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Should Juvenile Adjudications Count as Prior Convictions for Apprendi Purposes?

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In *Apprendi v. New Jersey*, the Supreme 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." From this holding, the Court established the general rule that due process requires a jury to decide all issues leading to a sentence enhancement above the prescribed statutory maximum. The Court carved out a limited exception for prior convictions only. As a result, if a trial court judge finds that the defendant had a prior conviction, he may use this fact to enhance the defendant's sentence beyond a statutory maximum without submitting it to a jury. The Third, Eighth, and Ninth Circuits are divided on the question of whether juvenile adjudications can and should be characterized as "prior convictions" for sentence enhancement purposes. In addition to this circuit split, as of January 2004, one state supreme court already has weighed in on this issue.

2. See id.
3. Compare *United States v. Jones*, 332 F.3d 688, 696 (3d Cir. 2003) (holding that "[a] prior nonjury juvenile adjudication that was afforded all constitutionally required procedural safeguards can properly be characterized as a prior conviction for *Apprendi* purposes"), and *United States v. Smalley*, 294 F.3d 1030, 1033 (8th Cir. 2002) (holding that juvenile adjudications count as prior convictions for *Apprendi* purposes), with *United States v. Tighe*, 266 F.3d 1187, 1194-95 (9th Cir. 2001) (holding that nonjury juvenile adjudications do not count as prior convictions for enhancement purposes).

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This Note examines the fundamental problems with allowing a judge to count juvenile adjudications as prior convictions for sentence enhancement purposes, within the meaning of the *Apprendi* exception, without carefully scrutinizing the circumstances of the adjudication. The Court's decision in *Apprendi* did not address "the unique issues that distinguish juvenile adjudications from adult convictions, such as the lack of a right to a jury trial."\(^5\) Although it may be safe to assume these safeguards existed in prior adult convictions, it is a mistake for a court to assume, without further inquiry, that a juvenile received sufficient procedural safeguards in his juvenile adjudication. Moreover, courts should not assume that the "fact" of a juvenile adjudication always establishes that the juvenile was "guilty," because the traditional purpose of the juvenile court system is to rehabilitate, not to establish guilt.

In this Note, Part I examines the *Apprendi* exception for prior convictions and the Court's rationale behind this exception. Part II describes the circuit split among the Third, Eighth, and Ninth Circuits over whether a juvenile adjudication should count as a prior conviction for *Apprendi* purposes. Part III outlines the history and goals of the juvenile court system, specifically examining the fundamental tension between the juvenile justice system's treatment rationale and the adult criminal justice system's punishment rationale. Part IV surveys various states' current practices of using juvenile adjudications for sentence enhancement purposes. Part V analyzes the problems with characterizing a juvenile adjudication as a prior conviction for *Apprendi* purposes without carefully scrutinizing the juvenile adjudication to determine whether the juvenile received sufficient procedural safeguards for the court to rely on that proceeding. Part VI evaluates three different approaches—building on current case law—which the Court could take to resolve the circuit split. The Court could decide that juvenile adjudications always count as prior convictions, that they never count as prior convictions, or that juveniles should have the right to a jury trial. This Note argues, based on the fundamental legal and procedural differences between a juvenile adjudication and an

\(^5\) *Tighe*, 266 F.3d at 1193.
adult conviction, the Court should not automatically allow a juvenile adjudication to count as a prior conviction without further inquiry. Finally, this Note concludes by recommending that a court scrutinize a juvenile adjudication to identify any factual issues and determine whether the juvenile received sufficient procedural safeguards before deciding whether that adjudication should count as a prior conviction and whether it needs to be submitted to a jury.

I. THE APPENDI EXCEPTION FOR PRIOR CONVICTIONS

A. Apprendi v. New Jersey

In June 2000, the Supreme Court changed the course of sentencing law in the landmark decision *Apprendi v. New Jersey.* The complex and frequently analyzed *Apprendi* decision rests on easily understood facts. On December 22, 1994, police arrested Charles C. Apprendi, Jr., for "fir[ing] several .22-caliber bullets into the home of an African-American family that had recently moved into a previously all-white neighborhood in Vineland, New Jersey." That same day, Apprendi "made a statement—which he later retracted—that even though he did not know the occupants of the house personally, 'because they are black in color he does not want them in the neighborhood.'" Apprendi pled guilty to two counts of firearm possession. The prosecution reserved the right to seek an enhanced sentence under the New Jersey hate crime statute. New Jersey law prescribed a sentencing range of five to ten years imprisonment for the most serious count, the possession of a firearm for an unlawful purpose. The law prescribed a range of ten

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

8. *Id.*

9. *Id.*

10. *Id.* at 470.

11. *Id.* at 469-70 (citing N.J. STAT. ANN. § 2C:43-6(a)(2) (West 1995)).
to twenty years imprisonment for such an offense committed as a hate crime.\textsuperscript{12} The trial judge sentenced Apprendi to twelve years in prison pursuant to this hate crime enhancement.\textsuperscript{13}

Apprendi appealed to the Appellate Division of the Superior Court of New Jersey, raising a Due Process Clause challenge to the hate crime statute.\textsuperscript{14} He argued that "the finding of bias upon which his hate crime sentence was based must be proved to a jury beyond a reasonable doubt."\textsuperscript{15} The New Jersey intermediate appellate court found that "the state legislature decided to make the hate crime enhancement a 'sentencing factor,' rather than an element of an underlying offense," and therefore it need not be proven to a jury beyond a reasonable doubt.\textsuperscript{16} A divided New Jersey Supreme Court affirmed, explaining that the statute "did not 'create a separate offense calling for a separate penalty.'"\textsuperscript{17}

The Supreme Court granted certiorari to consider the procedural due process question of "whether Apprendi had a constitutional right to have a jury find ... [racial] bias on the basis of proof beyond a reasonable doubt."\textsuperscript{18} In a 5-4 decision, the Court adopted the principle 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."\textsuperscript{19} The fact of a prior conviction allows a judge to enhance a sentence beyond the sentencing guideline range without submitting that fact to a jury.

\textsuperscript{12} See N.J. STAT. ANN. § 2C:43-7(a)(3) (West 1995). The New Jersey hate crime statute applies when the court finds by a preponderance of the evidence that the "defendant in committing the crime acted, at least in part, with ill will, hatred or bias toward, and with a purpose to intimidate, an individual or group of individuals because of race, color, religion, sexual orientation or ethnicity." N.J. STAT. ANN. § 2C:44-3(e) (West 1995) (repealed 2001).
\textsuperscript{13} \textit{Apprendi}, 530 U.S. at 471.
\textsuperscript{14} \textit{Id.} (citing \textit{Apprendi v. New Jersey}, 698 A.2d 1265 (N.J. Super. Ct. App. Div. 1997)).
\textsuperscript{15} \textit{Id.}
\textsuperscript{16} \textit{Id.}
\textsuperscript{17} \textit{Id.} at 473 (citing \textit{Apprendi v. New Jersey}, 731 A.2d 485, 494 (N.J. 1999)).
\textsuperscript{18} \textit{Id.} at 475-76. The Supreme Court limited its inquiry to the issue of procedural due process, stating, "[w]e have previously rejected a First Amendment challenge to an enhanced sentence based on a jury finding that the defendant had intentionally selected his victim because of the victim's race." \textit{Id.} at 475 n.1 (citing Wisconsin v. Mitchell, 508 U.S. 476, 480 (1993)).
\textsuperscript{19} \textit{Id.} at 490 (emphasis added).
B. History of the Apprendi Exception

The Apprendi exception for prior convictions is based on the Court's holding in Almendarez-Torres v. United States.\textsuperscript{20} Almendarez-Torres involved a statute that authorized a maximum prison sentence of two years for an alien who returned to the United States despite previous deportation,\textsuperscript{21} but a maximum prison sentence of twenty years for such an alien whose "initial deportation was subsequent to a conviction for [the] commission of an aggravated felony."\textsuperscript{22} The question before the Court was "whether this latter provision defines a separate crime or simply [is a sentencing factor] authoriz[ing] an enhanced penalty."\textsuperscript{23} The Court held: "[It] is a penalty provision, which simply authorizes a court to increase the sentence for a recidivist. It does not define a separate crime."\textsuperscript{24} While normally elements of an offense must be stated "in the indictment, submitted to a jury, and proven by the [prosecution] beyond a reasonable doubt," the Almendarez-Torres Court held that a prior conviction does not face these requirements because recidivism is a sentencing factor.\textsuperscript{25}

\begin{itemize}
\item \textsuperscript{20} 523 U.S. 224 (1998). Some commentators have argued that the Court created the Apprendi exception for prior convictions to avoid overruling the holding of Almendarez-Torres. See, e.g., Benjamin J. Priester, Constitutional Formalism and the Meaning of Apprendi v. New Jersey, 38 AM. CRIM. L. REV 281, 291 n.64 (2001) ("In Apprendi ... the Court included an exception for recidivism, excepting the fact of a prior conviction from the Apprendi principle.... The Court apparently did so to avoid having to overrule the holding[ of Almendarez-Torres ... ]") (citation omitted); James K. Robinson, Thirtieth Annual Review of Criminal Procedure: United States Supreme Court and Courts of Appeals, 1999-2000, 89 GEO. L.J. 1045, 1048 (2001) ("The [Apprendi] Court did not overrule its prior decision in Almendarez-Torres holding that prior conviction of a crime may constitutionally be treated as a sentencing factor rather than as an element of the offense ....").
\item \textsuperscript{21} Almendarez-Torres, 523 U.S. at 226 (citing 8 U.S.C. § 1326(a) (1994)).
\item \textsuperscript{22} Id. (citing 8 U.S.C. § 1326(b)(2) (1994)).
\item \textsuperscript{23} Id.
\item \textsuperscript{24} Id.
\end{itemize}
C. Rationale Behind the Apprendi Exception

In order to determine whether a juvenile adjudication should count as a prior conviction, it is necessary to analyze the rationale behind the exception. The Court's rationale for the prior conviction exception in Apprendi was that "the certainty that procedural safeguards attached to any 'fact' of prior conviction ... mitigated the due process and Sixth Amendment concerns otherwise implicated in allowing a judge to determine a 'fact' increasing punishment beyond the maximum of the statutory range."\(^{26}\)

The Court has not yet considered whether it is safe to assume that due process and procedural safeguards were adhered to in a juvenile adjudication. Although the Court held that it is sufficient for a judge to rely on the "fact" of a prior conviction, it nevertheless adopted its Apprendi exception for prior convictions only after scrutinizing the facts in Almendarez-Torres. In its interpretation of Almendarez-Torres, the Court noted that "Almendarez-Torres had admitted the three earlier convictions for aggravated felonies—all of which had been entered pursuant to proceedings with substantial procedural safeguards of their own."\(^{27}\) The Court thus left open the issue of whether a juvenile adjudication would count as a prior conviction, within the meaning of Apprendi, if that adjudication lacked sufficient procedural safeguards. Indeed, while Justice Thomas joined the Apprendi majority in ruling 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," his concurring opinion nevertheless suggests that he would reconsider the majority opinion in Almendarez-Torres which is the foundation for the Apprendi exception in the first place.\(^{28}\)

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27. Id.
28. Id. at 520-21 (Thomas, J., concurring). Justice Thomas concluded that he had "succumbed" to "one of the chief errors of Almendarez-Torres" and found that "it is evident why the fact of a prior conviction is an element under a recidivism statute." Id. In Apprendi, Justice Thomas joined Justices Stevens, Scalia, Souter, and Ginsburg in the majority opinion, whereas in Almendarez-Torres, he had joined an entirely different majority consisting of Justices Breyer, Rehnquist, O'Connor, and Kennedy. Id. at 468; Almendarez-Torres, 523 U.S. at 226 (holding that a prior conviction of a crime was a sentencing factor
In Jones v. United States, the Court analyzed a triumvirate of procedural safeguards associated with prior convictions. It stated, "unlike virtually any other consideration used to enlarge the possible penalty for an offense ... a prior conviction must itself have been established through procedures satisfying the fair notice, reasonable doubt, and jury trial guarantees." The Court also emphasized the importance of the reasonable doubt and jury trial safeguards in Apprendi. The Court noted:

[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.

As the Court explained in both Jones and Apprendi, the rationale behind the prior conviction exception rests on the assumption that there were sufficient procedural safeguards attached to the prior proceeding for a sentencing judge to rely on the "fact of conviction" in that prior proceeding. The historically different goals of the juvenile justice system and adult criminal justice system have resulted in significantly fewer procedural safeguards for juveniles. Juvenile adjudications do not seek and are not meant to establish guilt or innocence, but rather to determine what is in the best interest of each child. Furthermore, social factors may influence a juvenile's disposition, which traditionally has not been considered punishment.

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29. Jones, 526 U.S. at 249. This 1999 Supreme Court decision is distinct from the 2003 Third Circuit decision United States v. Jones, 332 F.3d 688 (3d Cir. 2003), discussed primarily infra Part II.C. To avoid confusion, throughout the rest of this Note the 1999 Supreme Court decision Jones v. United States is always discussed in the same context as the Apprendi decision and stands for the proposition that there is a triumvirate of procedural safeguards associated with prior convictions.

30. Jones, 526 U.S. at 249.
31. Apprendi, 530 U.S. at 496.
32. See discussion infra Part III.A-B.
33. Juvenile courts are cognizant of society's interests; they simultaneously attempt to rehabilitate the juvenile while attempting to preserve the best interests of the community. See infra note 88 and accompanying text.
II. THE CIRCUIT SPLIT

Since *Apprendi*, three circuits have disagreed over whether a juvenile adjudication should count as a prior conviction for sentence enhancement purposes. In *United States v. Tighe*, the Ninth Circuit held that “the use of Tighe’s 1988 nonjury juvenile delinquency adjudication to increase his maximum statutory penalty violated *Apprendi*.“ Just one year later, the Eighth Circuit ruled in *United States v. Smalley* that “juvenile adjudications can rightly be characterized as ‘prior convictions’ for *Apprendi* purposes.” In *State v. Hitt*, a state court case decided around the same time as *Smalley*, the Supreme Court of Kansas held “the *Apprendi* exception for prior convictions encompasses juvenile adjudications.” In January 2003, the Supreme Court denied certiorari in both *Smalley* and *Hitt*. By denying certiorari, the Supreme Court has left the circuit split unresolved. In June 2003, in *United States v. Jones*, the Third Circuit weighed in on the issue. See *United States v. Jones*, 332 F.3d 688 (3d Cir. 2003). In those circuits that have not yet decided this issue, adults who receive sentences beyond the statutory maximum undoubtedly will appeal their sentences.

34. 266 F.3d 1187, 1197 (9th Cir. 2001).
35. 294 F.3d 1030, 1033 (8th Cir. 2002).
36. 42 P.3d 732, 740 (Kan. 2002). Hitt challenged the constitutionality of the Kansas Sentencing Guidelines Act which provided that juvenile adjudications may be included in the criminal history score without being charged in the indictment and proven to a jury beyond a reasonable doubt as required by *Apprendi*. *Id.* at 734. The Supreme Court of Kansas rejected Hitt’s argument on the grounds that “juvenile adjudications are included within the historical cloak of recidivism and enjoy ample procedural safeguards; therefore, the *Apprendi* exception for prior convictions encompasses juvenile adjudications.” *Id.* at 740. The court explained, “t]he *Apprendi* Court spoke in general terms of the procedural safeguards attached to a prior conviction. It did not specify all procedural safeguards nor did it require certain crucial procedural safeguards.” *Id.*
37. *Hitt*, 42 P.3d 732, cert. denied, 537 U.S. 1104 (2003); *Smalley*, 294 F.3d 1030, cert. denied, 537 U.S. 1114 (2003). The Court asked the Solicitor General for his opinion as to whether the Court should grant certiorari in *Hitt*. The Department of Justice recommended that the Supreme Court deny certiorari in *Hitt*, but grant the petition for certiorari in *Smalley* because the Department of Justice thought *Smalley* was a better vehicle for reconsidering *Almendarez-Torres* and deciding whether juvenile adjudications should count as prior convictions for *Apprendi* purposes. Brief for the United States as Amicus Curiae at 7, *Hitt* (No. 01-10864).
38. As a result of the Court’s refusal to grant certiorari, the issue of whether juvenile adjudications should count as prior convictions will generate additional judicial scrutiny in other circuits and possibly exacerbate the circuit split. The Third Circuit has already weighed in on the issue. See *United States v. Jones*, 332 F.3d 688 (3d Cir. 2003). In those circuits that have not yet decided this issue, adults who receive sentences beyond the statutory maximum undoubtedly will appeal their sentences.
v. Jones, the Third Circuit joined the circuit split, agreeing with the Eighth Circuit's reasoning.\(^3\)

_Tighe, Smalley, and Jones_ are the only circuit court decisions that have dealt with the question of whether juvenile adjudications should count as prior convictions for _Apprendi_ purposes. In all three cases, the court reviewed the legality of using juvenile adjudications to enhance an adult sentence above a prescribed statutory maximum of ten years pursuant to the Armed Career Criminal Act (ACCA).\(^4\) "The [ACCA] mandates a minimum sentence of 15 years for anyone convicted of being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1) who is found to have three previous convictions for a violent felony or a serious drug offense."\(^4\)

In the ACCA, Congress declared that "the term 'conviction' includes a finding that a person has committed an act of juvenile delinquency involving a violent felony."\(^4\)

The next three sections analyze the facts, holdings, and rationales behind _Tighe, Smalley_, and _Jones_, respectively, in the order in which they were decided.

A. United States v. Tighe

In _United States v. Tighe_, the Ninth Circuit was the first circuit to consider whether juvenile adjudications should count as prior convictions for _Apprendi_ purposes. Tighe pled guilty to a three-count indictment, charging him, _inter alia_, with being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1).\(^4\) The indictment did not state that Tighe would receive a minimum sentence of fifteen years if he was found to be an armed career criminal.\(^4\) At sentencing, the district court found that Tighe had a total of three previous convictions which included one juvenile

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39. 332 F.3d 688, 696 (3d Cir. 2003).
42. 18 U.S.C. § 924(e)(2)(C). Although the statute makes a "juvenile delinquency involving a violent felony" a "conviction" by definition, nevertheless the statutory definition may still be the subject of constitutional scrutiny.
43. _Tighe_, 266 F.3d at 1190.
44. Id.
The court enhanced his sentence based on the three prior convictions pursuant to the ACCA.\textsuperscript{46} Tighe challenged the ACCA as unconstitutional on its face and as applied to him.\textsuperscript{47} The court quickly dismissed his facial challenge to the statute and focused on Tighe’s claim that the statute was unconstitutional as applied to him because one of the three felony convictions used to enhance his sentence was a juvenile adjudication at which he was not afforded the right to a jury trial.\textsuperscript{48} The court noted that Congress specifically decided to allow juvenile delinquency adjudications involving violent felonies to count as predicate convictions, “[d]espite the lack of a jury trial and certain other procedural protections in the context of most juvenile proceedings ....”\textsuperscript{49} For \textit{Apprendi} purposes, however, the \textit{Tighe} court distinguished this type of predicate conviction from an adult prior conviction, finding:

\begin{quote}
At first blush, it may appear that Tighe’s 1988 juvenile adjudication, which Congress has characterized as a “prior conviction” for the purposes of ACCA, falls precisely within \textit{Apprendi}’s exception for “the fact of a prior conviction” .... Such an analysis, however, ignores the significant constitutional differences between adult convictions and juvenile adjudications.\textsuperscript{50}
\end{quote}

The court concluded that “\textit{Apprendi}’s narrow ‘prior conviction’ exception is limited to prior convictions resulting from proceedings that afforded the procedural necessities of a jury trial and proof beyond a reasonable doubt. Thus, the ‘prior conviction’ exception does not include nonjury juvenile adjudications.”\textsuperscript{51} In short, the Ninth Circuit held that the ACCA was unconstitutional as applied to Tighe.

\begin{footnotes}
\item[45] \textit{Id.}
\item[46] \textit{Id.}
\item[47] \textit{Id.} at 1190-91.
\item[48] \textit{Id.} at 1191.
\item[49] \textit{Id.} (citing Armed Career Criminal Act, 18 U.S.C. § 924(e)(2)(C) (2000)).
\item[50] \textit{Id.} at 1192-93.
\item[51] \textit{Tighe}, 266 F.3d at 1194-95.
\end{footnotes}
B. United States v. Smalley

In United States v. Smalley, the Eighth Circuit disagreed with the Ninth Circuit's Tighe decision. The Smalley court held that juvenile adjudications can count as prior convictions for Apprendi purposes. The facts of Smalley are very similar to those of Tighe. On May 9, 2001, Kansas City police officers arrested Smalley for carrying a 9mm pistol in his waistband. Smalley pled guilty to being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1), which carries a maximum penalty of ten years of incarceration. The prosecutor for the United States recommended a sentence enhancement beyond the normal statutory maximum and the district court sentenced Smalley to fifteen years of incarceration pursuant to the ACCA. Two of the three prior convictions that triggered the ACCA enhancement were juvenile adjudications which occurred when Smalley was twelve years old. In the third prior conviction, Smalley was certified as an adult under Missouri law and pleaded guilty to involuntary manslaughter when he was fifteen years old.

The court rejected Smalley's argument that "because there was no right to a jury in the juvenile proceedings, these adjudications do not fit the 'prior conviction' exception of Apprendi ...." As in Tighe, the Smalley court noted that "Congress characterized juvenile adjudications as 'prior convictions' under the ACCA." The court acknowledged that "whether juvenile adjudications can be characterized as 'prior convictions' for Apprendi purposes is a constitutional question ...." Unlike Tighe, however, the Smalley court viewed Apprendi and Jones as establishing that certain procedural protections are sufficient, without specifying which procedural protections are necessary for an adjudication to count as a prior

52. United States v. Smalley, 294 F.3d 1030, 1032 (8th Cir. 2002).
53. Id. at 1033.
54. Brief for the United States at 2, Smalley (No. 02-6693).
56. Brief for Appellant at 12, Smalley (No. 01-3898). In 1992, Smalley admitted in juvenile court to a first-degree robbery charge and a first-degree assault charge. Id. at 8.
57. Id. at 12.
58. Brief for the United States at 6, Smalley (No. 01-3898).
59. Smalley, 294 F.3d at 1031.
60. Id. at 1031-32.
conviction for *Apprendi* purposes. The *Smalley* court held that juvenile adjudications "are so reliable" that characterizing them as "prior convictions" for *Apprendi* purposes does not offend due process.

C. United States v. Jones

In *United States v. Jones*, the Third Circuit addressed the issue of whether "a prior juvenile adjudication, albeit nonjury, [should] qualify] as a 'prior conviction' for purposes of the *Apprendi* exception." On April 10, 2000, Jones entered an apartment in Pittsburgh brandishing two guns, one of which he fired twice. He stole "$10,000 in cash and some clothing." Just like Tighe and Smalley, Jones was charged with possession of a firearm in violation of 18 U.S.C. § 922(g)(1), which carries a maximum penalty of ten years incarceration under 18 U.S.C. § 922(a)(2). The District Court for the Western District of Pennsylvania found that Jones was subject to 18 U.S.C. § 924(e) of the ACCA, which "mandates a minimum sentence of [fifteen] years imprisonment for anyone convicted of being a felon in possession [of a firearm] in violation of 18 U.S.C. § 922(g)(1) who is found to have three previous convictions for a violent felony or serious drug offense." The District Court held that 18 U.S.C. § 924(e) applied to Jones because he had "two adult state felony drug convictions and one prior juvenile adjudication for a violent crime, thereby constituting the necessary three prior convictions for application of the ACCA." Jones was convicted and

61. Id. at 1032 ("[W]hile the Court established what constitutes sufficient procedural safeguards (a right to jury trial and proof beyond a reasonable doubt), and what does not (judge-made findings under a lesser standard of proof), the Court did not take a position on possibilities that lie in between these two poles."). Summarizing its position, the court explained, "it is incorrect to assume that it is not only sufficient but necessary that the 'fundamental triumvirate of procedural protections' ... underlie an adjudication before it can qualify for the *Apprendi* exemption." Id.
62. Id. at 1033.
64. Id. at 690.
65. Id.
66. Id.
67. Id.
68. Id.
sentenced to fifteen years imprisonment with a subsequent four-year term of supervised release.\textsuperscript{69}

Jones appealed his conviction to the United States Court of Appeals for the Third Circuit on three grounds. First, he raised the statutory claim that his prior juvenile adjudication did not fit under the ACCA’s definition of a “violent felony.”\textsuperscript{70} Second, he raised the constitutional challenge that his prior juvenile adjudication should not count as a “prior conviction” for purposes of the Apprendi exception because his juvenile proceedings were not held before a jury.\textsuperscript{71} Finally, Jones claimed “that the District Court violated his Sixth Amendment right to counsel by enhancing his sentence based upon his prior juvenile adjudication because records for that adjudication do not indicate that he was represented by counsel and do not show that he waived his right.”\textsuperscript{72} Only his second and third arguments are relevant for the purposes of this Note.

The Jones court summarized the circuit split between Tighe and Smalley and sided with the Smalley court. It held, “when a juvenile is adjudicated guilty beyond a reasonable doubt in a bench trial that affords all the due process protections that are required, the adjudication should be counted as a conviction for purposes of subsequent sentencing under the ACCA.”\textsuperscript{73}

With respect to the Sixth Amendment claim, the record was silent as to whether Jones was represented by counsel during his juvenile adjudication, and if he was not, whether he waived his right to counsel.\textsuperscript{74} When an appellant fails to establish that his prior conviction suffers a constitutional infirmity, the court attaches the presumption of regularity to the conviction.\textsuperscript{75} Since the record from

\begin{itemize}
\item \textsuperscript{69} Id.
\item \textsuperscript{70} Id. at 691.
\item \textsuperscript{71} Id. at 694.
\item \textsuperscript{72} Id. at 696-97.
\item \textsuperscript{73} Id. at 696.
\item \textsuperscript{74} Id. at 697.
\item \textsuperscript{75} Id. at 698 (citing Parke v. Raley, 506 U.S. 20 (1992)). Interestingly, the court noted as a preliminary matter, Jones does not allege that he was not represented by counsel during his juvenile adjudication. Instead, he argues that where, as here, the certified records from a prior conviction do not show that the defendant was represented by counsel, there is a presumption that the defendant was denied his right to counsel.
\item \textsuperscript{76} Id. at 697.
\end{itemize}
Jones' juvenile adjudication was silent, the court rejected Jones' contention that "the Government must prove that he was either afforded his right to counsel or waived that right."

III. THE JUVENILE JUSTICE SYSTEM

A. Juvenile Justice Goals

Before analyzing the Apprendi issues raised by juvenile adjudications, a review of the history of juvenile courts helps explain why juvenile courts have fewer procedural safeguards and are more informal than adult criminal courts. The juvenile court movement began in the United States near the end of the nineteenth century because "reformers were appalled by adult procedures and penalties, and by the fact that children could be given long prison sentences and mixed in jails with hardened criminals." The fundamental goal of the first juvenile courts was to provide assistance for juveniles. The traditional focus was on individual treatment and rehabilitation, rather than finding guilt and imposing punishment. The early reformers believed that "juveniles lack the mens rea ... necessary ... to establish criminal culpability ...." Juvenile courts insisted "that the proceedings were not adversary, but that the state was proceeding as parens patriae." John T. Whitehead and Steven P. Lab, authors of Juvenile Justice, described the early juvenile courts as follows:

76. Id. at 698.
77. In re Gault, 387 U.S. 1, 15 (1967).
78. JOHN T. WHITEHEAD & STEVEN P. LAB, JUVENILE JUSTICE 46 (1996).
79. William T. Stetzer, Note, The Worst of Both Worlds: How the Kansas Sentencing Guidelines Have Abandoned Juveniles in the Name of "Justice," 35 WASHBURN L.J. 308, 316 (1996). Reformers believed that "society's role was not to ascertain whether the child was 'guilty' or 'innocent,' but '[w]hat is he, how has he become what he is, and what had best be done in his interest and in the interest of the state to save him from a downward career.'" Gault, 387 U.S. at 15 (quoting Julian Mack, The Juvenile Court, 23 HARV. L. REV. 104, 119-20 (1909)). Since the courts' decisions are often driven by the best interest of the child rather than the question of the child's guilt or innocence, juvenile adjudications may not be reliable for the purposes of establishing a juvenile's guilt.
81. Gault, 387 U.S. at 16; see also WHITEHEAD & LAB, supra note 78, at 47-50.
The [juvenile] court was to operate in a highly informal manner without any of the trappings of the adult court. Lawyers and other adversarial features of the adult system (such as rules of evidence and testimony under oath) were discouraged. The judge was to take a paternal stance toward the juvenile and provide whatever help and assistance was needed. The emphasis was on assisting the youth rather than on punishing an offense. The court was not restricted to dealing with youths who committed criminal acts. Rather, the court could intervene in any situation where a youth was considered to be in need of help.\textsuperscript{82}

As a result of this rehabilitation rationale, the Court justified making the juvenile court less formal. The first juvenile courts did not provide juveniles with any of the due process rights that the Fifth and Fourteenth Amendments provide to adults.\textsuperscript{83}

To distinguish a juvenile adjudication from an adult criminal proceeding, the juvenile court adopted a distinct "civil" vocabulary.\textsuperscript{84} A juvenile is "adjudicated" as "delinquent" rather than "convicted" as "guilty" of a crime.\textsuperscript{85} Moreover, juvenile courts grant a "disposition" rather than "sentencing" the juvenile.\textsuperscript{86}

State legislatures have emphasized the rehabilitative goal of the juvenile justice system. Most states have a juvenile court statute which contains a preamble or "purpose clause" to aid the courts in interpreting legislative intent.\textsuperscript{87} The historical purpose of the juvenile court as stated in these purpose clauses has been simultaneously to "serve the moral, emotional, mental, and physical welfare of the minor and the best interests of the community ...."\textsuperscript{88}

\textsuperscript{82} WHITEHEAD & LAB, supra note 78, at 46.
\textsuperscript{83} See discussion infra Part III.B.
\textsuperscript{84} See BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, JUVENILE RECORDS AND RECORDKEEPING SYSTEMS 11 (Nov. 1988) [hereinafter RECORDKEEPING SYSTEMS]; see also Gault, 387 U.S. at 17 ("[P]roceedings involving juveniles were described as 'civil' not 'criminal' and therefore not subject to the requirements which restrict the state when it seeks to deprive a person of his liberty.").
\textsuperscript{85} RECORDKEEPING SYSTEMS, supra note 84, at 11.
\textsuperscript{86} See, e.g., WHITEHEAD & LAB, supra note 78, at 446.
\textsuperscript{88} Id. (quoting ILL. COMP. STAT. ANN. 37/701-2 (West 1972)).
B. The Extension of Due Process Rights to Juveniles

During the early years of the juvenile justice system, juveniles were denied due process rights in court proceedings. Since the original goal of the juvenile system was to achieve that which was in the child's best interest, "traditional notions of adult criminal due process and procedure were thought unnecessary, if not detrimental, to cure the juvenile of the 'disease of delinquency.'"

Nearly a half century after the creation of the first juvenile court in Illinois in 1899, the Supreme Court, in *Haley v. Ohio*, considered the extension of due process rights to juveniles for the first time. In 1966 in the landmark case *Kent v. United States*, the Court extended some traditional due process rights to juveniles. In *Kent*, the Court declared that a juvenile court must satisfy basic requirements of "due process and fair treatment" before transferring a juvenile to an adult court. The Court decided that due process entitles a juvenile to certain minimum procedural safeguards, including the right to a hearing—albeit an informal hearing—and the right to the assistance of an attorney at that hearing before he can be transferred into an adult criminal court. One year after *Kent*, *In re Gault* extended to juveniles in juvenile proceedings the Fifth Amendment privilege against self-incrimination and the Sixth Amendment rights to notice of the charges against them, to confront and cross-examine their accusers, and to the assistance of counsel. The Court also extended to juveniles the due process safeguard of proof beyond a reasonable doubt in *In re Winship*. In...
Breed v. Jones, the Court held that juvenile courts must adhere to the double jeopardy protections offered by the Fifth Amendment.\textsuperscript{96} In less than thirty years, the Court extended to juveniles every federal constitutional protection afforded adult criminal defendants except the right to a jury trial.\textsuperscript{97} In McKeiver v. Pennsylvania, the Court held that "trial by jury in the juvenile court's adjudicative stage is not a constitutional requirement."\textsuperscript{98} Although the Sixth Amendment guarantees the right to an impartial jury "in all criminal prosecutions,"\textsuperscript{99} nevertheless the Court decided that a juvenile court proceeding was not a "criminal prosecution, within the meaning and reach of the Sixth Amendment."\textsuperscript{100}

C. The Evolving View of Juvenile Offenders

Many commentators and even the Supreme Court have recognized that the juvenile justice system in reality may not be serving its original goal of rehabilitation.\textsuperscript{101} The juvenile court system is "clearly more punitive now than it was two decades ago."\textsuperscript{102} Despite this sea change, juveniles still are not uniformly afforded the same procedural safeguards as adults. Less than four years after McKeiver, the Supreme Court acknowledged that "in terms of potential consequences, there is little to distinguish an adjudicatory

\textsuperscript{96} 421 U.S. 519 (1975).
\textsuperscript{98} 403 U.S. 528, 545 (1971). The Court concluded that "one cannot say that in our legal system the jury is a necessary component of accurate factfinding." Id. at 543.
\textsuperscript{99} U.S. CONST. amend. VI.
\textsuperscript{100} McKeiver, 403 U.S. at 541.
\textsuperscript{101} See Kent v. United States, 383 U.S. 541, 556 (1966) ("[T]here may be grounds for concern that the child receives the worst of both worlds: that he gets neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children.") (citing Joel F. Handler, The Juvenile Court and the Adversary System: Problems of Function and Form, 1965 WIS. L. REV. 7; see also In re Gault, 387 U.S. 1, 19 n.23 (1967).

The Court further stated:

While there can be no doubt of the original laudable purpose of juvenile courts, studies and critiques in recent years raise serious questions as to whether actual performance measures well enough against theoretical purpose to make tolerable the immunity of the process from the reach of constitutional guaranties applicable to adults.

\textit{Kent}, 383 U.S. at 555.
\textsuperscript{102} Sanborn, supra note 92, at 234.
hearing ... from a traditional criminal prosecution.”

In the 1960s, an increase in “the frequency and severity of juvenile crime eroded confidence in the belief that juveniles lacked the criminal culpability necessary to be judged ‘guilty’ of crimes.”

In 1967, the President’s Commission on Law Enforcement and Administration of Justice’s Task Force Report commented on the failures of the juvenile justice system. According to the report:

In theory the juvenile court was to be helpful and rehabilitative rather than punitive. In fact the distinction often disappears .... In theory the court’s action was to affix no stigmatizing label. In fact a delinquent is generally viewed by employers ... as a criminal .... In theory the court’s operations could justifiably be informal, its findings and decisions made without observing ordinary procedural safeguards, because it would act only in the best interest of the child. In fact it frequently does nothing more nor less than deprive a child of liberty without due process of law ....

The juvenile system has become more punitive and criminal in nature since Gault was decided in 1967. The juvenile is no longer merely treated for his crime; he is now being punished.

The vocabulary of the juvenile justice system is no longer “civil.” In Gault, the Court recognized that labeling a juvenile adjudication “civil” is misleading because it could lead to incarceration against one’s will. The Court decided that it would no longer succumb to the “feeble enticement of the ‘civil’ label-of-convenience which has been attached to juvenile proceedings.”

104. PRIVACY AND JUVENILE JUSTICE RECORDS, supra note 80, at 7.
105. McKeiver, 403 U.S. at 544 n.5 (citing PRESIDENT’S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: JUVENILE DELINQUENCY AND YOUTH CRIME 9 (1967)).
106. Id.
108. In re Gault, 387 U.S. 1, 49 (1967) (“[J]uvenile proceedings to determine ‘delinquency,’ which may lead to commitment to a state institution, must be regarded as ‘criminal’ for purposes of the privilege against self-incrimination.”).
109. Id. at 50.
Amendments to state juvenile statutes reflect a new, expressly punitive purpose underlying the juvenile justice system. In the 1980s alone, ten legislatures revised their juvenile statutes' purpose clauses to deemphasize rehabilitation, and instead emphasize public safety, punishment, and individual accountability. As the juvenile justice system shifts its focus towards offense-based punishment, "[t]he historical justifications for the procedural deficiencies of the juvenile court are increasingly untenable." The Court should decide whether it wants to extend the same procedural safeguards to juveniles as adults or decriminalize the juvenile system and return it to its original goal of rehabilitation.

IV. CURRENT PRACTICES OF USING JUVENILE ADJUDICATIONS FOR SENTENCE ENHANCEMENT PURPOSES

In the 1980s, legal scholars launched a movement to allow juvenile court records to factor into criminal court sentencing. This movement was spurred by an upward trend in the rate of violent crime among teenagers. According to the Bureau of Justice Statistics, while "[t]he vast majority of juveniles desist from crime, ... a small minority engag[e] in chronic and serious recidivistic behavior." In 1992, the U.S. Attorney General's Task Force on Combating Violent Crime recommended that states amend their sentencing provisions to allow juvenile adjudications to enhance adult sentences.

10. Feld, supra note 87, at 842. For a discussion of state juvenile statutes, see supra notes 87-88 and accompanying text.
11. Feld, supra note 87, at 842.
12. Id. at 909.
13. See Joseph B. Sanborn, Jr., Striking Out on the First Pitch in Criminal Court, 1 BARRY L. REV. 7, 12-13 (2000) ("[D]evelopments within academic circles (especially between 1978 and 1984) contributed mightily to launching the movement to allow juvenile court records to have actual and open recidivist impact in criminal court sentencing."). In the late 1980s, only twenty states had statutes that allowed their courts to use a juvenile adjudication as a sentencing factor. Sanborn, supra note 92, tbl.2.
15. See PRIVACY AND JUVENILE JUSTICE RECORDS, supra note 80, at 2 ("Recidivism rates among juvenile offenders have not increased, but a relatively small percentage of juvenile offenders are chronic and frequent recidivists, accounting for the vast majority of juvenile offenses.").
Joseph B. Sanborn, Jr., a professor at the University of Central Florida, conducted a study in 2000 to determine which jurisdictions allow adult criminal courts to consider juvenile records in determining adult criminal court sentences.\textsuperscript{117} He found that all fifty-two jurisdictions (fifty states, the District of Columbia, and Federal) allow adult criminal courts to consider juvenile records as a factor in determining sentencing.\textsuperscript{118} According to Professor Sanborn’s study, forty-five jurisdictions have juvenile court statutes that specifically authorize adult courts to use juvenile records during sentencing.\textsuperscript{119} These forty-five jurisdictions overlap with thirty-five jurisdictions that have “a variety of criminal court provisions (e.g., sentencing statutes and guidelines, court rules, presentence investigation reports)” that clearly authorize consideration of juvenile records in determining an adult’s criminal court sentence.\textsuperscript{120} Sanborn found that “only New Hampshire lacks a law or rule between its juvenile and criminal courts’ codes that expressly tells adult courts to use the juvenile record to some extent at sentencing.”\textsuperscript{121} In addition to these statutory provisions, “case law in forty-six jurisdictions (including New Hampshire) has upheld factoring juvenile adjudications into criminal court sentencing.”\textsuperscript{122}

Juvenile adjudications can factor into adult criminal sentencing decisions in numerous ways. They can count as history points,\textsuperscript{123}

\begin{enumerate}
\item \textsuperscript{117} See Sanborn, \textit{supra} note 113, at 17-34.
\item \textsuperscript{118} \textit{Id.} at 7, 17.
\item \textsuperscript{119} \textit{Id.} at 20.
\item \textsuperscript{120} \textit{Id.}
\item \textsuperscript{121} \textit{Id.}
\item \textsuperscript{122} \textit{Id.} According to Sanborn’s study, although six jurisdictions have statutes that authorize the use of juvenile records in criminal court sentencing, nevertheless these jurisdictions do not have case law governing the use of juvenile records. These jurisdictions are Arkansas, Maine, Mississippi, New Mexico, Vermont, and the District of Columbia.
\item \textsuperscript{123} See, \textit{e.g.}, U.S. SENTENCING GUIDELINES MANUAL § 4A1.2(d)(2)(A) (2001) (instructing a judge to “add 2 points ... for each adult or juvenile sentence to confinement of at least sixty days if the defendant was released from such confinement within five years of his commencement of the instant offense”); \textit{see also} KAN. STAT. ANN. § 21-4724(c)(3) (2001) (“The department of corrections shall have access to any juvenile records maintained by the Kansas bureau of investigation or the department of social and rehabilitation services for use in determining the person’s criminal history classification.”).\
\end{enumerate}
aggravating factors,\textsuperscript{124} or "strikes."\textsuperscript{125} According to Sanborn's study, only two states—Arizona and Georgia—clearly prevent adult courts from enhancing criminal sentences based on juvenile adjudications.\textsuperscript{126}

The fact that almost every jurisdiction allows the use of juvenile adjudications as a factor in determining adult criminal sentences, however, does not mean that this practice is constitutional.\textsuperscript{127} The practice of using juvenile adjudications to enhance adult criminal convictions has attracted criticism from many scholars. Some scholars argue it is unconstitutional to use juvenile adjudications for enhancement purposes at all.\textsuperscript{128}

Although many commentators have vehemently attacked the use of juvenile adjudications for enhancement purposes because juveniles are not afforded the same procedural due process safeguards as adults, the Supreme Court has conveniently ignored these procedural due process issues.\textsuperscript{129} Barry C. Feld, a professor at the University of Minnesota Law School, has argued "[i]t is ... inconsistent to use less stringent procedures to obtain convictions

\textsuperscript{124} In North Carolina and Tennessee juvenile records act as aggravating factors within the guidelines' structure. Similarly, juvenile records serve as an aggravating factor in the adult sentencing of six nonguidelines states. Sanborn, \textit{supra} note 113, at 23-24.

\textsuperscript{125} For discussions of whether juvenile adjudications should count as "strikes," see Lisa Forquer, \textit{Comment, California's Three Strikes Law—Should a Juvenile Adjudication Be a Ball or a Strike?}, 32 \textit{SAN DIEGO L. REV.} 1297 (1995); Christine Markel, \textit{Note & Comment, A Swing and a Miss: California's Three Strikes Law}, 17 \textit{WHITTIER L. REV.} 651 (1996); Amanda K. Packel, \textit{Comment, Juvenile Justice and the Punishment of Recidivists Under California's Three Strikes Law}, 90 \textit{CAL. L. REV.} 1157 (2002). Currently "California, Louisiana, and Texas allow juvenile adjudications to serve as all but the final strike." Sanborn, \textit{supra} note 113, at 24. In these jurisdictions, thus in theory, a defendant who is convicted in an adult court for a crime which does not carry a potential life sentence could receive a life sentence because his juvenile adjudications count as prior "strikes." \textit{Id}.

\textsuperscript{126} Nevertheless, in these states juvenile records can be proffered to make adult offenders ineligible for probation. Sanborn, \textit{supra} note 113, at 21.

\textsuperscript{127} See, e.g., \textit{McKeiver v. Pennsylvania}, 403 U.S. 528, 548 (1971) ("The fact that a practice is followed by a large number of states is not conclusive in a decision as to whether that practice accords with due process ....") (quoting \textit{Leland v. Oregon}, 343 U.S. 790, 798 (1952)).


\textsuperscript{129} Feld, \textit{supra} note 87, at 838 (arguing that the Court in \textit{McKeiver} sidestepped the issues of procedural justice raised by the recognition that punishment plays an increasing, if not dominant, role in juvenile court sentencing practices).
in juvenile court in the name of rehabilitation, and then to use those same convictions to enhance subsequent criminal sentences as adults." As the juvenile justice system becomes increasingly punitive, it becomes more important for juveniles to receive due process safeguards.

In a report for the Department of Justice, Robert Belair justified allowing juvenile court records to factor into an adult court sentencing, stating:

> By extending many of the adult criminal due process protections to juvenile trials, the Court has imbued the juvenile trial with the elements of fairness, impartiality and dispositiveness customarily associated with adult trials. Thus, when a juvenile is found delinquent today there is reason for confidence in the fairness and accuracy of that judgment.¹³¹

The problem with the supposition that juvenile delinquents should be treated more like adult criminals is that it assumes that juveniles receive the same, or close to the same, procedural safeguards as adults. This is not a safe assumption.

V. SCRUTINIZING PROCEDURAL SAFEGUARDS BEFORE COUNTING JUVENILE ADJUDICATIONS AS PRIOR CONVICTIONS FOR APPRENDI PURPOSES

The *Apprendi* exception is based on an assumption that there were sufficient procedural safeguards in the previous conviction for the Court to accept its reliability.¹³² While it may be safe to assume that prior adult convictions are reliable because they contained sufficient procedural safeguards, it is not safe to make this assumption with respect to juvenile adjudications. Juvenile adjudications should not count as prior convictions for *Apprendi* purposes unless a court carefully scrutinizes the safeguards attached to the adjudication because juvenile adjudications differ from adult convictions in many ways. The differences between the two systems arise from fundamentally different goals. Historically,

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¹³¹ BELAIR, supra note 97, at 24.
¹³² See discussion supra Part I.C.
the juvenile system focused on rehabilitation, while the adult system focused on punishment to fit the crime.\textsuperscript{133}

There are several substantial differences between the juvenile justice system and the adult criminal court system which impact whether a juvenile adjudication should count as a prior conviction for \textit{Apprendi} purposes. First, juveniles are not provided with the same procedural safeguards as adults. Although the Court has extended many Fifth and Sixth Amendment due process rights to juveniles,\textsuperscript{134} it refused to extend the right to a trial by jury.\textsuperscript{135} In \textit{McKeiver}, the Court did not grant juveniles the right to a jury trial because it refused to superimpose on the juvenile system the formalities of the adult system and instead stressed the paternal attention that the juvenile court system can give to juveniles.\textsuperscript{136} As the goals of the juvenile system converge with the goals of the adult system,\textsuperscript{137} the justification for providing juveniles with fewer procedural safeguards disappears. Second, in practice, juveniles often do not receive the right to counsel despite the Court’s mandate in \textit{Gault}.\textsuperscript{138} Third, the rehabilitative nature of juvenile adjudications makes it more difficult to track a juvenile’s record than an adult’s criminal record. There is a lack of uniformity in juvenile recordkeeping systems among states as well as a lack of uniformity in states’ approaches to sealing and expunging juvenile records.\textsuperscript{139}

All of these differences taken together suggest that the narrow prior conviction exception of \textit{Apprendi} should not apply automatically to a juvenile adjudication without further inquiry. A court should not make the blanket assumption that a juvenile adjudication contained sufficient procedural safeguards to warrant its use in adult criminal court sentencing. Judges need to make case-by-

\textsuperscript{133} See discussion \textit{supra} Part III.A.
\textsuperscript{134} These due process rights include the privilege against self-incrimination, the right to adequate notice, the right to confront and cross-examine accusers, and the right to assistance of counsel. \textit{In re Gault}, 387 U.S. 1, 33-34, 41, 55, 57 (1967). The Court also has extended the reasonable doubt standard of proof to juvenile proceedings. \textit{In re Winship}, 397 U.S. 358, 368 (1970); see \textit{supra} note 95 and accompanying text.
\textsuperscript{135} See \textit{McKeiver v. Pennsylvania}, 403 U.S. 528, 545 (1971).
\textsuperscript{136} \textit{Id.} at 550.
\textsuperscript{137} See discussion \textit{supra} Part III.C.
\textsuperscript{138} 387 U.S. at 55-57; see discussion \textit{infra} Part V.C.
\textsuperscript{139} See discussion \textit{infra} Part V.D.
case determinations by scrutinizing the procedural safeguards actually provided to a juvenile before they can accept the "fact" of a juvenile adjudication as reliable for Apprendi purposes.

A. Jury Trial

The Court's two main rationales in McKeiver for not extending the right to a jury trial to juveniles were that juvenile adjudications are informal and they are not criminal.\textsuperscript{140} For these same reasons, courts should not automatically count juvenile adjudications as prior convictions for Apprendi purposes. The Sixth Amendment guarantees the right to a jury "[i]n all criminal prosecutions."\textsuperscript{141} In McKeiver, the Court stated that juvenile adjudications were not criminal and that a right-to-a-jury requirement would formalize the juvenile system and "most likely be disruptive of the unique nature of the juvenile process."\textsuperscript{142} The Court's justification for not extending the right to a jury trial to juveniles was that "the juvenile court proceeding has not yet been held to be a 'criminal prosecution,'" within the meaning and reach of the Sixth Amendment.\textsuperscript{143}

Some scholars have argued that there should be a per se rule that prohibits using juvenile adjudications for enhancement purposes when the juvenile was not provided with a jury trial.\textsuperscript{144} The basic argument is that the Sixth Amendment guarantees the right to a jury "[i]n all criminal prosecutions,"\textsuperscript{145} and because a juvenile adjudication is a "criminal prosecution," a nonjury juvenile adjudication violates the Sixth Amendment.\textsuperscript{146} Alternatively, nonjury juvenile adjudications by juveniles should be treated as "criminal prosecution[s]," and juveniles would be entitled to the Sixth Amendment's guarantee of a jury trial.

\textsuperscript{140} McKeiver, 403 U.S. at 541, 550.
\textsuperscript{141} U.S. CONST. amend. VI.
\textsuperscript{142} McKeiver, 403 U.S. at 540 (quoting In re Terry, 438 Pa. 339, 349-50 (1970) (internal quotation marks omitted)). The Court stated that the imposition of the jury trial on the juvenile court system "would not strengthen greatly, if at all, the factfinding function, ... would not remedy the defects of the system, ... [and] would bring with it into that system the traditional delay, the formality, and the clamor of the adversary system." Id. at 547, 550.
\textsuperscript{143} Id. at 541.
\textsuperscript{144} See, e.g., Stetzer, supra note 79, at 316 ("Juvenile Adjudications Entered Without the Right to Trial by Jury Are Constitutionally Infirm for Use in Enhancing Adult Sentences.").
\textsuperscript{145} U.S. CONST. amend. VI.
\textsuperscript{146} In Duncan v. Louisiana, the Court extended the Sixth Amendment right to a jury trial to the states via the Fourteenth Amendment because "trial by jury in criminal cases is fundamental to the American scheme of justice." 391 U.S. 145, 149 (1968). As one scholar notes, the Court's reasoning in Duncan should also apply to juvenile proceedings.
adjudications should not be used for enhancement purposes because "equal protection demands that juveniles who are being treated similarly to adults should receive rights similar to those extended to adults."\(^{147}\)

The Court could choose to resolve the Third, Eighth, and Ninth Circuits' split based solely on the issue that juveniles do not receive the right to a jury trial. In doing so, the Court could reconsider \textit{McKeiver} by extending the right to a jury trial to juveniles in all juvenile cases, or at least in those adjudications involving serious crimes. The drawbacks with this approach, as the Court recognized in \textit{McKeiver}, are that these costly new requirements would burden the juvenile justice system and that "[i]f the formalities of the criminal adjudicative process are to be superimposed upon the juvenile court system, there is little need for its separate existence."\(^{148}\) Alternatively, the Court could conclude, based on \textit{McKeiver}, that juvenile adjudications are more civil than criminal in nature, and therefore that juvenile adjudications should not count as prior convictions for purposes of the \textit{Apprendi} exception.

\section*{B. Informality of Juvenile Courts}

Lack of procedural formality in the juvenile justice system decreases the reliability of a juvenile court's factfinding. In furtherance of the goal of rehabilitation, a judge takes into account a juvenile's social background in fashioning the appropriate remedy, and therefore, "judges are exposed to far more prejudicial information about a youth ... and this influences the likelihood of both conviction and institutional confinement."\(^{149}\)

\begin{quote}
\footnotesize
In \textit{Duncan}, the Supreme Court emphasized that the purposes of the jury trial were to check against arbitrary actions by the government, to safeguard against the overzealous prosecutor and the biased judge and to assure fair trials. Jury trials are necessary in juvenile court for the same reasons. Juries would not have access to the youths' records, would not know defendants from previous offenses or stages in the court process, and would not realize which juveniles had been held in detention.

Sanborn, \textit{supra} note 92, at 236 (footnote omitted).
\end{quote}

\(^{147}\) Sanborn, \textit{supra} note 92, at 236.
In addition, many juvenile matters result in no judicial fact-finding. A prosecutor often elects to use pretrial diversion rather than proceeding to an adjudication. Pretrial diversion aims to "avoid the stigma and negative labelling of formal court intervention." A prosecutor may choose to "divert any youth who has not been diverted previously, and who is or could be charged with any crime other than an offense against the person."

Pretrial diversion could be used to enhance an adult sentence under a literal reading of the ACCA. Under the ACCA, "the term "conviction" includes a finding that a person has committed an act of juvenile delinquency involving a violent felony." The ACCA further defines the term "violent felony" to mean "any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult." The language "any act of juvenile delinquency" does not, on its face, formally require a juvenile adjudication; a juvenile could commit an act of juvenile delinquency without being adjudicated delinquent. Therefore, in theory, a pretrial diversion could be used as a predicate "conviction" for the ACCA despite the fact that there had been no formal judicial factfinding.

C. Right to Counsel

Despite the Court's mandate in Gault that every juvenile in a juvenile court has the right to counsel, many states have failed to comply with this demand. Juveniles still consistently do not receive the right to counsel in many states. In a study comparing

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150. Feld, Violent Youth and Public Policy, supra note 128, at 1095.
151. Id. at 1097.
153. Id. § 924(e)(2)(B) (emphasis added).
155. Feld, Violent Youth and Public Policy, supra note 128, at 1109-10.
rates of representation in six states, three of the six states provided
counsel to only about half of their juveniles. Many juveniles are
"adjudicated delinquent without the presence or assistance of an
attorney, which further prejudices the accuracy of the fact-finding
process." There are many explanations for why so many juveniles are still
unrepresented—a common one being that juveniles waive their
right to counsel. Indeed, juveniles may waive this right. "Parents
may be reluctant to retain an attorney or accept the appointment
of a public defender for their child," because some counties "seek
reimbursement for the expenses and attorney's fees expended on
behalf of the child." Additionally, "in some jurisdictions the
assistance of counsel is technically available, but children must
formally request the appointment of an attorney." Another
possible reason for undercompliance may be that rural areas do not
have sufficient legal services to provide every juvenile with an
attorney.

D. Juvenile Recordkeeping Systems

States have widely varying recordkeeping practices which affect
the use of juvenile adjudications in adult courts. An adult court

156. Id. at 1109-10 & n.658 (citing Feld, Cross-State Comparison, supra note 154, at 401
(indicating youth representation rates ranging from 38% in North Dakota, 48% in Minnesota,
and 53% in Nebraska, to 85% in California, 90% in Pennsylvania, and 96% in New York)).
157. Feld, supra note 149, at 246. In Minnesota, for example, "in the majority of
delinquency/status offense cases (62%) there is not representation." Id. at 189 n.160 (quoting
K. Fine, Out of Home Placement of Children in Minnesota: A Research Report 48
(1983)).
158. Barry C. Feld, Justice for Children: The Right to Counsel and the Juvenile
159. Id.
160. Puritz et al., supra note 154, at 22.
161. IJA-ABA Joint Comm'n on Juvenile Justice Standards, Standards Relating to
162. According to the U.S. Department of Justice:
"there is often a lack of uniformity in recordkeeping practices regarding
juvenile records among law enforcement agencies even within the same state.
How the records are created, when they are created, what they contain, the
length of retention, and where the records are retained, if they are retained at
all, are some of the decisions which are typically left to the discretion of
individual law enforcement agencies—all of which have an impact on the use
and availability of juvenile history records."
can only use a juvenile adjudication for enhancement purposes if it can find it. Unlike adult criminal courts where criminal records are uniformly available, there may be widely inconsistent treatment of two similarly situated juveniles because of the inability to track juvenile records. For example, two individuals with the same prior juvenile adjudication, who are each facing an adult sentence, may be treated differently because one state kept good records while the other state sealed and expunged the records or cannot retrieve them. Among the factors that affect the use of juvenile adjudications in compiling an adult’s criminal history are the creation of a juvenile record, the ability to track a juvenile throughout a state or even the country, and the sealing and expungement practices of a state.

Sealing and expunging practices affect the use of juvenile adjudications in adult courts. Some jurisdictions seal juvenile records based on state statutes, while others act pursuant to court orders, agency administrative standards, state regulations, or city or county ordinances. The rationale behind sealing and expunging practices is:

To get away from the notion that the child is to be dealt with as a criminal; to save [him] from the brand of criminality, the brand that sticks to [him] for life; to take [him] in hand and instead of first stigmatizing and then reforming [him] to protect [him] from the stigma.

E. Arbitrariness in Adjudication

Prosecutors have wide discretion in determining whether to prosecute a juvenile in juvenile court. They have discretion to decide which juveniles are diverted before trial and which juveniles are transferred. Only about half of the juveniles police refer to a

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163. See id.
164. Id. at 13.
165. BELAIR, supra note 97, at 14 (quoting Mack, supra note 79, at 109).
166. For example, one statistic reflects that "[b]etween 1987 and 1994, the number of delinquency cases judicially waived [i.e., transferred] to criminal court [each year] grew 73% (from 6800 to 11,700)." OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, U.S. DEPT OF JUSTICE, JUVENILE OFFENDERS AND VICTIMS: 1999 NATIONAL REPORT 170 (1999).
local prosecutor’s office or juvenile probation department are actually formally prosecuted.\footnote{167}

This discretion leads to the obvious criticism that some juveniles will be exposed to the juvenile system more than others. The use of an adult’s prior juvenile record against him during sentencing will depend heavily on whether he was transferred, adjudicated delinquent, or never adjudicated against as a juvenile. Consequently, the informality of the juvenile system raises both due process and fundamental fairness concerns.

VI. APPROACHES TO RESOLVING THE CIRCUIT SPLIT

This Note has analyzed numerous issues that the Supreme Court should consider in resolving the circuit split as to whether juvenile adjudications should count as prior convictions for Apprendi exception purposes. The Court will eventually have to address these issues and resolve the split among the Third, Eighth, and Ninth Circuits. The Court could agree with the Third and Eighth Circuits’ rationale in \textit{Jones} and \textit{Smalley} and find that a jury trial is not a prerequisite for a juvenile adjudication to count as a prior conviction. Such a holding, however, would ignore the fundamental differences between juvenile adjudications and adult convictions.\footnote{168} Alternatively, the Court could agree with the Ninth Circuit’s rationale in \textit{Tighe} and rule that the Apprendi exception for prior convictions does not include juvenile adjudications. This approach would require declaring the ACCA, which explicitly states that certain acts of juvenile delinquency are considered convictions, unconstitutional because the juvenile did not have the right to a jury trial.\footnote{169} In a less likely approach, the Court could decide not to follow any of the circuits’ approaches but rather choose to reconsider its holding in \textit{McKeiver} by providing all juveniles with the right to a jury trial.\footnote{170}

\footnotesize{167. See Privacy and Juvenile Justice Records, \textit{supra} note 80, at 24.}
\footnotesize{168. See discussion \textit{supra} Part V.}
\footnotesize{169. See \textit{supra} notes 152-53 and accompanying text.}
\footnotesize{170. For an argument that the Supreme Court should override \textit{McKeiver}, see Barry C. Feld, The Constitutional Tension Between Apprendi and McKeiver: Sentence Enhancements Based on Delinquency Convictions and the Quality of Justice in Juvenile Courts, 38 Wake Forest L. Rev. 1111 (2003).}
In light of the substantial differences between juvenile adjudications and adult convictions, the best approach is for the Court to modify the *Apprendi* exception for prior convictions. The Court should set forth explicit standards and mechanisms for scrutinizing the procedural safeguards actually afforded to a juvenile in a particular case before the *Apprendi* exception would apply.

A. Problems with the Smalley and Jones Approach

The Supreme Court denied certiorari to *Smalley* in January 2003. Although *Smalley* may not have been an appropriate vehicle for resolving the circuit split, the Court could eventually resolve the split by adopting the *Smalley* court's reasoning. Review of the Third Circuit's decision in *United States v. Jones* could provide such a vehicle for the Court to take the *Smalley* approach.

The issue in *Smalley* was whether a juvenile adjudication could count as a prior conviction for the ACCA to be applicable. The court recognized that "the question of whether juvenile adjudications should be exempt from *Apprendi*’s general rule should not turn on the narrow parsing of words, but on an examination of whether juvenile adjudications, like adult convictions, are so reliable that due process of law is not offended by such an exemption." Despite the fact that Smalley had not been afforded a jury trial at his juvenile adjudications, the court concluded that juveniles like Smalley still receive safeguards that "are more than sufficient to ensure the reliability that *Apprendi* requires."

The *Smalley* court erred in assuming that juvenile adjudications always possess sufficient procedural safeguards to be reliable as prior convictions. Even assuming that the *Smalley* court was correct in holding that the right to a jury trial is not necessary to ensure the reliability of a juvenile adjudication, it erred by not considering whether Smalley received other procedural safeguards.

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171. See *supra* note 37 and accompanying text.
173. *Id.* at 1032-33.
174. *Id.* at 1033. The court noted that: "For starters, juvenile defendants have the right to notice, the right to counsel, the right to confront and cross-examine witnesses, and the privilege against self-incrimination.... A judge in a juvenile proceeding, moreover, must find guilt beyond a reasonable doubt before he or she can convict." *Id.* (citing *In re Winship*, 397 U.S. 358, 368 (1970)).
For instance, the Smalley court did not address, nor did it appear to know, whether Smalley had an attorney present at his juvenile adjudication, and if not, why he did not have one. Did a parent, guardian, or state-appointed representative waive that right?

The Jones court adopted essentially the Smalley approach. Although both courts held that juvenile adjudications can count as prior convictions for Apprendi purposes, the Jones court engaged in a more in-depth discussion of which procedural safeguards must be present at a juvenile adjudication. It addressed the Sixth Amendment issue at the appellant’s behest. The court attached a presumption of regularity to Jones’ prior adjudication. Jones had the burden of proof to establish the constitutional infirmity of his Sixth Amendment right. He failed to meet this burden of proof because the record was silent as to whether he had representation and he did not even allege that he was not represented by counsel. If Jones had claimed affirmatively that he was not represented by counsel, then the court would have had to engage in judicial factfinding to determine whether he was represented. The court avoided this judicial factfinding through the presumption of regularity.\footnote{175}

Unlike the Smalley court, which failed to consider whether Smalley had other procedural safeguards during his juvenile adjudication, the Jones court actually inquired into whether Jones received other procedural safeguards.\footnote{176} The court recognized that Jones could have attacked his conviction on other procedural grounds; for example, he could have argued that he was not found guilty beyond a reasonable doubt.\footnote{177}

\section*{B. Adopting the Tighe Approach}

Rather than adopt the Smalley approach, the Court could decide that the Apprendi exception for prior convictions does not apply to juvenile adjudications. In Tighe, the Ninth Circuit concluded that

\footnote{175. See discussion supra Part II.C.}
\footnote{176. United States v. Jones, 332 F.3d 688, 698 (3d Cir. 2003) (“On a final note, we have no reason to doubt that Jones was provided other procedural safeguards during his juvenile adjudication.”).}
\footnote{177. The record of Jones’ juvenile adjudication states, “after a full hearing, the Court finds by proof beyond a reasonable doubt that [Lester Jones] has committed the ... delinquent acts.” Id. at 698. The record thus establishes proof beyond a reasonable doubt of delinquency, but not necessarily of guilt.}
"Apprendi's narrow 'prior conviction' exception is limited to prior convictions resulting from proceedings that afforded the procedural necessities of a jury trial and proof beyond a reasonable doubt. Thus, the 'prior conviction' exception does not include nonjury juvenile adjudications."\(^\text{178}\) Although this per se exclusion would be a clear and easy ruling to follow, it runs counter to the modern trend of severely punishing repeat offenders, including juveniles, with sentence enhancements.

Another way to adopt the Tighe approach would be to modify the Apprendi exception based on the fundamental differences between juvenile adjudications and prior adult convictions. The Court held in Apprendi 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."\(^\text{179}\) The Court did not define what it meant by a "prior conviction." The Court could clarify that the Apprendi exception does not include juvenile adjudications.

C. Reconsidering McKeiver

The Court could reconsider McKeiver to determine whether a juvenile adjudication is fundamentally civil or criminal in nature. In McKeiver, the Court held that "trial by jury in the juvenile court's adjudicative stage is not a constitutional requirement."\(^\text{180}\) The Court sidestepped the Sixth Amendment right to an impartial jury trial "[i]n all criminal prosecutions" by determining that a juvenile adjudication was not a criminal prosecution.

The Court could decide that the historical differences between the juvenile and adult justice systems no longer exist and, therefore, decide to provide juveniles with procedural safeguards identical to those of adults. In other words, the Court could reconsider McKeiver and extend the right to a jury trial to juveniles in all juvenile cases. More than thirty years ago, in McKeiver, the Court stated that it was not yet ready to characterize juvenile adjudications as criminal for Sixth Amendment purposes.\(^\text{181}\) With the increasing emphasis on

\(^{178}\) United States v. Tighe, 266 F.3d 1187, 1194-95 (9th Cir. 2001) (footnote omitted).
\(^{181}\) Id. at 541.
the criminal nature of juvenile adjudications in recent years, however, it may be time for the Court to reexamine *McKeiver*. Now, more than thirty years after *McKeiver*, the *Apprendi* exception again raises the issue of whether it is proper to consider juvenile adjudications *civil* for the purpose of denying juveniles the right to a jury, or *criminal* for the *Apprendi* purpose of calling them “prior convictions” and allowing a judge to use them to enhance an adult sentence.\(^8\) It is inconsistent to consider juvenile adjudications *civil* for one purpose, but then *criminal* for another. The Court could resolve this inconsistency by either extending to juveniles the right to a jury trial or determining that juvenile adjudications are not prior convictions for *Apprendi* exception purposes. Although the option of overruling *McKeiver* may be intuitively appealing to some critics, it may be practically unrealistic; it would severely burden the juvenile justice system and would call into question the need for a separate juvenile court system in the first place.

**CONCLUSION: SCRUTINIZING JUVENILE ADJUDICATIONS**

Since juvenile adjudications are fundamentally different from adult prior convictions in purpose and procedure, the Court should adopt the *Tighe* approach with its blanket ban on counting juvenile adjudications as prior convictions. Such a decision would mandate that a juvenile adjudication cannot count as a prior conviction unless the defendant was afforded a jury trial in his juvenile proceeding.\(^{183}\) Assuming, however, that the Court is unwilling to adopt this blanket approach, the Court needs to at least establish basic standards and procedures for a trial judge or jury to scrutinize juvenile adjudications to determine whether the juvenile was afforded sufficient procedural safeguards for the court to rely on the juvenile adjudication.

It appears that when the Court confronts the question of whether juvenile adjudications should count as prior convictions for *Apprendi* purposes, it will have three issues to address. First, the Court must delineate a checklist of procedural safeguards that

\(^{182}\) Cf. Stetzer, *supra* note 79, at 316 (“Kansas should not consider a juvenile proceeding civil and rehabilitative in one context, but then criminal in another.”).

\(^{183}\) See discussion *supra* Parts IV, V.A.
constitute the basic minimum safeguards that must be present in a juvenile adjudication before it can count as a prior conviction for *Apprendi* purposes.\(^{184}\) Second, the Court must establish who has the burden of proof or production and what is required to meet that burden. Finally, the Court will have to decide whether judicial factfinding of the procedural safeguards present in the juvenile adjudication should be performed by a judge or jury.\(^{185}\)

A workable procedure would be to establish a rebuttable presumption that a juvenile adjudication has sufficient procedural safeguards and reliability for it to be treated as an adult conviction. A defendant would have to contest the use of his juvenile adjudication against him on the basis of some constitutional infirmity. A trial judge would then have the responsibility to decide questions of law and due process. For instance, if the trial judge determines that the juvenile was not afforded the right to counsel, then he would find it unconstitutional to count the prior adjudication as a prior conviction. This is analogous to what the Third Circuit did in *United States v. Jones* where it, in effect, employed a presumption of regularity because the appellant failed to meet his burden of establishing that his prior adjudication suffered from a constitutional infirmity.

In the United States, our criminal court system usually reserves questions of fact for the jury and questions of law for the judge. The *Apprendi* exception for prior convictions marks an exception to this general rule based on the “certainty” of the prior conviction.\(^{186}\) In *Apprendi*, the Court held that the fact of a prior conviction need not be submitted to a jury. If the defendant contests his prior juvenile adjudication by claiming that it contained a constitutional infirmity, and if the defendant’s claim raises factual issues that cannot be resolved summarily, then a court or a jury must engage in fact-

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184. This list of basic minimum procedural safeguards could include, but need not be limited to, the following rights: the right to fair notice, the right to proof beyond a reasonable doubt, the right to a jury trial, the right to any exculpatory evidence, and the right to counsel.

185. Judicial scrutiny may involve a judge or jury in the following factfinding: was the juvenile represented by an attorney, was the juvenile adjudicated delinquent by a jury, and does being adjudicated “delinquent” establish “guilt”? The required factfinding also may involve lengthy pretrial determinations so that a defendant will know the potential sentence he faces before trial.

186. *See supra* note 26 and accompanying text.
finding before it can decide whether to count the juvenile adjudication as a prior conviction for *Apprendi* purposes. This factfinding, which calls into question the "certainty" of the prior conviction, is no longer within the bounds of the *Apprendi* exception and is the type of factfinding which *Apprendi* requires a jury to conduct. Allowing the court to make factual determinations of contested facts which may require lengthy hearings and extensive evidence would fly in the face of the original intent of *Apprendi*.

The Court should not ignore the fundamental differences between an adult conviction and a juvenile adjudication. The original focus of the juvenile system on rehabilitation has changed over the years. If the Court does not recognize that the juvenile system has evolved to embrace the concept of punishment, then juveniles will receive the "worst of both worlds ... [they will] get[] neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children."187

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