent felonies. One of these felonies was a nonjury juvenile adjudication.[162]

On appeal to the Ninth Circuit, Tighe argued that the use of his juvenile adjudication in increasing his sentence under the ACCA was unconstitutional in light of *Apprendi* because the juvenile adjudication had not been charged in his indictment, submitted to a jury, or proved beyond a reasonable doubt.[163] A divided panel ultimately sided with Tighe.[164] The majority began its analysis by stating that the *Apprendi* rule did not directly address Tighe's argument due to the "significant constitutional differences between adult convictions and juvenile adjudications," one being the lack of a jury trial right for juvenile offenders.[165] The majority then focused on the Supreme Court's use of the word "conviction" in *Almendarez-Torres*, *Jones*, and *Apprendi*. It noted that the prior conviction at issue in *Almendarez-Torres* was not treated as a substantive element of the offense in that case, but rather as a sentencing factor.[166] Examining *Jones*, the majority in *Tighe* highlighted that decision's emphasis on the fact that prior convictions had satisfied the fair notice, jury trial, and proof beyond a reasonable doubt requirements.[167] The *Tighe* majority then explained that the special status reserved for prior convictions existed because they had presumably already been subject to this "fundamental triumvirate of procedural protections."[168]

With respect to the *Apprendi* decision, the *Tighe* majority highlighted *Apprendi*'s emphasis on the jury trial right as a procedural safeguard justifying the prior conviction exception.[169] In fact, the *Tighe* majority argued that the reason *Apprendi* did not overrule *Almendarez-Torres* was because the prior convictions used to enhance the sentence in *Almendarez-Torres* were secured after a jury trial with a beyond a reasonable doubt standard of proof.[170] Moreover, the majority highlighted

162. *Tighe*, 266 F.3d at 1190. In the juvenile proceeding, Tighe faced charges of reckless endangerment, first-degree robbery, and unauthorized use of a motor vehicle. *Id.*

163. *Id.* at 1191.

164. *Id.* at 1189–90. Before finding an *Apprendi* violation, the court first dismissed Tighe's argument that the ACCA's use of prior convictions to increase an offender's sentence beyond the statutory maximum violated *Apprendi* because the fact of his prior convictions was not proved to a jury beyond a reasonable doubt. In dismissing this argument, the court merely restated the holding of *Apprendi*, which directly contradicted Tighe's argument. *Id.* at 1191.

The court then rejected the government's contention that *Tighe* was controlled by a previous decision of the Ninth Circuit, *United States v. Williams*, 891 F.2d 212 (9th Cir. 1989). In *Williams*, the defendant pleaded guilty to a charge of bank robbery. The trial court relied on Williams's two juvenile adjudications in increasing his sentence to fifty-seven months imprisonment. The maximum sentence for the offense was twenty years. Thus, the court in *Tighe* distinguished *Williams* as a case in which "the defendant's ultimate sentence . . . was *within* the statutorily mandated range for the offense of conviction. In other words, William's [sic] prior juvenile adjudications were not used to increase the statutorily mandated maximum punishment to which he was exposed." *Tighe*, 266 F.3d at 1192.

165. *Tighe*, 266 F.3d at 1192–93; *see also* McKeiver v. Pennsylvania, 403 U.S. 528, 545 (1971).

166. *Tighe*, 266 F.3d at 1193.

167. *Id*.

168. *Id.*

169. *Id.* at 1194.

170. *Id.*

the Supreme Court's admonition in *Apprendi* that the holding in *Almendarez-Torres* was to be treated as a "narrow exception" to *Apprendi*'s general rule.[171] These considerations led the majority to conclude that the prior conviction exception was limited to convictions "that were themselves obtained through proceedings that included the right to a jury trial and proof beyond a reasonable doubt."[172] Thus, Tighe's nonjury juvenile adjudication did not fall within the exception.[173]

The dissent in *Tighe* disagreed with the reasoning and conclusion of the majority.[174] After noting that Congress had specifically listed juvenile adjudications as convictions that could be counted towards sentence enhancements under the ACCA, the dissent argued that the Ninth Circuit's decision in *United States v. Williams*,[175] allowing juvenile adjudications to serve as the basis for a sentence enhancement, controlled the present case.[176] Furthermore, the dissent characterized as "tortured" the majority's distinction between convictions in which the defendant had a right to jury trial and nonjury juvenile adjudications.[177] Instead, the dissent read *Jones* to require that prior convictions used to enhance sentences had to have been constitutionally secured according to the proceeding's due process requirements.[178] Finally, the dissent suggested that the majority's decision would ultimately work to the disadvantage of criminal defendants, because presentation of their previous instances of juvenile delinquency to a jury might prejudice the jury.[179]

Before examining the approach taken by the Eighth Circuit in *Smalley*, two additional points about the *Tighe* decision must be made. The first concerns the immediate outcome of the decision. The *Tighe* decision does not preclude sentencing judges from considering an adult defendant's prior juvenile record. To the contrary, prosecutors under *Tighe* remain capable of obtaining enhanced sentences based on prior juvenile offenses. Moreover, the defendant's juvenile record can still be used to increase his or her sentence beyond the statutory maximum the defendant would ordinarily face. The importance of *Tighe* is that it obligates prosecutors to prove to a jury beyond a reasonable doubt that a defendant sustained prior nonjury juvenile adjudications in order to use them as the basis for sentence enhancement. The literal language of the *Apprendi* rule requires nothing more.[180]

171. *Id.*
172. *Id.*
173. As of this writing, only one other court has agreed with the *Tighe* approach to the use of nonjury juvenile adjudications for *Apprendi* purposes. *See* State v. Brown, No. 2002-KA-1217, 2003 WL 21299836, at *7 (La. Ct. App. May 28, 2003).
174. *Tighe*, 266 F.3d at 1198 (Brunetti, J., dissenting).
175. 891 F.2d 212 (9th Cir. 1989).
176. *Tighe*, 266 F.3d at 1199 (Brunetti, J., dissenting).
177. *Id*. at 1200 (Brunetti, J., dissenting).
178. *Id*. (Brunetti, J., dissenting).
179. *Id*. (Brunetti, J., dissenting).
180. Apprendi v. New Jersey, 530 U.S. 466, 490 (2000).

The second point concerns an unstated implication of the *Tighe* decision. While acknowledging the *Apprendi* Court's focus on the reliability of prior convictions, the *Tighe* court argued that reliability for *Apprendi* purposes could only be found in a prior conviction handed down by a jury.[181] Thus, any proceeding not featuring the right to a jury trial would lack the reliability that the prior conviction exception requires. *Tighe* can, therefore, be read as calling into question the reliability of nonjury juvenile adjudications for sentence enhancement purposes.[182] The implications of this conclusion will be discussed later in this part.

B. Nonjury Juvenile Adjudications As Prior Convictions

1. United States v. Smalley

Nine months after *Tighe*, in *United States v. Smalley,*[183] the Court of Appeals for the Eighth Circuit disagreed with the Ninth Circuit, ruling that a prior nonjury juvenile adjudication fell within the prior conviction exception. In *Smalley*, the defendant again was charged with and pleaded guilty to being a felon in possession of a firearm.[184] After his plea, the government filed a notice seeking an enhanced sentence under the ACCA.[185] The district court determined that Smalley was eligible for the sentence enhancement based on his prior nonjury juvenile adjudications.[186] Smalley appealed, arguing that the use of his juvenile adjudications to increase his sentence beyond the statutory maximum under the ACCA violated *Apprendi*.

The *Smalley* court disagreed with the holding in *Tighe*.[187] According to the *Smalley* court, it was "incorrect to assume that it is not only sufficient but necessary that the 'fundamental triumvirate of procedural protections,' as the Ninth Circuit put it, underly [sic] an adjudication before

181. *Tighe*, 266 F.3d at 1193.

182. Several commentators advance this argument, maintaining that juries are more accurate fact finders than judges for several reasons. First, judges must make "pretrial" determinations concerning the admissibility of evidence. This evidence can be so persuasive of guilt that a judge may not be able to properly disregard it. Second, commentators highlight the fact that juvenile court judges hear hundreds or thousands of cases each year. They tend to see the same law enforcement personnel testify as witnesses, and it is argued that this repetition leads to an undue presumption that these witnesses always tell the truth. This repetition of fact situations is also said to encourage "less meticulous" habits in considering the evidence. Finally, commentators tout the advantages of group deliberation present in the jury setting, arguing that a multiplicity of perspectives ensures more reliable fact-finding than a single, possibly prosecution-friendly perspective. *See* Janet E. Ainsworth, *Re-Imagining Childhood and Reconstructing the Legal Order: The Case for Abolishing the Juvenile Court*, 69 N.C. L. REV. 1083, 1120–26 (1991) (arguing that juries are more accurate fact finders than juvenile court judges); Martin Guggenheim & Randy Hertz, *Reflections on Judges, Juries, and Justice: Ensuring the Fairness of Juvenile Delinquency Trials*, 33 WAKE FOREST L. REV. 553, 562–82 (1998).

183. 294 F.3d 1030 (8th Cir. 2002), *cert. denied*, 537 U.S. 1114 (2003).

184. *Id*. at 1031.

185. *Id*.

186. *Id*.

187. *Id*. at 1032.

it can qualify for the *Apprendi* exception."[188] The court based its decision on several considerations. First, the court did not read *Jones* to require that the jury trial right attach to prior convictions.[189] Second, the court noted that the majority in *Apprendi* mentioned only the reasonable doubt and jury trial rights in its discussion of the prior conviction exception; the right to fair notice was not discussed.[190] From this, the *Smalley* court argued that because all three procedural protections were not mentioned in relation to the exception, all three were not required.[191] Finally, the court highlighted the fact that the majority in *Apprendi* had not referred to the language from *Jones* ("[o]ne basis for that possible constitutional distinctiveness . . . .")[192] that the *Tighe* court had quoted and relied upon.[193]

Under the *Smalley* approach, the proper way to analyze the issue is to determine "whether juvenile adjudications, like adult convictions, are so reliable that due process of law is not offended by such an exemption."[194] In support of this approach, the court noted that juveniles are accorded the rights to fair notice, counsel, confrontation and cross-examination of witnesses.[195] Moreover, juveniles may exercise the privilege against self-incrimination, and judicial findings of guilt must be beyond a reasonable doubt.[196] These procedural protections ensured that juvenile adjudications had the requisite degree of reliability required to fall within the "prior conviction" exception.[197] Denying juveniles the opportunity to have their case heard by a jury did not by itself undermine the reliability of the proceeding because, as the Supreme Court had noted in *McKeiver*, the use of juries would not enhance the fact-finding portion of the proceeding.[198]

188. *Id*. The United States Court of Appeals for the Third Circuit recently agreed with the *Smalley* court in United States v. Jones, 332 F.3d 688 (3d Cir. 2003). In *Jones*, the defendant pleaded guilty to being a felon in possession of a firearm and was sentenced under the ACCA enhancement because the court found that he had three prior convictions. *Id*. at 690. One of these convictions was a juvenile adjudication at which Jones had not received a jury trial. On appeal, Jones argued that the *Tighe* decision was a more faithful extension of *Apprendi*. *Id*. at 696. The court reviewed both the *Tighe* and *Smalley* approaches and ultimately rejected Jones's argument, stating that "[l]ike the *Smalley* court, we find nothing in *Apprendi* or *Jones*, two cases relied upon by the *Tighe* court and Lester Jones on this appeal, that requires us to hold that prior nonjury juvenile adjudications that afforded all required due process safeguards cannot be used to enhance a sentence under the ACCA." *Id*.

189. *Smalley*, 294 F.3d at 1032.

190. *Id*.

191. *See id* at 1032–33; *see also* Apprendi v. New Jersey, 530 U.S. 466, 488 (2000).

192. *See supra* text accompanying note 119.

193. *Smalley*, 294 F.3d at 1032 (8th Cir. 2002).

194. *Id*. at 1033.

195. *Id.*

196. *Id*.

197. *Id*.

198. *Id.*; *see also* McKeiver v. Pennsylvania, 403 U.S. 528, 547 (1971).

2. *Treatment in State Courts*

Courts in Kansas and California[199] are the only state courts thus far that have examined the issue of whether nonjury juvenile adjudications fall within the prior conviction exception. In Kansas, *State v. Spates*[200] first considered the issue of whether a trial court could consider a defendant's nonjury juvenile adjudications in elevating his sentence beyond a statutory maximum. Spates pleaded guilty to a charge of aggravated assault, and at sentencing the trial court relied on a juvenile adjudication for aggravated battery in elevating his sentence beyond the maximum he would have faced for the aggravated assault charge.[201] Spates argued that his juvenile adjudication should not have been considered at sentencing because he did not have the right to a jury trial in the juvenile proceeding.[202] The court rejected this argument, noting that a prior decision by the Kansas Supreme Court had held that juvenile adjudications could be used to calculate a defendant's criminal history score, so long as the adjudications were not "constitutionally infirm."[203]

Four months after the court of appeals handed down the decision in *Spates*, the issue came before the Kansas Supreme Court. In *State v. Hitt*,[204] the defendant pleaded guilty to a charge of conspiracy to commit aggravated battery. At sentencing, the trial court relied on Hitt's six juvenile adjudications in imposing a sentence beyond the statutory maximum for the conspiracy charge.[205] Hitt appealed and the court, after considering the implications of *Almendarez-Torres*, *Jones*, *Apprendi*, and *Tighe*, recognized the three justifications for the prior conviction exception: the historical use of recidivism in sentencing, the fact that recidivism usually pertains only to punishment and not guilt or innocence, and the fact that a prior conviction is "cloaked in substantial procedural safeguards."[206] In light of these considerations and the fact that a contrary ruling "would require the sentencing of many and result in lighter sentences for them and future defendants," the Kansas Supreme Court held that "[j]uvenile adjudications are included within the historical cloak of recidivism and enjoy ample procedural safeguards; therefore, the *Ap-*

199. One court in California has rejected, albeit in dictum, the reasoning of the *Tighe* majority. People v. Bowden, 125 Cal. Rptr. 2d 513, 517 (Cal. Ct. App. 2002) (rejecting the reasoning of the *Tighe* majority and refusing to apply it in the context of California's Three Strikes law).

200. 36 P.3d 839, 840 (Kan. Ct. App. 2001).

201. *Id.*

202. *Id*. at 842–43. Spates also argued that his prior juvenile adjudication could not be used to enhance his sentence as an adult because it was not a criminal conviction. *Id*. at 843 (quoting State v. LaMunyon, 911 P.2d 151, 155 (Kan. 1996) ("It is well established that a juvenile adjudication is not a 'criminal conviction.'")).

203. *Id.* at 843 (citing *LaMunyon*, 911 P.2d at 158).

204. 42 P.3d 732, 734 (Kan. 2002), *cert. denied*, 537 U.S. 1104 (2003).

205. *Id*.

206. *Id*. at 736.

prendi exception for prior convictions encompasses juvenile adjudications."[207]

C. Nonjury Juvenile Adjudications and the Justifications for the Prior Conviction Exception

Under the *Tighe* approach, *Apprendi*'s prior conviction exception is limited to convictions obtained after fair notice and proof to a jury beyond a reasonable doubt.[208] According to the *Smalley* approach, any conviction can fall within the exception so long as the process that was constitutionally due the defendant was given.[209] This section applies the three justifications for the prior conviction exception to nonjury juvenile adjudications. As will be seen, nonjury juvenile adjudications satisfy each criteria.

1. Traditional Use As a Sentencing Factor

The first separate juvenile justice system in the United States is little more than one hundred years old.[210] Initially concerned with rehabilitating children thought not to be completely responsible for their acts, juvenile systems over the course of the twentieth century became increasingly punishment oriented.[211] As the focus of juvenile systems gradually shifted from rehabilitation to retribution, the practice of relying on juvenile records during adult sentencing has increased.[212] First endorsed in the 1950s, the practice was justified by the need for sentencing judges to consider information concerning a defendant's character and previous conduct in order to impose an appropriate sentence.[213]

At present, the vast majority of states and the federal government recognize the ability of sentencing judges to consider a defendant's juvenile record as part of the defendant's background and overall character.[214] More specifically, a significant number of states in the last twenty years have begun to count juvenile adjudications for purposes of applying specific enhancements for repeat offenders.[215] Of the states in this latter category, at least ten do not provide jury trials in juvenile proceed-

207. *Id.* at 740.

208. United States v. Tighe, 266 F.3d 1187, 1194 (9th Cir. 2001).

209. United States v. Smalley, 294 F.3d 1030, 1032–33 (8th Cir. 2002), *cert. denied*, 537 U.S. 1114 (2003).

210. *See supra* text accompanying note 53.

211. Mills, *supra* note 54, at 911.

212. Joseph B. Sanborn, Jr., *Striking out on the First Pitch in Criminal Court*, 1 BARRY L. REV. 7, 11 (2000).

213. *Id*. (discussing Commonwealth *ex rel*. Hendrickson v. Myers, 144 A.2d 367 (Pa. 1958)).

214. *Id.* app. 1 (listing case law from forty-four states and the federal government approving consideration of a defendant's juvenile adjudications in adult criminal sentencing).

215. *Id.* app. 2 (listing case law from eighteen states and the federal government upholding use of juvenile adjudications as convictions under recidivist statutes).

ings.[216] The federal government also follows this practice.[217] The Federal Sentencing Guidelines require sentencing judges to add points to a defendant's criminal history score for each juvenile adjudication in the defendant's history, regardless of whether the defendant was afforded a jury trial in those adjudications.[218] In *United States v. Williams*,[219] the Ninth Circuit specifically endorsed this practice, holding that "it was not a violation of Williams's due process rights for the sentencing judge to use his prior, nonjury, juvenile adjudications to enhance his sentence under the sentencing guidelines."[220] Establishing a limit prohibiting nonjury juvenile adjudications from consideration at sentencing, the court wrote, would require a finding that "the enhancement of an adult criminal sentence requires a higher level of due process protection than the imposition of a juvenile sentence."[221] In sum, while the practice of using juvenile adjudications to enhance adult sentences is relatively new given the comparative youth of juvenile systems, the practice is not an entirely novel phenomenon. Rather, it has substantial roots in federal and state case law and statutes.

2. *The Existence of Nonjury Juvenile Adjudications As an Offender-Related Fact*

Unless conduct is criminalized only when committed by a person with a record of prior convictions, nonjury juvenile adjudications will almost always fall on the offender-related side of the offender-related/offense-related divide.[222] In *Graham v. West Virginia*,[223] the Supreme Court held that due process did not require the existence of prior convictions to be alleged in the same indictment that charged a substantive offense for a recidivist penalty to be applied.[224] The Court characterized the existence and accuracy of the prior convictions as unrelated to the commission of the substantive offense, but rather relevant "to the

216. *Compare* DAVIS, *supra* note 55, § 5.3 & nn.76, 78 (listing states that, either by statute or judicial decision, grant or deny juveniles the right to trial by jury), *with* Sanborn, *supra* note 212, app. 2 (listing states that count juvenile adjudications as convictions for recidivist enhancements).

217. DAVIS, supra note 55, § 5.3 n.7.

218. U.S. SENTENCING GUIDELINES MANUAL § 4A1.2(d)(2) (2001). The Guidelines also indicate that juvenile status offenses are not to be counted in determining a defendant's criminal history. *Id.* § 4A1.2(c)(2).

219. 891 F.2d 212 (9th Cir. 1989).

220. *Id.* at 215.

221. *Id.*

222. One example of a statute that denotes recidivism as an element is 18 U.S.C. § 922(g)(1) (2000), which criminalizes possession of a firearm only by convicted felons.

223. 224 U.S. 616 (1912).

224. *Id.* at 625 ("[I]t cannot be said that the prisoner was deprived of due process of law because the question as to former conviction was passed upon separately.").

punishment only."[225] This characterization continues today in the Federal Sentencing Guidelines.[226]

The same offender-related characterization applies to all juvenile adjudications for two reasons. First, like a prior adult conviction, a prior juvenile adjudication is rarely, if ever, defined as a substantive element of an offense.[227] This is because prior juvenile adjudications, like prior adult convictions, rarely relate directly to the conduct for which a person is prosecuted. In the case of a defendant charged with assault, for example, no one would argue that the defendant's prior assault conviction is substantive proof of his or her guilt of the later charge. Nor would the prior conviction be an element of the later assault charge. Second, the existence of prior juvenile adjudications is more appropriately considered an offender-related fact rather than an offense-related fact because their existence is rarely disputed.[228] When disputed, the factual finding that a defendant has prior juvenile adjudications can oftentimes be made merely by examining court records or taking testimony from juvenile court employees.[229] Determination of a defendant's identity and history of juvenile adjudications rarely involves contested testimony or requires the subjective interpretation and credibility determinations that juries make.[230] On the other hand, finding facts related to a specific offense, like the existence of racial bias in *Apprendi*, often requires sifting through conflicting testimony and assessing witness credibility.[231]

3. Reliability of Nonjury Juvenile Adjudications

The third distinguishing feature highlighted in *Apprendi* as a reason for exempting the fact of prior convictions from the presentation and proof requirements is the "certainty that procedural safeguards attached

225. *Id.* at 629.

226. *See* Justice Stephen Breyer, *Justice Breyer: Federal Sentencing Guidelines Revisited*, 14 CRIM. JUST. 28, 31 (1999) (noting that a defendant's history of prior convictions is grouped into a broader category of "Offender Characteristics" that determine the sentence).

227. Rather than being defined as a substantive element of an offense, prior juvenile adjudications are used as potential sentence enhancers during the sentencing phase. *See* Audrey Dupont, *The Eighth Amendment Proportionality Analysis and Age and the Constitutionality of Using Juvenile Adjudications to Enhance Adult Sentences*, 78 DENV. U. L. REV. 255, 274–75 (2000); David Dormont, Note, *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, 1773–74 (1991).

228. *See* Almendarez-Torres v. United States, 523 U.S. 224, 235 (1998) (citing cases).

229. State v. Apprendi, 731 A.2d 485, 512 (N.J. 1999) (Stein, J., dissenting), *rev'd*, 530 U.S. 466 (2000). In *Smalley*, a Missouri juvenile court employee testified at the sentencing hearing in the district court as to Smalley's prior juvenile adjudications. Brief for the United States at 4, Smalley v. United States, 294 F.3d 1030 (8th Cir. 2002) (No. 01-3898WMKC), *cert. denied*, 537 U.S. 1114 (2003) (No. 02-6693). *But see* Huigens, *supra* note 15, at 408 (noting that question of identity is sometimes uncertain enough to warrant trial procedures).

230. United States v. Forbes, 16 F.3d 1294, 1299 (1st Cir. 1994).

231. Joshua S. Bratspies, *Beyond a Reasonable Doubt: Limiting the Ability of States to Define Elements of an Offense in the Context of Hate Crime Legislation*, 30 SETON HALL L. REV. 893, 921 (2000).

to any 'fact' of prior conviction."[232] As previously noted, this emphasis on procedural protections reflects the belief that prior convictions are so reliable that it is unnecessary to prove the fact of their existence to a jury.[233] The disagreement between the *Tighe* and *Smalley* courts is a disagreement about what must adorn a prior conviction for it to be reliable enough to fall within the exception.[234]

Per the *Tighe* approach, prior conviction exception reliability is contingent on the presence of a "fundamental triumvirate" of procedures: notice, trial by jury, and proof beyond a reasonable doubt.[235] Support for this approach is found in the opinions in *Jones* and *Apprendi*, where the Supreme Court distinguished prior convictions from other sentencing facts because they were presumably obtained after proof to a jury beyond a reasonable doubt.[236] In excluding nonjury juvenile adjudications from the prior conviction exception, the *Tighe* approach relies on the fact that the jury trial right was specifically listed in both *Jones* and *Apprendi*.

This approach, however, is at odds with the Court's treatment of the jury trial and reasonable doubt requirements in *Duncan* and *Winship*, as well as the Court's rationale for denying the jury trial right to juveniles in *McKeiver*. In *Duncan*, the Court extended the jury trial right to most state prosecutions on the theory that the jury was a basic necessity in the American justice system—needed to check the exercise of government authority and prevent oppression.[237] In *Winship*, the Court constitutionalized the requirement that guilt in criminal trials and juvenile adjudications be established beyond a reasonable doubt. Underlying the *Winship* decision was a concern that defendants not be saddled with a criminal conviction unless their guilt had been reliably established.[238] Finally, in *McKeiver*, the Court denied the jury trial right to juveniles yet specifically noted that this would not adversely affect fact-finding in (and therefore the reliability of) delinquency adjudications.[239] The *Tighe* approach

232. Apprendi v. New Jersey, 530 U.S. 466, 488 (2000).
233. *See supra* Part III.B–C.
234. *See Eighth Circuit*, *supra* note 18, at 707.
235. *See supra* Part IV.A.
236. *See supra* Part III.B–C.
237. *See supra* notes 39–43 and accompanying text.
238. Lewis, *supra* note 50, at 296.
239. *See supra* notes 70–83 and accompanying text. Some scholars, while acknowledging problems with judicial fact-finding in juvenile adjudications, believe that the solution is not an extension of the jury trial right, but rather legislative and judicial reforms in the fact-finding process itself that eliminate or diminish the chance of prejudgment of a case or bias against a particular juvenile. Guggenheim & Hertz, *supra* note 182, at 582–86.

Of course the argument could be made that it is not the *Tighe* approach that conflicts with this line of Supreme Court precedent, it is *Apprendi*'s insistence on the jury trial right as a requirement for placement within the prior conviction exception. It can be argued that by specifically mentioning the jury trial right, the Court intended to prevent nonjury juvenile adjudications from being included in the "prior conviction" exception. Such an intent is unlikely, however, given the lack of a sound justification for requiring a prosecutor to allege and prove the existence of prior juvenile adjudications to a jury, yet not requiring the same process for prior criminal convictions. If *Tighe* is read, as I argue, to question the reliability of nonjury juvenile adjudications, then requiring a jury to find the fact of their

ignores the *McKeiver* rationale and fails to acknowledge the fact that the beyond a reasonable doubt standard of proof is geared more towards assuring the reliability of a criminal conviction or juvenile adjudication than is the jury trial right.

The *Smalley* approach, on the other hand, is a more faithful extension of *Duncan*, *Winship*, and *McKeiver*. This approach equates the reliability sought by *Apprendi* not with specific rights, but rather with the broader concept of due process.[240] Simply stated, if an adult or juvenile is given the process constitutionally due to him, and is either convicted of a crime or found delinquent, then that conviction or adjudication carries the reliability necessary for placement in the *Apprendi* exception. For adults, due process requires trial by jury; for juveniles, it does not. Yet in both contexts, the outcome is deemed reliable enough to serve as the basis for future sentence enhancement. When examined in terms of the reliability that due process requires, there is no justification for treating nonjury juvenile adjudications differently from other convictions under *Apprendi*.

V. RESOLUTION

The preceding analysis demonstrated how the *Tighe* court incorrectly interpreted language in *Apprendi* to produce a result at odds with the three justifications for the prior conviction exception. It also illustrated a conflict between the *Tighe* approach and the Supreme Court's rationale underlying the extension of the jury trial and proof beyond a reasonable doubt rights in the criminal context and the refusal to extend the jury trial right in the juvenile context. Furthermore, the *Smalley* approach was shown to conform more closely to the spirit animating the prior conviction exception, as well as previous Supreme Court cases dealing with the jury trial and proof beyond a reasonable doubt rights. Winning the battle for Supreme Court precedent supremacy does not end the debate, however. A more fundamental question still remains. Regardless of how case law dictates the conflict between the *Tighe* and *Smalley* approaches should be resolved, it remains important to ask the following question: As a matter of policy, should nonjury juvenile adjudications fall within the prior conviction exception?[241]

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existence in a later prosecution will do nothing to improve their reliability. As the Solicitor General recently stated, "if a juvenile-court proceeding were not sufficiently reliable to permit use of the resulting judgment as a predicate for a sentencing enhancement in a subsequent criminal prosecution, the infirmity could not be cured by requiring the jury rather than the judge in the later prosecution to determine that the prior adjudications had actually occurred." Brief for the United States at 10–11, United States v. Smalley, 294 F.3d 1030 (8th Cir. 2002) (No. 01-3898WMKC), *cert. denied*, 537 U.S. 1114 (2003) (No. 02-6693).

240. *See supra* notes 187–98 and accompanying text.

241. This question proceeds on the assumption that it is permissible to consider juvenile records in adult criminal sentencing. Some challenge this assumption, arguing that using a person's juvenile history undermines the rehabilitative intentions of juvenile systems. *See* Dupont, *supra* note 227, at

The answer to this question is apparent in light of the aforementioned effects of the *Tighe* decision. Recall that the decision does not prohibit the government from using nonjury juvenile adjudications to increase a defendant's sentence beyond an otherwise applicable statutory maximum.[242] Rather, *Tighe* only requires that nonjury juvenile adjudications used in this manner be presented and proved to the trial jury beyond a reasonable doubt. By presenting this information to the jury and holding the government to a high burden of proof, the *Tighe* approach seeks to ensure that the facts used to enhance a defendant's sentence are accurately and reliably found. This was, after all, a primary concern in *Apprendi*; however, the *Tighe* approach actually hinders achievement of this goal in two ways.

First, it is generally agreed that the introduction of a defendant's prior convictions at trial poses a significant risk of prejudice to the defendant.[243] As previously noted, the fact that a defendant has a record of prior adult or juvenile convictions is rarely relevant to the question of guilt or innocence of the crime charged.[244] At the same time, the persuasive nature of prior bad acts is such that it can distract jurors from considering substantive evidence that either proves or disproves guilt. The fear is that a trial jury, having been informed of a defendant's prior criminal history, will find the defendant guilty of the charge at issue based, at least in part, on his or her history and accompanying reputation. In this way, the introduction of prior convictions in the trial setting reduces rather than enhances the reliability of fact-finding; it also endangers the defendant's right to a fair and impartial trial. Yet, the *Tighe* approach requires prosecutors to prove that defendants sustained nonjury juvenile adjudications in order to use them at sentencing. A defendant could, of course, stipulate to the existence of his or her juvenile record, but this would not solve the prejudice problem because the jury would still have to find as a fact that the juvenile record existed. Other options for minimizing or eliminating the risk of prejudice to the defendant, such

279–80; Dormont, *supra* note 227, 1797–98. Others focus on alleged deficiencies in the juvenile system and argue that the use of juvenile adjudications in adult sentencing is unconstitutional. *See* Richard E. Redding, *Using Juvenile Adjudications for Sentence Enhancement Under the Federal Sentencing Guidelines: Is It Sound Policy?*, VA. J. SOC. POL'Y & L. 231, 256, 260 (2002) (arguing that juvenile adjudications should be presumed invalid for purposes of criminal sentence enhancement and should only be used when "necessary to ensure that the criminal history score does not otherwise significantly underrepresent the defendant's offending history"). Others highlight the government's interest in punishing recidivists and argue that the status of being a juvenile should not preclude a court from considering past instances of criminal conduct. *See* Mills, *supra* note 54, at 938–39.

242. *See supra* Part IV.A.

243. This view has been subscribed to by Congress, courts, and commentators. *See, e.g.,* Almendarez-Torres v. United States, 523 U.S. 224, 235 (1998) (citing Spencer v. Texas, 385 U.S. 554, 560 (1967)); United States v. Forbes, 16 F.3d 1294, 1299 (1st Cir. 1994); United States v. Jackson, 824 F.2d 21, 25-26 (D.C. Cir. 1987) (examining legislative history of Armed Career Criminal Act and other recidivist statutes). *See generally* Harold Dubroff, Note, *Recidivist Procedures*, 40 N.Y.U. L. REV. 332 (1965).

244. *See supra* Part IV.C.2.

as bifurcated proceedings and limiting instructions, have their own drawbacks.[245]

The *Smalley* approach, on the other hand, allows the fact of nonjury juvenile adjudications to be determined after the question of guilt or innocence of the charge offense has been determined. This approach removes the risk of prejudice inherent in giving a trial jury access to a defendant's prior juvenile history, thereby preserving the defendant's chances of receiving a fair and impartial trial. It also eliminates the need for stipulations, bifurcated proceedings, and limiting instructions.

The second flaw in the *Tighe* approach is that its cure does not match its diagnosis. The *Tighe* majority ruled that the existence of nonjury juvenile adjudications was a fact that did not fall within the prior conviction exception. By equating the reliability required by *Apprendi* with the presence of the jury trial right, the majority implicitly stated that nonjury juvenile adjudications were not reliable enough to fall within the exception. Given this diagnosis, an appropriate cure would have been to exclude all nonjury juvenile adjudications from consideration at sentencing when consideration would result in the imposition of a sentence higher than the otherwise applicable maximum. But this is not the cure *Tighe* prescribes. It merely requires, in conformity with the *Apprendi* rule, that a jury find that a defendant has suffered these "unreliable" adjudications. Put simply, any unreliability in nonjury juvenile adjudications is not cured by requiring a subsequent trial jury to find that the adjudications actually occurred.[246]

VI. CONCLUSION

In sum, it is clear that both case law and policy concerns suggest that nonjury juvenile adjudications fall within *Apprendi*'s prior conviction exception. This result, suggested in *Smalley* and *Hitt*, conforms to the Supreme Court's jurisprudence regarding the rights to trial by jury and proof beyond a reasonable doubt as they apply in the criminal justice and juvenile justice systems. This approach also avoids the potentially prejudicial affects of introducing a defendant's prior juvenile record at a trial. Perhaps the best that can be said of the *Tighe* approach is that it

245. In a bifurcated proceeding, there are two trials. In the first, the jury determines essentially whether the defendant is guilty or innocent of the offense charged. If the defendant is found guilty, and refuses to stipulate to the existence of a prior criminal history, then the jury is required to resolve this question. *See* Dubroff, *supra* note 243, at 333. The addition of a second level of trial proceedings, however, would further tax an already strained judicial system and impose additional burdens on jurors and witnesses. *See* Jeffrey Standen, *The End of the Era of Sentencing Guidelines:* Apprendi v. New Jersey, 87 IOWA L. REV. 775, 794 (2002). In addition, the effectiveness of instructions requiring jurors not to consider a defendant's prior criminal history in relation to the question of guilt or innocence is suspect. *See* Stephanos Bibas, *Judicial Fact-Finding and Sentence Enhancements in a World of Guilty Pleas*, 110 YALE L.J. 1097, 1144–45 (2001).

246. Brief for the United States at 10–11, United States v. Smalley, 294 F.3d 1030 (8th Cir. 2002) (No. 01-3898WMKC), *cert. denied*, 537 U.S. 1114 (2003) (No. 02-6693).

has its heart in the right place. Courts should be vigilant in ensuring that sentences are imposed only on the basis of reliable information. To this end, if there are legitimate reasons to be concerned about the reliability of nonjury juvenile adjudications, legislatures and courts should address those concerns head on.[247] *Apprendi*, however, was not meant to do this work.

247. Along these lines, one possible solution is the extension of the jury trial right to juveniles. *See Eighth Circuit*, *supra* note 18, at 712; Kropf, *supra* note 55, at 2168–79.