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Apprendi after *Miller* and *Graham*: How the Supreme Court's Recent Jurisprudence on Juveniles Prohibits the Use of Juvenile Adjudications as Mandatory "Sentencing Enhancements"

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Apprendi after *Miller* and *Graham*

HOW THE SUPREME COURT'S RECENT JURISPRUDENCE ON JUVENILES PROHIBITS THE USE OF JUVENILE ADJUDICATIONS AS MANDATORY "SENTENCING ENHANCEMENTS"

INTRODUCTION

On December 12, 2011, in the United States District Court for the Western District of Oklahoma, Cory Devon Washington was sentenced after pleading guilty to two counts of firearm possession—felon in possession of a firearm and possession of an unregistered firearm.[1] Under ordinary circumstances, Washington would have faced a maximum of 10 years incarceration for such offenses.[2] Washington, however, was sentenced to a minimum of 15 years after the sentencing judge applied the requirements of the Armed Career Criminal Act (ACCA).

The ACCA is a federal law that sets mandatory minimum sentences of incarceration for crimes involving a firearm when the defendant has three prior convictions for a "violent felony" or "serious drug offense."[3] Washington had three prior involvements with the justice system, including two convictions as an adult—one for assault and battery and another for burglary—and a juvenile adjudication for pointing a weapon that was dismissed after Washington completed a five-month probationary sentence.[4] Not only had the juvenile offense been dismissed, it had occurred when Washington was 16 years old, nearly 20 years prior.[5] But the sentencing judge

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[1] Brief of Defendant/Appellant at 5, United States v. Washington, 706 F.3d 1215 (10th Cir. 2012) (No. 11-6339), 2012 WL 1074455 at *5.

[2] *Id.* at 11.

[3] *See* 18 U.S.C. § 924 (e)(1) (2012).

[4] United States v. Washington, 706 F.3d 1217 (10th Cir. 2012).

[5] *Id.* An additional argument made by the defendant in the *Washington* case was that the defendant's juvenile adjudication should not be considered a conviction under the ACCA not only because it was a juvenile offense but also because it was actually dismissed after a period of probation *See id.* at 1218-19. The court did not find this argument convincing because Oklahoma state law does not automatically seal

determined that Washington's juvenile offense of pointing a gun counted as a conviction for a violent felony under the ACCA, meaning that Washington had *three* prior convictions for violent felonies.[6] Under the mandatory requirements of the ACCA, the court sentenced Washington to a minimum term of imprisonment of 15 years.[7]

Washington's case is only one of the stories in the ongoing question of how to treat prior juvenile adjudications when sentencing adult defendants who have violated federal or state laws. In *McKeiver v. Pennsylvania*, the Supreme Court held that due process does not require the right to a jury trial in juvenile delinquency adjudications.[8] In 2000, the Court held in *Apprendi v. New Jersey* 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."[9] Failure to submit and prove such facts to a jury constitutes a violation of the defendant's right to due process.[10] The exclusion of convictions from this requirement has been commonly referred to as a "conviction exception" or the "*Apprendi* exception."[11] The intercept between *Apprendi* and *McKeiver* has resulted in disagreement over whether juvenile adjudications obtained without a jury trial guarantee can be counted as convictions, subject to the *Apprendi* exception, for the sentencing of adult defendants without running afoul of due process and violating the defendant's rights under the Sixth and Fourteenth Amendments.

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juvenile dismissals and because these cases are still relevant under state law for future sentencing purposes. *Id.* Therefore, the court reasoned such dismissals are also relevant under the ACCA. *Id.* This secondary argument presents an additional set of legal analysis that will not be dealt with at any length in this note.

[6] *Id.* at 1217.

[7] *Id.*

[8] McKeiver v. Pennsylvania, 403 U.S. 528 at 545-50 (1971).

[9] Apprendi v. New Jersey, 530 U.S. 466, 490 (2000) (emphasis added).

[10] *Id.*

[11] *See e.g.*, Welch v. United States, 604 F.3d 408, 426-27 (7th Cir. 2010), *cert. denied*, 131 S. Ct. 3019 (2011); United States v. Wright, 594 F.3d 259, 262-64 (4th Cir. 2010), *cert. denied*, 131 S. Ct. 507 (2010); United States v. Matthews, 498 F.3d 25, 34 (1st Cir. 2007), *cert. denied,* 552 U.S. 1238 (2008); United States v. Crowell, 493 F.3d 744, 749 (6th Cir. 2007), *cert. denied*, 552 U.S. 1105 (2008); Boyd v. Newland, 467 F.3d 1139, 1151-52 (9th Cir. 2006), *cert. denied*, 550 U.S. 933 (2007); United States v. Burge 407 F.3d 1183, 1188-89 (11th Cir. 2005), *cert. denied,* 546 U.S. 981 (2005); United States v. Jones, 332 F.3d 688, 694-96 (3d Cir. 2003), *cert. denied*, 540 U.S. 1150 (2004); United States v. Smalley, 294 F.3d 1030, 1032 (8th Cir. 2002), *cert. denied*, 537 U.S. 1114 (2003); United States v. Tighe, 266 F.3d 1187, 1189-90 (9th Cir. 2001).

A significant number of circuit courts have held that a juvenile adjudication counts as a conviction.[12] Many in the scholarly community, however, have argued that juvenile adjudications should not count as previous convictions because of the absence of a jury trial guarantee.[13] Thus, any sentencing scheme where the judge imposes a mandatory or enhanced sentence based on the adult defendant's prior juvenile record, without submitting and proving this fact to the jury, is a violation of due process. This note will argue that a juvenile adjudication should not count as a conviction under the *Apprendi* exception: that based on the factual underpinnings of recent Supreme Court jurisprudence on the nature of juveniles in *Miller v. Alabama* and *Graham v. Florida*, the Court should conclude that the purpose of the juvenile court system prohibits courts from counting a juvenile delinquency adjudication as a "conviction" when sentencing adult defendants. Therefore, any sentencing scheme under which the judge imposes a mandatory or enhanced sentence based on the adult defendant's prior juvenile record is a violation of due process.

Part I will introduce Supreme Court jurisprudence on the evolution of the juvenile court system and the extension of some procedural protections to juvenile delinquency proceedings. Part II will explain *Apprendi v. New Jersey* and the Court's recognition of a "conviction exception." Part III will discuss how federal courts have treated juvenile adjudications in light of the *Apprendi* exception. Part IV will discuss recent Supreme Court cases dealing with juveniles as a class distinguishable from adults, specifically the most recent cases of *Miller v. Alabama* and *Graham v. Florida.* Finally, in Part V, this note will address how *Miller v. Alabama* and *Graham v. Florida* reflect a change in the Court's perception of juveniles. It advances the

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[12] *See e.g.*, *Welch*, 604 F.3d at 428-29; *Wright*, 594 F.3d at 264; *Matthews*, 498 F.3d at 35; *Crowell*, 493 F.3d at 750; *Burge* 407 F.3d at 1191; *Jones*, 332 F.3d 688, 696; *Smalley*, 294 F.3d 1030, 1033.

[13] *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); Jason Abbott, Note, *The Use of Juvenile Adjudications Under the Armed Career Criminal Act,* 85 B.U. L. REV, 263 (2005); Douglas M. Schneider, Note, *But I Was Just a Kid!: Does Using Juvenile Adjudications to Enhance Adult Sentences Run Afoul of* Apprendi v. New Jersey*?*, 26 CARDOZO L. REV. 837 (2005); Brian P. Thill, Comment, *Prior "Convictions" Under* Apprendi*: Why Juvenile Adjudications May Not Be Used to Increase an Offender's Sentence Exposure If They Have Not First Been Proven to a Jury Beyond a Reasonable Doubt,* 87 MARQ. L. REV. 573 (2004). *But see* Daniel Kennedy, Note, *Nonjury Juvenile Adjudications as Prior Convictions Under* Apprendi, 2004 U. ILL. L. REV. 267, Part IV & V (2004) (arguing that juvenile adjudications should fall under the conviction exception as they are reliable).

argument that, regardless of whether a juvenile adjudication was obtained by a jury, the Court's view of juveniles as a class fundamentally distinct from adults prohibits equating juvenile adjudications with adult convictions under *Apprendi*.

I. SUPREME COURT JURISPRUDENCE ON THE JUVENILE SYSTEM

In the 1800s, Progressive Reformers pushed to create institutions and enact laws that would shape and mold the development of children.[14]

> The legal doctrine of *parens patriae*—the right and responsibility of the state to substitute its own control over children for that of the natural parents when the latter appeared unable or unwilling to meet their responsibilities or when the child posed a problem for the community—provided the formal justification to intervene.[15]

The root of the juvenile justice system as a method of combating delinquency stems from "positivist ideology" and the notion of a "rehabilitative ideal," requiring an individualized approach to each child and deference to professional opinions.[16] Progressive reformers imagined a court system where "professionals made discretionary, individualized treatment decisions to achieve benevolent goals and social uplift and substituted a scientific and preventive approach for the traditional punitive goals of the criminal law."[17] Adopting this flexible approach, and in an effort to avoid the stigmatization associated with the adult criminal system, reformers classified the juvenile court as a civil system where "petitions" were filed (as opposed to charges brought), "[c]ourts found youths to be 'delinquent' rather than guilty of an offense, and youths received 'dispositions' rather than sentences."[18]

In the 1960s, the Supreme Court, however, concerned about the degree of power and discretion wielded by the State, stepped in to extend Constitutional protections to youths in the juvenile system. In 1967, the Supreme Court decided *In re Gault*, holding that while the juvenile system was different from the adult criminal system, the possibility of serious consequences such as confinement and loss of liberty required

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[14] BARRY C. FELD, BAD KIDS: RACE AND THE TRANSFORMATION OF THE JUVENILE COURT 34-45 (1999).

[15] *Id.* at 52.

[16] *Id.* at 60.

[17] *Id.* at 62.

[18] *Id.* at 68.

the imposition of procedural protections including the right to notice of charges, the right to counsel, the right to cross-examine and confront witnesses, and the privilege against self-incrimination.[19] The facts of *Gault* vividly illustrated the potential for abuse given the wide discretion exercised in the juvenile court system. The defendant, Gerald Gault, was committed to custody for six years for making an obscene phone call, whereas an adult who committed the same offense would have faced a maximum punishment of a 50 dollar fine.[20]

While the purported purpose of the juvenile court system is to rehabilitate juveniles, the Court recognized that "[t]he rhetoric of the juvenile court movement ha[d] developed without any necessarily close correspondence to the realities of court and institutional routines."[21] The facts of *Gault* exhibited such a glaring departure from the benevolent and rehabilitative ideal of the juvenile court that it spurred major constitutional change.[22] Three years later, the Court held, in *In re Winship*, that juveniles are constitutionally entitled to the same criminal trial standard of "proof beyond a reasonable doubt."[23]

The Court extended many of the constitutional protections available to adult criminal defendants to juvenile defendants in recognition of the unavoidably adversarial nature of the juvenile system.[24] Thus, in both *Gault* and *Winship*, the Court "emphasized the *dual* functions of constitutional criminal procedures to ensure accurate fact-finding *and* to protect against governmental oppression."[25] Especially telling was the Supreme Court's decision that the Fifth Amendment privilege against self-incrimination applied to juvenile court proceedings, demonstrating that despite the state's benevolent motives, a juvenile still required certain fundamental protections against the power of the state.[26]

The Court, however, seemed to take a step back from this philosophy not long after deciding *Winship*. At the end of

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[19] *In re* Gault, 387 U.S. 1, 4-58 (1967).

[20] *Id.* at 29.

[21] *Id.* at 30 (quoting STANTON WHEELER & LEONARD S. COTTRELL, JUVENILE DELINQUENCY: ITS PREVENTION AND CONTROL 35 (1996)).

[22] FELD, *supra* note 14, at 99-100.

[23] *In re* Winship, 397 U.S. 358, 367-68 (1970). Several years before *Gault* was decided, Chief Justice Warren had foreshadowed the possibility of the decision when, speaking before the National Council of Juvenile Court Judges, he acknowledged that the juvenile system was different from adult criminal court but expressed concern for the possibility of "unbridled caprice." FELD, *supra* note 14, at 99 (1999).

[24] FELD, *supra* note 14, at 101.

[25] *Id.* at 104.

[26] *Id.* at 101.

the same year *Winship* was decided, the Court heard arguments in *McKeiver v. Pennsylvania* on whether a jury trial is constitutionally required in a juvenile delinquency proceeding.[27] The Court's recognition in *Gault* and *Winship* that juvenile proceedings were in fact adversarial and could result in significant consequences despite their purpose of rehabilitation seemed to suggest that the Court would continue the trend of applying adult procedural protections to juvenile proceedings.[28] Notably, between *Gault* and *McKeiver*, the Court had decided *Duncan v. Louisiana*, holding that the right to a jury in criminal prosecutions, guaranteed by the Sixth Amendment, applied to the states through the Due Process Clause of the Fourteenth Amendment.[29]

In *McKeiver*, the Court reiterated its holding in *Duncan* "that trial by jury in criminal cases is fundamental to the American scheme of justice" but stated that *Duncan*

> does not automatically provide the answer to the present jury trial issue, if for no other reason than that the juvenile court proceeding has not yet been held to be a "criminal prosecution," within the meaning and reach of the Sixth Amendment, and also has not yet been regarded as devoid of criminal aspects merely because it usually has been given the civil label.[30]

The Court acknowledged the failure of the juvenile system to achieve its idealistic goals, citing extensively from a Presidential Commission report detailing these failures.[31] However, the Court held that, nevertheless, "trial by jury in the juvenile court's adjudicative stage is not a constitutional requirement."[32]

The Court discussed *Duncan* at the beginning of its opinion, but it decided the issue based on the Fourteenth Amendment due process standard of "fundamental fairness," without delving into the intricacies of a Sixth Amendment analysis.[33] The Court's avoidance of an explicit Sixth Amendment analysis suggests it was uncomfortable with classifying juvenile

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[27] McKeiver v. Pennsylvania, 403 U.S. 528, 528 (1971).

[28] *See* FELD, *supra* note 14, at 101.

[29] Duncan v. Louisiana, 391 U.S. 145, 156 (1968); *see also* FELD, *supra* note 14, at 104.

[30] *McKeiver*, 403 U.S. 528 at 540-41 (internal citations omitted) (emphasis added).

[31] *Id*. at 543-45.

[32] *Id*. at 545.

[33] *Id.* at 540-43; *see also* FELD, *supra* note 14, at 104 ("[T]he Supreme Court decided *McKeiver* solely on the basis of the Fourteenth Amendment's Due Process Clause and 'fundamental fairness' without reference to the Sixth Amendment or its *Duncan* rationale.").

delinquency adjudications either as entirely civil or entirely criminal matters.

II. *APPRENDI V. NEW JERSEY* AND THE "CONVICTION EXCEPTION"

Decades after the Supreme Court's line of cases addressing constitutional protections in the juvenile system, the Court found itself facing constitutional claims in an entirely different area—the sentencing of adult defendants. In 2000, the Supreme Court decided *Apprendi v. New Jersey*.[34] In *Apprendi*, under a plea agreement, the defendant pled guilty to two counts of possession of a firearm and one count of unlawful possession of a bomb.[35] The state of New Jersey reserved the right to seek a higher sentence on one of the counts by applying the state's "hate crime" statute, claiming that the crime was committed with a biased purpose based on a statement by Apprendi suggesting a racial motive.[36] After the trial judge accepted the defendant's guilty plea, the judge held an evidentiary hearing, without a jury present, to determine whether Apprendi's acts were due to a biased purpose.[37] The judge held that Apprendi's actions met the statutory requirements "by a preponderance of the evidence" and that the sentencing enhancement under the hate crime statute applied.[38] The Supreme Court reversed, 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."[39]

The *Apprendi* Court did not expressly overturn *McMillan v. Pennsylvania*,[40] a 1986 decision holding that a

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[34] Apprendi v. New Jersey, 530 U.S. 466 (2000).

[35] *Id.* at 469-70.

[36] *Id.* at 470; *See* N.J. STAT. ANN. § 2C:44-3(e) (West Supp. 1999–2000) ("The defendant in committing the crime acted with a purpose to intimidate an individual or group of individuals because of race, color, gender, handicap, religion, sexual orientation or ethnicity.").

[37] *Apprendi*, 530 U.S. 466 at 470.

[38] *Id.* at 471.

[39] *Id.* at 490. The Court acknowledged that the *Apprendi* holding confirms a principle first expressed in a footnote to the Court's opinion in *Jones v. United States*, concerning a federal statute. *See id.* at 476; Jones v. United States, 526 U.S. 227, 243, n.6 (1999) ("[U]nder the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than a prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt."). In *Apprendi*, the Court explained that "[t]he Fourteenth Amendment commands the same answer in this case involving a state statute." *Apprendi*, 530 U.S. 466 at 476.

[40] *See generally Apprendi,* 530 U.S. 466.

"sentencing factor" could affect the judge's sentencing decision even if it was not found by a jury.[41] The Court in *Apprendi* made a point of stressing that in *McMillan*, it "did not, however, . . . budge from the position that (1) constitutional limits exist to States' authority to define away facts necessary to constitute a criminal offense . . . [and (2)] a state scheme that keeps from the jury facts that 'expos[e] [defendants] to greater or additional punishment,' may raise serious constitutional concern."[42]

The *Apprendi* Court's discussion of a "sentencing factor" was necessary for it to clarify how its decision fit in with *Almendarez-Torres v. United States*, decided two years before *Apprendi.*[43] In *Almendarez-Torres,* the Court held that the use of a previous conviction to sentence the defendant to a longer term constituted a "sentencing factor" and not an element of the crime that needed to be listed in an indictment.[44] Therefore, it did not violate due process or other constitutional provisions.[45] The *Almendarez-Torres* holding applied only to criminal indictments and was not concerned with sentencing procedures. At issue in *Almendarez-Torres* was a federal statute enhancing the maximum prison term for a deported alien returning to the United States without permission, if he had previously been deported upon conviction of an aggravated felony.[46]

The *Apprendi* Court explained that,

> [b]ecause 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—no question concerning the right to a jury trial or the standard of proof that would apply to a contested issue of fact was before the Court.[47]

The *Almendarez-Torres* decision focused on the general characterization of recidivism as a "sentencing factor" that did not need to be charged in the indictment.[48] As Almendarez-Torres admitted to prior convictions for aggravated felonies, the Court never reached the question of what constituted a

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[41] *Apprendi*, 530 U.S. 466 at 485-86. *See* McMillan v. Pennsylvania, 477 U.S. 79 (1986).

[42] Apprendi v. New Jersey, 530 U.S. 466, 486 (2000) (citations omitted).

[43] Almendarez-Torres v. United States, 523 U.S. 224, 226 (1998).

[44] *Id.* at 226-27.

[45] *Id.* at 226.

[46] *Id.* at 224. *See* 8 U.S.C. § 1326(a) & (b)(2) (2012).

[47] *Apprendi*, 530 U.S. 466 at 488.

[48] *See Almendarez-Torres*, 523 U.S. 224, 230 (1998).

"conviction" under the statute in issue.[49] Consequently, the *Apprendi* Court did not overrule *Almendarez-Torres* because the facts of the case still fit within the *Apprendi* holding allowing for a "conviction exception" to the general rule that facts enhancing the sentence should go before a jury.[50] The Court, however, went so far as to suggest that

> it is arguable that *Almendarez-Torres* was incorrectly decided, and that a logical application of our reasoning today should apply if the recidivist issue were contested. Apprendi does not contest the decision's validity and we need not revisit it for purposes of our decision today to treat the case as a narrow exception to the general rule we recalled at the outset. Given its unique facts, it surely does not warrant rejection of the otherwise uniform course of decision during the entire history of our jurisprudence.[51]

Recently, in *Alleyne v. United States*, the Court held that *Apprendi* applies not only to facts that increase the statutory maximum, but also facts that increase the mandatory minimum.[52] Therefore, "any fact that increases the mandatory minimum is an 'element' that must be submitted to the jury."[53] While Chief Judge Roberts's dissenting opinion disagreed with the application of *Apprendi* in the context of mandatory minimums, he described the *Apprendi* rule as "draw[ing] its legitimacy from two primary principles: (1) common law understandings of the 'elements' of a crime, and (2) the need to preserve the jury as a 'strong barrier' between defendants and the State."[54]

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[49] *See id.* at 248.

[50] *Apprendi*, 530 U.S. 466 at 487-90.

[51] *Id.* at 489-90 (footnote omitted).

[52] Alleyne v. United States, 133 S. Ct. 2151 (2013).

[53] *Id.* at 2153.

[54] *Id.* at 2170 (Roberts, C.J., dissenting). Three days after *Alleyne*, the Court issued another opinion concerning the *Apprendi* exception in *Descamps v. United States*. *See* Descamps v. United States, 133 S. Ct. 2276 (2013). In *Descamps*, the Court limited the amount of information a sentencing court can consider when determining whether the defendant's prior conviction falls under the ACCA as a "violent felony." *Id.* at 2281-82.; *see also* Daniel Richman, *Opinion Analysis: When Is a Burglary Not a Burglary?*, SCOTUSBLOG (June 20, 2013, 11:18 PM), http://www.scotusblog.com/2013/06/opinion-analysis-when-is-a-burglary-not-a-burglary/ ("Justice Thomas concurred in the judgment just to make clear that he still wants *Almendarez-Torres* dead.").

III. THE JUVENILE ADJUDICATION AS "PRIOR CONVICTION" DILEMMA

A. The "Armed Career Criminal Act"

Apprendi dealt with a state law, but the application of the "conviction exception" has frequently arisen under the ACCA, a federal act.[55] The ACCA mandates a 15-year minimum period of incarceration for defendants convicted of possessing a firearm, in violation of 18 U.S.C. § 924, if the defendant previously was convicted of three or more "violent felonies" or "serious" drug offenses.[56]

The ACCA has forced many federal courts of appeals to take up the issue of whether a defendant's juvenile adjudication should count as a prior conviction.[57] The act defines "conviction" as "includ[ing] a finding that a person has committed an act of juvenile delinquency involving a violent felony."[58] While the ACCA includes a juvenile adjudication in its definition of conviction, the adjudication still must be a "conviction" under the *Apprendi* exception, or else its use as a mandatory sentencing enhancement without submission to a jury constitutes a violation of due process.

As the language of the ACCA specifically indicates that Congress intended for a juvenile delinquency adjudication to count as a predicate conviction, federal circuit courts have frequently been tasked with determining whether a juvenile adjudication counts as an exception under *Apprendi* in the context of the ACCA.[59] The courts have also been faced with the same constitutional question in light of similar state laws.[60]

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[55] 18 U.S.C. § 924 (2011); *See* Daniel Richman, *Opinion Analysis: When Is a Burglary a "Burglary?"*, SCOTUSBLOG (Jan. 4, 2013, 10:29 PM), http://www.scotusblog.com/2013/01/argument-preview-when-is-a-burglary-a-burglary/ ("Because its application brings some of the federal system's harshest mandatory penalties, and requires federal courts to categorize a diverse range of prior state convictions . . . the Armed Career Criminal Act ('ACCA'), 18 U.S.C. § 924(e), has provided the Court with considerable business (and a fair amount of exasperation)."). *See, e.g.*, *supra* notes 1-7 (describing the application of the ACCA in the *Washington* case).

[56] 18 U.S.C. § 924 (e)(1) (2012).

[57] *Id.* § 924(e)(2)(B) (2012).

[58] *Id.*

[59] *See, e.g.*, Welch v. United States, 604 F.3d 408, 426 (7th Cir. 2010), *cert. denied*, 131 S. Ct. 3019 (2011); United States v. Wright, 594 F.3d 259, 262-65 (4th Cir. 2010), *cert. denied,* 131 S. Ct. 507 (2010); United States v. Matthews, 498 F.3d 25 (1st Cir. 2007), *cert. denied,* 552 U.S. 1238 (2008).

[60] *See, e.g.*, Boyd v. Newland, 467 F.3d 1139, 1142 (9th Cir. 2006), *cert. denied,* 550 U.S. 933 (2007). These laws are commonly referred to as "Three Strikes Laws."

B. *The Federal Courts of Appeals on Juvenile Adjudications and* Apprendi

A vast majority of federal circuit courts have decided that a juvenile adjudication counts as a "conviction," making it an "exception" under *Apprendi*.[61] While some courts of appeals have carefully laid out the legal analysis under *Apprendi*,[62] others have deferred to previous decisions in the state courts or other circuit courts, relying on the fact that there is no "clearly established federal law" in this area.[63]

One potentially confounding issue is that while the ACCA is a federal statute and the *Apprendi* exception is a constitutional due process concern, a previous juvenile adjudication will almost always be determined under the state's specific legal procedures for juveniles.[64] Even juveniles who violate federal law are typically prosecuted by state authorities in the state's juvenile system unless the state "does not have jurisdiction or refuses to assume jurisdiction over [the] juvenile."[65] Therefore, the state's procedures and characterization of juvenile adjudications is relevant to the overall constitutional analysis.

While a majority of the courts of appeals now hold that a juvenile adjudication should count as a previous conviction, or a "strike" for ACCA purposes, the first case to address this issue determined otherwise. In *United States v. Tighe,* decided in 2001, the year following *Apprendi*, the Court of Appeals for the Ninth Circuit held that a juvenile adjudication does not count as a "conviction" and therefore may not be used as a sentencing enhancement under the ACCA.[66] In *Tighe*, the district court sentenced the defendant to a minimum term of 15 years in prison after the sentencing judge included a 1988 juvenile adjudication of reckless endangerment, robbery, and unauthorized use of a motor vehicle as a prior conviction for a

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[61] *See Welch*, 604 F.3d at 426; *Wright*, 594 F.3d at 263-65; *Matthews*, 498 F.3d at 36; United States v. Crowell, 493 F.3d 744, 750 (6th Cir. 2007), *cert. denied,* 552 U.S. 1105 (2008); *Boyd*, 467 F.3d at 1151-52; United States v. Burge 407 F.3d 1183, 1186-87 (11th Cir. 2005), *cert. denied,* 546 U.S. 981 (2005); United States v. Jones, 332 F.3d 688, 697-98 (3d Cir. 2003), *cert. denied,* 540 U.S. 1150 (2004); United States v. Smalley, 294 F.3d 1030, 1031-33 (8th Cir. 2002), *cert. denied,* 537 U.S. 1114 (2003).

[62] *See, e.g.*, *Smalley*, 294 F.3d at 1031-33; United States v. Tighe, 266 F.3d 1187, 1192-93 (9th Cir. 2001).

[63] *See Boyd*, 467 F.3d 1139 at 1142; *Welch*, 604 F.3d 408. *See infra* note 102 for the standard of review used when the federal court hears a *habeas corpus* petition after the defendant was sentenced in state court.

[64] 18 U.S.C. § 5032 (2012).

[65] *Id.*

[66] *See Tighe*, 266 F.3d 1187 at 1194-95.

violent felony.[67] The Ninth Circuit explained that Congress's characterization of a juvenile adjudication as a "prior conviction" under the ACCA "ignores the significant constitutional differences between adult convictions and juvenile adjudications."[68] The court stressed that "[n]either *Apprendi,* nor *Almendarez-Torres*—the case upon which *Apprendi* relied to create the 'prior conviction' exception to its general rule—specifically addressed the unique issues that distinguish juvenile adjudications from adult convictions, such as the lack of a right to a jury trial in most juvenile adjudications."[69]

The Ninth Circuit looked carefully at *United States v. Jones*,[70] a Supreme Court case decided just before *Apprendi* and upon which the *Apprendi* court relied.[71] Although *Jones* did not deal with a case involving a prior conviction, the Supreme Court took the opportunity to discuss why convictions were different from other elements that may increase a defendant's sentence: "One basis for that constitutional distinctiveness [of prior convictions] is not hard to see: unlike virtually any other consideration used to enlarge the possible penalty for an offense *. . . a prior conviction must itself have been established through procedures satisfying the fair notice, reasonable doubt[,] and jury trial guarantees*."[72] The *Tighe* court continued the Supreme Court's analysis to reason that

> *Jones'* recognition of prior convictions as a constitutionally permissible sentencing factor was rooted in the concept that prior convictions have been, by their very nature, subject to the fundamental triumvirate of procedural protections intended to guarantee the reliability of criminal convictions: fair notice, reasonable doubt[,] and the right to a jury trial.[73]

Thus, the *Tighe* court pointed out that the basis for an exception for convictions is inapplicable in juvenile adjudications obtained without a right to a jury trial.[74] The *Tighe* court then

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[67] *Id.* at 1190.

[68] *Id.* at 1192-93.

[69] *Id.* at 1193.

[70] *Id.*; *see also* Jones v. United States, 526 U.S. 227, 243-52 (1999) (holding that a federal statute requiring a greater term of imprisonment when the offense resulted in "serious bodily injury or death" constitutes separate elements of the offense which must be presented to the jury).

[71] *See* Apprendi v. New Jersey, 530 U.S. 466, 472-73 (2000).

[72] *Tighe*, 266 F.3d at 1193 (quoting *Jones*, 526 U.S. at 249).

[73] *Id.* at 1193.

[74] *Id.* The *Tighe* court did not address the argument that some states *may* provide juvenile delinquency defendants with the right to a jury trial as Tighe himself did not have a right to a jury trial under Oregon state law. "It does not matter to this analysis whether any state provides the right to a jury trial for juvenile adjudications. It is undisputed that

completed the analysis by looking at whether the conviction exception should be *extended* to include nonjury adjudications and decided not to take such a step.[75] The court reasoned that such an extension of the *Apprendi* holding would be unwarranted given "[t]he *Apprendi* Court's serious reservations about the reasoning of *Almendarez-Torres* [which] counsel against any extension of that opinion's holding."[76]

In the year following *Tighe*, the Eighth Circuit Court of Appeals addressed the exact same issue in *United States v. Smalley*, which also focused on the use of a juvenile adjudication as a "conviction" under the ACCA.[77] In *Smalley*, the defendant had multiple prior juvenile adjudications which the trial court counted as "convictions" to increase his sentence.[78] The *Smalley* court noted that the language of the ACCA indicated that Congress intended for juvenile adjudications to count as convictions, "[b]ut the issue of whether juvenile adjudications can be characterized as prior convictions for *Apprendi* purposes is a constitutional question implicating Mr. Smalley's right not to be deprived of liberty without due process of law."[79] The court then went on to describe the holding of *Tighe*, noting it was the only federal court case on point.[80]

The *Smalley* court disagreed with the *Tighe* holding, reasoning that the Court's opinion in *Apprendi* did not take a position on what constitutes sufficient procedural safeguards in every situation:

> We think that while 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 between these two poles.[81]

Tighe was not provided a jury when he was adjudged a juvenile delinquent in Oregon . . . ." *Id.* at 1194 n.4. Therefore, the court did not consider whether a juvenile adjudication based on a jury verdict would count as a "conviction" under *Apprendi*. *Id.*

[75] *Id.* at 1194.

[76] *Id.* "Even though it is arguable . . . *Almendarez-Torres* was incorrectly decided, and that a logical application of our reasoning today should apply if the recidivist issue were contested, *Apprendi* does not contest the decision's validity and we need not revisit it for purposes of our decision today to treat the case as a *narrow exception* to the general rule we recalled at the outset." *Id.* (*quoting* Apprendi v. United States, 530 U.S. 466, 489-90 (2000)).

[77] United States v. Smalley, 294 F.3d 1030, 1031 (8th Cir. 2002).

[78] *Id.* at 1031.

[79] *Id.* at 1031-32 (internal quotations omitted).

[80] *Id.* at 1032.

[81] *Id.*

The *Smalley* court "conclude[d] 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."[82] The court then determined that they are,[83] went on to list the many other procedural safeguards available to juvenile defendants,[84] and concluded by stating that a jury in a juvenile proceeding is not constitutionally required under *McKeiver v. Pennsylvania*.[85]

The Third Circuit soon faced the same issue in *United States v. Jones*, where the court held that a nonjury juvenile adjudication counts as a conviction under the *Apprendi* exception.[86] The court adopted the reasoning of the *Smalley* court, stating "we find nothing in *Apprendi* or *Jones*, two cases relied upon by the *Tighe* court and [the defendant] 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."[87]

While the defendant, Jones, lost in front of the Third Circuit, he succeeded on a subsequent appeal on the only basis available to him—the fact that he was unrepresented by

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[82] *Id.* at 1032-33.

[83] *Id.*

[84] "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.* at 1033 (internal citations omitted). Interestingly, now that the court has reasoned juvenile adjudications to be counted as prior convictions, the court uses the term "convict" rather than the proper procedural term, "adjudicate."

[85] *Id. See generally* McKeiver v. Pennsylvania, 403 U.S. 528 (1971).

[86] United States v. Jones, 332 F.3d 688, 696 (3d Cir. 2003). A year earlier, the Third Circuit had avoided having to make a definitive ruling on the precise issue by holding that, in the case before it, the juvenile adjudication did not constitute a "violent felony" under the language of the ACCA. United States v. Richardson, 313 F.3d 121, 127 (3d Cir. 2002). The *Richardson* court noted that, "as Richardson's case well illustrates, [the ACCA] provides for dramatically increased penalties." *Id.* at 123. The trial court applied the ACCA enhancement to Richardson's case by counting a "juvenile adjudication for robbery and other offenses, along with two adult convictions for possessing crack cocaine with intent to distribute." *Id.* The court noted that if the enhancement did not apply, Richardson's sentence would have been limited to a ten year statutory *maximum*, and he likely would have been sentenced within the guideline range of eight and a third to ten years. *Id.* (emphasis added). If the ACCA enhancement applied, Richardson faced a *minimum* sentence of fifteen years, with sentencing guidelines of roughly *nineteen and a half to twenty four years*. *Id.* (emphasis added). The trial court, counting the juvenile adjudication as a conviction, sentenced Richardson to 235 months, or roughly nineteen and a half years in prison—nearly twice the maximum allowable period of incarceration if no such enhancement applied. *Id.*

[87] *Id.*

counsel at his juvenile adjudication.[88] If juvenile adjudications count as convictions, then federal defendants are bound by *Custis v. United States*, a 1994 Supreme Court case holding that "a defendant in a federal sentencing proceeding . . . has no [] right (with the sole exception of convictions obtained in violation of the right to counsel) to collaterally attack prior convictions."[89] Therefore, if juvenile adjudications count as convictions under federal laws such as the ACCA, then the only basis on which a defendant may attack the validity of his prior adjudication was if he or she was unrepresented by counsel at the proceeding.[90] Any other suggested procedural deficits are insufficient.

Following the Third Circuit, other federal appellate courts began to almost uniformly adopt reasoning similar to *Smalley* and hold that juvenile adjudications count as convictions and therefore fall under the *Apprendi* exception.[91] The Eleventh Circuit Court of Appeals "base[d] [its] holding on the reasoning of . . . *Smalley* and *Jones*."[92] The Sixth,[93] First,[94] Fourth,[95] and Seventh[96] Circuits followed suit over the next five years, echoing the reasoning that juvenile adjudications are

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[88] *See* United States v. Jones, No. 2:01-CR-0136, 2006 WL 2939744 at *1-3 (W.D. Penn., Oct. 13, 2006). The court's opinion is noteworthy as it anecdotally sheds light on the possibility of procedural deficits in juvenile adjudications. The certified record of the defendant's adjudication was silent regarding whether he was represented by counsel. *Id.* at *1. At the evidentiary hearing, the defendant Jones testified that he was not represented by counsel during his juvenile adjudication and the juvenile court judge never inquired whether he wanted counsel. *Id.* at *2. Jones also testified that he never took the stand, he did not cross-examine any witnesses, and his co-defendant's counsel did not cross-examine any witnesses. *Id.* Finally, he testified that the hearing lasted 10 minutes. *Id.* "Jones testified that he did not appeal the Juvenile Adjudication because he lacked the resources or knowledge to do so." *Id.* The juvenile court judge could not recall the specifics of Jones' case, although he "conceded that he may not have asked the parent of an unrepresented co-defendant whether the defendant waived his right to counsel if [he] mistakenly thought the attorney present at the hearing was representing both co-defendants." *Id.* at *3.

[89] *See* Custis v. United States, 511 U.S. 485, 487 (1994).

[90] *Id.*

[91] *See, e.g.*, Welch v. United States, 604 F.3d 408 (7th Cir. 2010), *cert. denied*, 131 S. Ct. 3019 (2011); United States v. Wright, 594 F.3d 259 (4th Cir. 2010), *cert. denied,* 131 S. Ct. 507 (2010); United States v. Matthews, 498 F.3d 25 (1st Cir. 2007), *cert. denied,* 552 U.S. 1238 (2008); Boyd v. Newland, 467 F.3d 1139 (9th Cir. 2006), *cert. denied,* 550 U.S. 933 (2007); United States v. Crowell, 493 F.3d 744 (6th Cir. 2007), *cert. denied,* 552 U.S. 1105 (2008); United States v. Burge, 407 F.3d 1183 (11th Cir. 2005), *cert. denied,* 546 U.S. 981 (2005).

[92] *Burge*, 407 F.3d at 1190.

[93] *Crowell*, 493 F.3d at 750-51.

[94] *Matthews*, 498 F.3d at 35-36.

[95] *Wright*, 594 F.3d at 264.

[96] *Welch*, 604 F.3d at 429.

just as reliable and are afforded with all the protections constitutionally required.

Additionally, the Ninth Circuit, which originally decided *Tighe*, narrowed the holding even more when the court addressed the use of juvenile adjudications to enhance sentences under state law in *Boyd v. Newland*.[97] In *Boyd*, the state court considered the defendant's prior nonjury juvenile adjudication in deciding to increase his sentence.[98] The Ninth Circuit reiterated its holding from *Tighe*, stating:

> We have held that the *Apprendi* "prior conviction" exception encompasses only those proceedings that provide a defendant with the procedural safeguards of a jury trial and of proof beyond a reasonable doubt. Consequently, we do not recognize nonjury juvenile adjudications as "convictions" falling within the *Apprendi* exception, and ordinarily we do not allow sentencing enhancements based on such adjudications.[99]

The court, however, continued to recognize the dilemma that, in the years following *Tighe*, California state courts disagreed with the holding and have declined to follow it.[100] The court also acknowledged that subsequent federal appellate court decisions in other circuits disagreed with their interpretation.[101] Faced with conflicting interpretations the court stated:

> Although we are not suggesting that *Tighe* was incorrectly decided, as some of these varying interpretations of *Apprendi* suggest, the opinion does not represent clearly established federal law 'as determined by the Supreme Court of the United States.' In general, Ninth Circuit precedent remains persuasive authority in determining what is clearly established federal law. But in the face of authority that is directly contrary to *Tighe*, and in the absence of explicit direction from the Supreme Court, we cannot hold that the California courts' use of Petitioner's juvenile adjudication as a sentencing enhancement was contrary to, or involved an unreasonable application of, Supreme Court precedent.[102]

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[97] *See generally Boyd*, 467 F.3d 1139.

[98] *Id.* at 1151.

[99] *Id.* at 1151-52 (citations omitted).

[100] *See id.* at 1152.

[101] *Id.*

[102] *Id.* (citations omitted). As the Ninth Circuit Court of Appeals was deciding a *habeas corpus* petition arising from a state court judgment, such a deferential standard of review was required under federal law:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to a judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

Taking *Tighe* and *Boyd* together now leads to an incongruous result: in the state of California, a defendant's juvenile adjudication counts as a conviction under *Apprendi* when the defendant is prosecuted under state law while that exact same adjudication may not qualify as a conviction under federal law. In other words, the use of the adjudication to enhance a sentence under state law is constitutionally valid, while that same use under federal law is a violation of the defendant's constitutional right to due process.

When the Seventh Circuit Court of Appeals in *Welch v. United States* followed the reasoning of the other circuits and held that a juvenile adjudication counts as a conviction under the *Apprendi* exception, Judge Posner wrote a strong dissenting opinion.[103] His dissent focuses on two distinct reasons why a juvenile adjudication should not count as a conviction: the different procedures and different objectives in the juvenile court system.[104]

In terms of different procedures, Judge Posner begins by recognizing that a juvenile adjudication "is best described as 'quasi-criminal.'"[105] His opinion further acknowledges that *McKeiver v. Pennsylvania* holds that a jury is not required in a juvenile court proceeding to imprison (i.e. " remand") a juvenile,

> [b]ut whether a juvenile can be imprisoned on the basis of findings made by a juvenile-court judge rather than by a jury is different from whether a "conviction" so procured (if it should even be called a "conviction") is the kind of "prior conviction" to which the Court referred in *Apprendi*, namely a conviction that can be used to jack up a person's sentence beyond what would otherwise be the statutory maximum.[106]

Posner points out that the *Apprendi* Court implied the predicate conviction would be determined by a jury;

> [o]therwise[,] why does the Supreme Court require that any fact, as distinct from a conviction, used to enhance a sentence be a fact found by a jury (unless of course the defendant waived a jury)? Why didn't

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> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States[.]

28 U.S.C. § 2254 (2011).

103 *See* Welch v. United States, 604 F.3d 408, 429-32 (7th Cir. 2010) (Posner, J., dissenting).

104 *Id.*

105 *Id.* at 430.

106 *Id.* at 430-31.

> the Court just say that the fact must be found by a reliable means?[107]

Posner notes that the Court in *Jones v. United States* specifically pointed out that "a prior conviction must itself have been established through procedures satisfying the fair notice, reasonable doubt, *and jury trial* guarantees."[108] These three procedural requirements are not explicitly stated in *Apprendi* and many courts considered the absence of such a statement in determining that juvenile adjudications should count as prior convictions,[109] essentially reading the *Apprendi* holding in a vacuum. Posner argues:

> The Court in *Apprendi* did not take [these three procedural requirements] back when it said that
>
> > if a defendant faces punishment beyond that provided by statute when an offense is committed under certain circumstances but not others, it is obvious that both the loss of liberty and the stigma attaching to the offense are heightened; it necessarily follows that the defendant should not—at the moment the State is put to proof of those circumstances—be deprived of protections that have, *until that point, unquestionably attached.*
>
> The defendant in this case was not "deprived of protections" that had attached to his juvenile-court proceeding.[110]

Although Posner does not explicitly say so, he seems to suggest that the language in *Apprendi* naturally follows from *Jones*. How else do we know what "protections" the Court is referring to? Furthermore, while the *Apprendi* Court did not overrule *Almendarez-Torres*, the Court left it on extremely narrow footing,[111] which is telling considering that *Almendarez-Torres* involved predicate convictions that actually were subject to the same procedural protections, including the right to a jury trial.[112]

The next section of Posner's dissent is particularly interesting as it puts forth novel arguments and employs language similar to recent Supreme Court jurisprudence on the punishment of juveniles. Posner discusses the *objectives* of the juvenile court system as constituting a concern separate and

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[107] *Id.* at 431.

[108] *Id.* (quoting Jones v. United States, 526 U.S. 227, 249 (1999)).

[109] Welch v. United States, 604 F.3d 408, 431 (7th Cir. 20120) (Posner, J., dissenting).

[110] *Id.* (citations omitted).

[111] Apprendi v. New Jersey, 530 U.S. 466, 489-90 (2000).

[112] *Id.* at 488.

distinct from the *procedures* of the juvenile system.[113] This part of Posner's opinion responds to the argument previously articulated by other courts of appeals that a nonjury juvenile adjudication which provides the defendant all the procedural due process afforded under *McKeiver*, cannot "become" a due process violation later down the road just because it is used to enhance an adult sentence.[114] The basic argument is simply: once constitutional, always constitutional. Posner challenges this assumption, arguing that

> [t]he constitutional protections to which juveniles have been held to be entitled have been designed with a different set of objectives in mind than just recidivist enhancement. So the mere fact that a juvenile had all the process he was entitled to doesn't make his juvenile conviction equivalent, for purposes of recidivist enhancement, to adult convictions.[115]

Posner then continues to challenge the *McKeiver* court's assumption that juvenile adjudications determined by judges are just as reliable as criminal convictions by juries.[116] Posner points to subsequent research suggesting that this is not the case.[117] He expresses a major concern which is "[o]f particular relevance to *Apprendi* [that] the literature finds that judges are more likely to convict in juvenile cases than juries are in criminal cases."[118] Posner suggests several reasons to explain this phenomenon:

> Juvenile-court judges are exposed to inadmissible evidence; they hear the same stories from defendants over and over again, leading them to treat defendants' testimony with skepticism; they become chummy with the police and apply a lower standard of scrutiny to the testimony of officers whom they have come to trust; and they make their decisions alone rather than as a group and so their

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[113] *Welch*, 604 F.3d 431-34 (Posner, J., dissenting).

[114] *See, e.g.*, United States v. Smalley, 294 F.3d 1030 (8th Cir. 2002).

[115] *Welch*, 604 F.3d at 431-32 (Posner, J., dissenting). Judge Posner makes the comparison to a guilty conviction for a military crime, obtained in front of a military commission without the right to a jury trial, being later used to enhance a "conviction of a conventional crime" and concludes that "would stretch *Apprendi* awfully far." *Id.* at 432.

[116] *Id.* at 432.

[117] *Id. See, e.g.*, Steven A. Drizin & Greg Luloff, *Are Juvenile Courts a Breeding Ground for Wrongful Convictions?*, 34 N. KY. L. REV. 257, 260 (2007) (arguing that juveniles make "less competent trial defendants" and "also tend to be more compliant and suggestible during police interrogations, two traits which are risk factors for false confessions"); *see generally* Martin Guggenheim & Randy Hertz, *Reflections on Judges, Juries, and Justice: Ensuring the Fairness of Juvenile Delinquency Trials*, 33 WAKE FOREST L. REV. 553, 556 (1998) (arguing "juries are generally more likely than judges to be fair and just triers of fact on the issue of guilt or innocence in a criminal or delinquency case").

[118] *Welch*, 604 F.3d 408 at 432.

> decisions lack the benefits of group deliberation. It would be hasty to conclude that juvenile-court judges are more prone to convict the innocent than juries are. But if it is true that juvenile defendants fare worse before judges than they would before juries—if there is reason to think that trial by jury would alter the outcomes in a nontrivial proportion of juvenile cases—one cannot fob off the *Apprendi* argument with the observation that a jury makes no difference.[119]

In addition to a greater likelihood that judges will find the defendant delinquent, Posner argues that juvenile delinquency defendants are also less likely to appeal or seek postconviction relief.[120] Finally, Posner expresses special concern that the majority of the court may be deciding the issue based upon a "circuit scorecard, without independent consideration of the issues"[121] and finds it "telling" that the government is unable "to give a reasoned basis" for its position that a juvenile adjudication should count as a conviction.[122] He concludes with a call to the Supreme Court, as "only the [Court] can decide authoritatively what its decisions mean."[123]

C. Juveniles as a Class Distinguishable from Adults

Although *McKeiver v. Pennsylvania* stands as the last case ruling on what procedures are constitutionally required in juvenile delinquency proceedings, the Court has decided cases within the last seven years expressly concerning the treatment and punishment of juveniles under the Eighth Amendment prohibition on cruel and unusual punishment.[124] While the

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[119] *Id.* (emphasis added). While Judge Posner comments that it would be "hasty to conclude juvenile-court judges are more prone to convict the innocent than juries are," some scholarship has argued that juveniles are at special risk of being wrongfully convicted. *See* Drizin & Luloff, *supra* note 117. Drizin and Luloff argue that juveniles are at special risk for wrongful convictions primarily because they "make less competent trial defendants" and exhibit "risk factors for false confessions." *Id.* at 260. While those factors exist regardless of whether the fact finder at trial is a judge or jury, they further argue that "[t]he risk of wrongful convictions in juvenile court proceedings may also be increased by a lack of many of the due process protections afforded adult criminal defendants," as well as "the fact that few juvenile cases are appealed and even fewer post-conviction and habeas cases are filed involving juveniles." *Id.* at 260; Martin Guggenheim and Randy Hertz take an approach which strongly supports Posner's assertion and argues that while juries are not necessarily more likely to reach the "correct" outcome, they provide a higher quality of factfinding than bench trials. *See* Guggenheim & Hertz, *supra* note 117, at 553, 562-82.

[120] *Welch*, 604 F.3d 408 at 432.

[121] *Id.* at 431.

[122] *Id.* at 432.

[123] *Id.*

[124] *See generally* Miller v. Alabama, 132 S. Ct. 2455 (2012); Graham v. Florida, 130 S. Ct. 2011 (2010); Roper v. Simmons, 543 U.S. 551 (2005).

Gault line of cases determined the procedures afforded to juveniles in the juvenile court system specifically, this line of cases dealt with the treatment of juveniles in the adult criminal system as all of the defendants were prosecuted and sentenced as adults.[125]

In *Roper v. Simmons*, the Court held that the execution of juveniles who were under 18 years old at the time of their crimes constituted cruel and unusual punishment barred by the Eighth Amendment.[126] The Court focused on juveniles as a group distinguishable from adults, outlining "[t]hree general differences between juveniles under 18 and adults [which] demonstrate that juvenile offenders cannot with reliability be classified among the worst offenders."[127] The Court found that juveniles, in comparison to adults, have a lack of maturity, a vulnerability to peer pressure, and a still-evolving character.[128] The Court argued that these differences mean that juveniles' "irresponsible conduct is not as morally reprehensible as that of an adult."[129] "From a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed."[130] The Court thus concluded that, in light of such diminished capacity, the justifications of the death penalty of retribution and deterrence do not apply to juveniles with the same force as adults.[131]

Five years later, in *Graham v. Florida*, the Supreme Court addressed the imposition of life without parole on juveniles who did not commit homicide and held such punishment to be unconstitutional under the Eighth Amendment.[132] The *Graham* Court summarized *Roper* as "establish[ing] that because juveniles have lessened culpability they are less deserving of the most severe punishments."[133] In determining whether the punishment was proportional to the crime under the Eighth

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[125] *See generally Miller*, 132 S. Ct. 2445; *Graham*, 130 S. Ct. 2011; *Roper*, 543 U.S. 551.

[126] *Roper*, 543 U.S. at 568 (2005).

[127] *Id.* at 569.

[128] *Id.* at 569-70.

[129] *Id.* at 570 (internal citation omitted).

[130] *Id.*

[131] *Id.* at 571. The Court's holding is especially noteworthy given that the beginning of its opinion was devoted to outlining the callous nature of the murder committed by the seventeen-year-old defendant. *Id.* at 555-58. One of the State's aggravating factors in seeking the death penalty was that the murder "involved depravity of mind and was outrageously and wantonly vile, horrible, and inhuman." *Id.* at 557.

[132] Graham v. Florida, 130 S. Ct. 2011, 2030 (2010).

[133] *Id.* at 2026.

Amendment, the Court concluded that, "compared to an adult murderer, a juvenile offender who did not kill or intend to kill has a twice diminished moral culpability. The age of the offender and the nature of the crime each bear on the analysis."[134] As in its *Roper* analysis, the Court addressed the State's justifications of retribution and deterrence and concluded them to be insufficient.[135] The Court's conclusion that retribution was an inadequate justification was directly related to its assessment of the relative culpability of juveniles, stating,

> Retribution is a legitimate reason to punish, but it cannot support the sentence at issue here. Society is entitled to impose severe sanctions on a juvenile nonhomicide offender to express its condemnation of the crime and to seek restoration of the moral imbalance caused by the offense. But [t]he heart of the retribution rationale is that a criminal sentence must be directly related to the personal culpability of the criminal offender. And as *Roper* observed, "[w]hether viewed as an attempt to express the community's moral outrage or as an attempt to right the balance for the wrong to the victim, the case for retribution is not as strong with a minor as with an adult."[136]

The analysis of the diminished culpability of juveniles is central to the *Graham* opinion as the Court does not hold life without parole for non-homicide adult offenders to be unconstitutional.

The most recent Supreme Court case on juvenile offenders as a group distinct from adults is *Miller v. Alabama*, decided in 2012. In *Miller,* the Court held that, even in the case of homicide offenses, "*mandatory* life without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment's prohibition on 'cruel and unusual punishments.'"[137] Unlike *Roper* and *Graham*, *Miller* did not hold that a type of punishment was unlawful based on the category of the offender; instead, the Court held that a type of punishment, while lawful, was unconstitutional if mandatorily applied to juveniles.[138] Only the procedure was at issue. The reasoning for the constitutional violation is that the state's mandatory sentencing "scheme prevents those meting out punishment from considering a 'juvenile's lessened culpability' and greater 'capacity for change.'"[139] Such a scheme essentially ignores the precepts of

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[134] *Id.* at 2027 (emphasis added).
[135] *Id.* at 2028.
[136] *Id.* (citations omitted) (quoting Roper v. Simmons, 543 U.S. 551, 571 (2005)).
[137] Miller v. Alabama, 132 S. Ct. 2455, 2460 (2012) (emphasis added).
[138] *Id.*
[139] *Id.* (citations omitted).

Roper and *Graham* "that children are constitutionally different from adults for purposes of sentencing."[140] The Court reiterated that the recognition of juveniles as having diminished culpability compared to adults rests on common sense as well as the support of biology and social science.[141]

While the defendants in *Miller* faced prosecution and sentencing in the adult criminal system, the Court's reasoning echoes the original justification for the juvenile court system, stating that "[l]ife without parole forswears altogether the rehabilitative ideal. It reflects an irrevocable judgment about [an offender's] value and place in society, at odds with a child's capacity for change."[142] In addition to reiterating the recognition from *Roper* and *Graham* that juveniles are less culpable than adults who have committed the same crime, *Miller* adds a decidedly different analysis. *Miller* ruled the procedure of mandatorily imposing the punishment, as opposed to the punishment itself, constitutionally impermissible.[143] Such procedure ran afoul of the Eighth Amendment because it did not take into account the lessened culpability of juveniles and instead completely equated juveniles with adults.

D. Apprendi *after* Miller *and* Graham

Since deciding *Apprendi* in 2000, the Supreme Court has not ruled on whether juvenile delinquency adjudications count as convictions and therefore need not be submitted to a jury during sentencing.[144] As the federal courts of appeals have struggled with that question, the Supreme Court's understanding and conception of juveniles has evolved as evidenced by its decisions in *Roper*, *Graham*, and *Miller*. The language of these cases all stress the lessened culpability of juveniles and the "rehabilitative ideal,"[145] justifications upon which the juvenile

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[140] *Id.* at 2464.

[141] *Id.* at 2464-65.

[142] *Id.* (alteration in original) (citations omitted).

[143] *Id.* at 2466.

[144] But see *infra* notes 151-58 for a discussion on recent petitions for certiorari and recent indications which could suggest the Court may be amenable to addressing the issue soon.

[145] *See Roper*, 543 U.S. at 571 ("Once the diminished culpability of juveniles is recognized, it is evident that the penological justifications for the death penalty apply to them with lesser force than to adults."); *Graham*, 130 S. Ct. at 2030 ("[The State's] judgment is not appropriate in light of a juvenile nonhomicide offender's capacity for change and limited moral culpability."); *Miller*, 132 S. Ct. 2455, 2468 ("So *Graham* and *Roper* and our individualized sentencing cases alike teach that in imposing a State's harshest penalties, a sentencer misses too much if he treats every child as an adult.").

court system was originally founded.[146] These cases have made it vitally important for the Supreme Court to take up the issue and explicitly rule on whether juvenile delinquency adjudications are convictions under the language of *Apprendi*.

As previously discussed, the language of *Apprendi* itself demonstrated the Court's already apparent uneasiness with its holding in *Almendarez-Torres*, allowing a "conviction exception."[147] In 2011, the Court considered granting certiorari petitions in cases that challenged the *Almendarez-Torres* decision altogether—choosing to relist the cases and call for briefs.[148] This is an even broader issue given that if the Court were to overrule *Almendarez-Torres*, it would get rid of the problem with the use of juvenile delinquencies altogether as there would no longer be a "conviction exception." The Court ultimately denied certiorari in those petitions.[149]

In May 2012, before the Court decided *Miller*, it considered granting certiorari in *Staunton v. California*,[150] a case in which the court used a juvenile delinquency adjudication under *Apprendi* to increase the defendant's sentence.[151] The Court did not immediately deny certiorari, but instead relisted the case for another conference to consider the petition.[152] In fact, the Court actually requested the record in the *Staunton* case.[153] Despite eventually denying certiorari,[154] the Court's actions suggest a willingness to eventually take up the issue if presented with amenable facts.[155] Granting certiorari in a case

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[146] *See* FELD, *supra* note 14, at 60.

[147] Apprendi v. New Jersey, 530 U.S. 466, 489-90 (2000).

[148] John Elwood, *Re-list Watch: Will the Court Reconsider Almendarez-Torres?*, SCOTUSBLOG (Jan. 27, 2011, 3:37 PM), http://www.scotusblog.com/2011/01/re-list-watch-will-the-court-reconsider-almendarez-torres/.

[149] Vazquez v. United States, 130 S. Ct. 1135 (2011); Ayala-Segoviano v. United States, 131 S. Ct. 1465 (2011).

[150] See Staunton v. California, 132 S. Ct. 2431 (2012) for denial of certiorari. For the case below, see People v. Huggins, No. H036254, 2011 WL 4852287 (Cal. Dist. Ct. App. Oct. 13, 2011) (Mr. Staunton was a co-defendant in People v. Huggins.)

[151] John Elwood, *Relist (and Hold) Watch*, SCOTUSBLOG (May. 17, 2012, 10:55 AM) http://www.scotusblog.com/2012/05/relist-and-hold-watch-19/.

[152] *Id.*

[153] *Id.*

[154] Staunton v. California, 132 S. Ct. 2431 (2012).

[155] Though the Court eventually denied the petition for certiorari, Staunton's case and the trial court's decision offered a less than perfect set of facts. *Id.* Staunton's prior juvenile adjudication that counted as a "strike" under California state law was a juvenile offense for robbery committed fourteen years prior to the offense in question. *See* People v. Huggins, No. H036254, 2011 WL 4852287 at *3 (Cal. Dist. Ct. App. Oct. 13, 2011) (Mr. Staunton was a co-defendant in People v. Huggins.) In addition to the juvenile offense, however, Staunton had eight prior felony convictions, several prior misdemeanor convictions, was on parole when he was convicted of the offense in question, and had violated parole at least once before. *Id.* at *2. The trial court denied

involving the use of a juvenile delinquency adjudication under *Apprendi* would allow the Court to revisit the original justification of the *Almendarez-Torres* "conviction exception" without forcing its hand on whether or not that decision should be entirely overruled.

If the Supreme Court does not choose to directly address the use of juvenile adjudications within the "conviction exception" in light of its decisions in *Graham* and *Miller*, it seems unlikely the lower courts will do so. While some circuit courts have ruled on the use of juvenile delinquency adjudications since *Roper* was decided in 2005, none have explicitly considered any of the language or reasoning in the *Roper* line of cases.[156] That is likely because: (1) the *Roper* cases were all decided based on the Eighth Amendment prohibition on cruel and unusual punishment rather than on due process grounds,[157] and (2) all of the *Roper* cases involved juveniles tried as adults in the adult criminal system, and thus did not implicate juvenile adjudications. No federal court of appeals has ruled on the use of juvenile delinquency adjudications under *Apprendi* since *Miller* was decided in 2012.[158] This is noteworthy because *Miller* deemed a process that equated juveniles and adults in terms of sentencing constitutionally offensive.[159] What does this mean then for

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Staunton's request to exclude the use of the juvenile adjudication as a prior strike based on "the facts and circumstances of not only this [juvenile] offense but Mr. Staunton's background." *Id.* at *3. The trial court also considered that Staunton had been convicted of two felony offenses in the time since the juvenile offense. *Id.* On appeal, the Sixth District declined to address the issue any further. *Id.* at *4.

156 *See, e.g.*, Welch v. United States, 604 F.3d 408 (7th Cir. 2010), *cert. denied*, 131 S. Ct. 3019 (2011); United States v. Wright, 594 F.3d 259 (4th Cir. 2010), *cert denied*, 131 S. Ct. 507 (2010); United States v. Matthews, 498 F.3d 25 (1st Cir. 2007), *cert. denied*, 552 U.S. 1238 (2008); United States v. Crowell, 493 F.3d 744 (6th Cir. 2007), *cert. denied*, 552 U.S. 1105 (2008); Boyd v. Newland, 437 F.3d 1139 (9th Cir. 2006), *cert. denied*, 550 U.S. 933 (2007); United States v. Burge 407 F.3d 1183 (11th Cir. 2005), *cert. denied*, 546 U.S. 981 (2005).

157 *See* Beth Caldwell, *Twenty-Five to Life for Adolescent Mistakes: Juvenile Strikes as Cruel and Unusual Punishment*, 46 U.S.F. L. REV. 581, 581-86 (2012) (arguing that, based on the reasoning of *Graham v. Florida*, the use of prior juvenile adjudications constitutes a violation of the Eighth Amendment).

158 While the *Washington* case discussed *supra* notes 1-2 & 4-7 was decided at the end of 2012 and thus was after *Miller*, the court decision makes no mention of *Apprendi* and it is not argued in the defendant-appellant's brief. *See* United States v. Washington, 706 F.3d 1215 (10th Cir. 2012); Brief of Defendant/Appellant at 5, United States v. Washington, 706 F.3d 1215 (10th Cir. 2012) (No. 11-6339), 2012 WL 1074455 at *11. The Tenth Circuit Court of Appeals has not yet decided on whether the use of juvenile adjudications is a violation of *Apprendi*. In dealing with state cases on habeas corpus claims, the Tenth Circuit has held a state court's determination that such use is not a violation of *Apprendi* is "neither contrary to, nor an unreasonable application of, clearly established Supreme Court precedent." *See* Harris v. Roberts, No. 12-3045, 2012 WL2354433 at *2 (10th Cir. 2012).

159 Miller v. Alabama, 132 S. Ct. 2455, 2466 (2012).

treating juvenile delinquency adjudications to be equivalent to adult criminal convictions for the purposes of sentencing?

E. Juvenile Adjudications Should Not Count Under the Apprendi *"Conviction Exception"*

There are two separate bases on which the use of juvenile delinquency adjudications should not be counted as equivalent to prior convictions under *Apprendi*: (1) the fact that juvenile delinquency adjudications are not supported by a jury trial guarantee, which is assumed as a prerequisite under the language of *Apprendi*,[160] and (2) recent Supreme Court jurisprudence recognizing and reiterating that juveniles are less culpable than adults and more capable of rehabilitation. The second basis, in particular, would mark a return to the conception upon which the juvenile court was founded and the paramount justification for a separate court system for juveniles.

1. The Use of Juvenile Adjudications as "Prior Convictions" Is a Violation of Due Process Because They Are Not Supported by a Jury Trial Guarantee

Because *McKeiver* has never been overturned, there is no constitutional right to a jury trial in a juvenile delinquency proceeding.[161] While a juvenile adjudication obtained without a jury trial is therefore constitutionally valid, many scholars argue that the language and reasoning of the *Apprendi* opinion require that the defendant had a right to a jury trial even though the Court did not explicitly define a "conviction."[162] The question then becomes—why does the language of *Apprendi* suggest that a "conviction" must have been obtained with a right to a jury trial? What procedural safeguards underlie a right to a jury that would require it?

Some authors have argued that the jury plays an important role in protecting against governmental oppression.[163] But the decision in *McKeiver* not to extend the right to a jury trial to juvenile court proceedings demonstrated that the Court

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[160] *See infra* note 165.

[161] *See* McKeiver v. Pennsylvania, 403 U.S. 528, 528 (1971).

[162] *See e.g.*, Feld, *supra* note 13; Abbott, *supra* note 13; Schneider *supra* note 13; Thill, *supra* note 13.

[163] *See, e.g.*, Andrew Sokol, Comment, *Juvenile Adjudications as Elevating Factors in Subsequent Adult Sentencing and the Structural Role of the Jury*, 13 U. PA. J. CONST. L. 791, 804-09 (2011) (focusing on the institutional role of the jury as protection from tyranny by the government).

was only concerned with accurate fact-finding in order for the adjudication to be constitutionally sound.[164] Many of the circuit courts arrived at their decisions regarding the use of juvenile adjudications by interpreting the holding of *Apprendi* to focus on the reliability of the previous proceeding.[165] Therefore, the courts reason, if *McKeiver* holds that a right to a jury trial is not required for juveniles because judges are just as reliable, and *Apprendi* holds that convictions are exempted from going in front of a jury because convictions are reliable, then juvenile adjudications may be equated with convictions for the purpose of sentencing without violating the defendant's right to due process.[166]

But many critics, including Judge Posner,[167] have challenged the factual basis of the *McKeiver* court's assumption that judges are just as reliable as juries,[168] leading others to argue that the unreliability of juvenile adjudications prohibit equating them with adult convictions.[169] Others go as far as to argue that *McKeiver* should be overruled, which would result in a constitutional right to a jury trial during the juvenile delinquency proceeding.[170]

Further, even if *McKeiver* were overruled and juveniles were granted the right to jury trials, there are still significant concerns that juvenile adjudications are less reliable than adult convictions based on the nature of juveniles themselves. Professor Steven Drizin and Greg Luloff suggest that a

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[164] FELD, *supra* note 14, at 104.

[165] *See, e.g.*, United States v. Smalley, 294 F.3d 1030, 1033 (8th Cir. 2002) (juvenile adjudications are "so reliable that due process of law is not offended by such an exemption"); *see also* Welch v. United States, 604 F.3d 408 (7th Cir. 2010).

[166] *See, e.g.*, *Smalley*, 294 F.3d at 1033; *see also* Welch v. United States, 604 F.3d 408 (7th Cir. 2010).

[167] *Welch*, 604 F.3d at 432-34.

[168] *See* Guggenheim & Hertz, *supra* note 117.

[169] *See, e.g.*, Feld, *supra* note 13, at 1120 (arguing that until *McKeiver* is overruled it is "unfair[ ] [to use] procedurally deficient, factually unreliable convictions to enhance subsequent sentences. States which deny delinquents jury trials in the contemporary punitive juvenile justice system compound that inequity when they use those nominally rehabilitative sentences to extend terms of adult imprisonment."); Abbott, *supra* note 13, at 91-92; Schneider, *supra* note 13, at 863 (arguing that juvenile adjudications without jury trials constitute "a deal between the state and the juvenile. . . . [where] the juvenile ideally receives treatment and in return surrenders certain procedural protections . . . . The state fails to hold up its end of the deal when it treats the juvenile adjudication as an adult conviction."); Thill, *supra* note 13, at 90-98 (arguing that the exception only applies narrowly to convictions obtained with a right to jury trial guarantee). *But see* Kennedy, *supra* note 13 (arguing that juvenile adjudications should fall under the conviction exception as they are reliable).

[170] *See, e.g.*, Feld, *supra* note 13, at 1124; Barry C. Feld, *Abolish the Juvenile Court: Youthfulness, Criminal Responsibility, and Sentencing Policy*, 88 J. CRIM. L. & CRIMINOLOGY 68 (1997) (arguing that the juvenile court should be abolished and youthfulness should be recognized as a mitigating factor in criminal proceedings).

multitude of factors may contribute to decreased reliability with juvenile adjudications as studies suggest juveniles are "at special risk of being wrongfully convicted . . . especially when it comes to false confessions" and developmental differences "make juveniles less competent trial defendants . . . [and] more compliant and suggestible during police interrogations."[171] The Supreme Court recognized in *Graham v. Florida* that some of "the features that distinguish juveniles from adults also put them at a significant disadvantage in criminal proceedings. . . . They are less likely than adults to work effectively with their lawyers to aid in their defense."[172] Other scholars have been disturbed by the high incidence of waiver of counsel in the juvenile courts[173] and even if the child is represented, some authors have argued that there is a strong concern for ineffective assistance of counsel in juvenile cases.[174] Notably, a claim of ineffective assistance of counsel would be brought on appeal and, as Judge Posner pointed out in his dissent in *Welch*, there is a much lower rate of appeal in juvenile court cases.[175] Recently, Megan Annitto, Director of the Center for Law and Public Service at West Virginia University College of Law, examined data measuring the rates of juvenile appeals in 15 states and appellate decisions over a period of 10 years.[176] She described juvenile courts as "an area of the law where the appellate role and transparency to the public is overwhelmingly absent."[177] These findings and studies on reliability in the juvenile court system suggest that, even if *Apprendi* is read to only require a reliable previous adjudication, simply requiring jury trials will not necessarily make juvenile adjudications as reliable as adult convictions.[178]

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[171] Drizin & Luloff, *supra* note 117, at 257-60 (2007).

[172] Graham v. Florida, 130 S. Ct. 2011, 2032 (2010).

[173] *See, e.g.*, Mary Berkheiser, *The Fiction of Juvenile Right to Counsel: Waiver in the Juvenile Courts*, 54 FLA. L. REV. 577 (2002) (arguing that permitting juveniles to waive counsel constitutes a denial of the right to counsel and that due process requires that juvenile courts should not accept waiver of counsel by juveniles).

[174] *See, e.g.*, Barbara Fedders, *Losing Hold of the Guiding Hand: Ineffective Assistance of Counsel in Juvenile Delinquency Representation*, 14 LEWIS & CLARK L. REV. 771, 774 (2010).

[175] *See* Welch v. United States, 604 F.3d 408, 432 (7th Cir. 2010) (Posner, J., dissenting).

[176] Megan Annitto, *Juvenile Justice on Appeal*, 66 U. MIAMI L. REV. 671, 672 (2012).

[177] *Id.*

[178] While the aforementioned findings on reliability rely heavily on social science and research as opposed to court opinions, the Supreme Court's decisions in *Roper, Graham,* and *Miller* all evinced a willingness to look to such research and findings when considering the relative culpability and rehabilitative capacity of juveniles. *See* Miller v. Alabama, 132 S. Ct. 2455, 2464-68 (2012); Graham v. Florida, 130 S. Ct. 2011, 2026-30 (2010); Roper v. Simmons, 543 U.S. 551, 568-73 (2005). Therefore, if the Court decided primarily to focus on the reliability of juvenile

2. Equating Prior Juvenile Adjudications with Convictions is a Violation of Due Process Because the Supreme Court Characterizes Juveniles as a Class Categorically Less Culpable than Adults

Many scholars and authors have argued against juvenile adjudications falling under the "conviction exception" on the basis that such adjudications have not been subjected to a jury trial guarantee and, subsequently, are either not as reliable as convictions obtained by juries or do not provide adequate protection from governmental oppression.[179] This note advances a second argument: based on the Supreme Court's recognition of juveniles in *Roper, Graham,* and *Miller* as a class categorically less culpable than adults, juvenile adjudications are fundamentally different than adult convictions and therefore their use as mandatory sentence enhancements constitutes a violation of due process.[180]

Over time, both the courts and the academic community have voiced doubts over whether the juvenile court system truly embraces the "rehabilitative ideal" upon which it was founded.[181] Even in *McKeiver*, despite holding that a right to a jury was not constitutionally required, the Court was still concerned with the failures of the juvenile court to live up to its intended purpose.[182] The Supreme Court's most recent cases on juveniles, however, decided in the context of the Eighth Amendment, seem to signal a return to focus on lessened culpability and capacity for rehabilitation when determining appropriate punishment.[183] As Professor Kristin Henning has written,

> The Supreme Court's recent review of adolescent development research in *Graham v. Florida* and *Roper v. Simmons* suggests that

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adjudications in making a future ruling, it is likely social science findings and data could again come into play.

[179] *See supra* notes 170-81.

[180] While this argument is based on the reasoning of *Roper, Graham,* and *Miller*, I am not arguing that the use of juvenile adjudications to increase mandatory sentences constitutes an Eighth Amendment violation. (For such an argument, see Beth Caldwell, *supra* note 157). Rather, the Court's conception and understanding of juveniles, as developed in its Eighth Amendment jurisprudence, sheds light on how the Court may view adjudications resulting from a system specifically created to accommodate juveniles as distinct from adults in the area of due process. For a detailed discussion of such "constitutional borrowing," see Nelson Tebbe & Robert L. Tsai, *Constitutional Borrowing*, 108 MICH. L. REV. 459 (2010).

[181] *See, e.g.*, Welch v. United States, 604 F.3d 408, 430 (7th Cir. 2010) (Posner, J., dissenting); Barry C. Feld, *supra* note 173.

[182] McKeiver v. Pennsylvania, 403 U.S. 528, 543-45 (1971).

[183] *See generally* Roper v. Simmons, 543 U.S. 551 (2005); Graham v. Florida, 130 S. Ct. 2011 (2010); Miller v. Alabama, 132 S. Ct. 2455 (2012).

> policymakers may be heading in the wrong direction with juvenile court policy . . . . [T]he Supreme Court has been seemingly less reactionary and more attentive to science in its analysis of criminal justice issues involving children.[184]

Additionally, the research upon which the Court has based such decisions "re-affirms the beliefs of the founders of the juvenile court."[185]

Juvenile adjudications are obtained in a system that is grounded in the purpose and design of accommodating juveniles as a class distinct from adults.[186] This is different from the purpose of the adult criminal system. *Roper, Graham,* and *Miller* all demonstrate the Supreme Court's decision that juveniles are categorically less culpable than adults.[187] Essentially, the purpose of the juvenile system is to account for the differences described in the *Roper* line of cases—less culpability, less stigmatization, and greater opportunity for rehabilitation.[188] Therefore, the use of juvenile adjudications under the *Apprendi* exception constitutes a due process violation by equating a juvenile adjudication with an adult conviction without any consideration of the relative culpability between the two.[189] Under the view currently adopted by a majority of the courts, a defendant with three prior juvenile adjudications is automatically considered to be as deserving of punishment as a defendant with three prior adult convictions. This result runs afoul of the *Roper* line of cases. At the time when the offense was committed, the juvenile defendant was less culpable than an adult. The passage of time does not now make him equally culpable.

The Court's focus on the inappropriateness of equating the misconduct of juveniles with that of adults tracks from

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[184] Kristin Henning, *Juvenile Justice After* Graham v. Florida*: Keeping Due Process, Autonomy, and Paternalism in Balance,* 38 WASH. U. J. L. & POL'Y 17, 23 (2012).

[185] *Id.*

[186] FELD, *supra* note 14 at 60.

[187] *See generally Miller*, 132 S. Ct. 2455; *Graham*, 130 S. Ct. 2011; *Roper*, 543 U.S. 551; *Graham*, 130 S. Ct. 2011.

[188] FELD, *supra* note 14 at 60.

[189] Although Judge Posner does not focus on relative culpability, he briefly touches upon a similar argument in his dissenting opinion in *Welch,* arguing that just because the juvenile adjudication is constitutionally sound for the purpose of the juvenile court system does not render it constitutionally sound for all purposes:

> The constitutional protections to which juveniles have been held to be entitled have been designed with a different set of objectives in mind than just recidivist enhancement. So the mere fact that a juvenile had all the process he was entitled to doesn't make his juvenile conviction equivalent, for the purposes of recidivist enhancements, to adult convictions.

Welch v. United States, 604 F.3d 408, 431-32 (7th Cir. 2010) (Posner, J., dissenting).

Roper and is developed through *Graham* and *Miller*. *Roper* focused on the fact that "[f]rom a moral standpoint it would be misguided to equate the failings of a minor child with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed."[190] While the *Roper* Court discussed the possibility of reform, a possibility that arguably applies with less persuasion in the case of an adult defendant with multiple offenses, the Court pointed out that the two social purposes served by the death penalty in that case were deterrence and *retributio*n.[191] The Court went on to state that "the case for retribution is not as strong with a minor as with an adult. Retribution is not proportional if the law's most severe penalty is imposed on one whose culpability or blameworthiness is diminished, to a substantial degree, by reason of youth and immaturity."[192]

Following *Roper*, *Graham* also focused on the diminished culpability of juveniles.[193] The Court directly discussed retribution as a possible justification for the imposition of a sentence of life without parole on a non-homicide juvenile offender.[194] The Court stated that while "[r]etribution is a legitimate reason to punish, . . . '[t]he heart of the retribution rationale is that a criminal sentence must be directly related to the personal culpability of the criminal offender.'"[195] Notably, the Court wrote:

> A sentence of life imprisonment without parole . . . cannot be justified by the goal of rehabilitation. The penalty forswears altogether the rehabilitative idea. By denying the defendant the right to reenter the community, the State makes an irrevocable judgment about that person's value and place in society. This judgment is not appropriate in light of a juvenile nonhomicide offender's capacity for change and limited moral culpability.[196]

The *Graham* Court's discussion of the "rehabilitative ideal" is noteworthy because the *Roper* line of cases, including *Graham* itself, deals with juvenile offenders in the adult system. By discussing the importance of the rehabilitative ideal in this context, the Court attaches the rehabilitative ideal not to the system in which the sentence is imposed, but rather to the age of the person at the time the offense is committed.

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190 Roper v. Simmons, 543 U.S. 551, 570 (2005).
191 *Id.* at 571.
192 *Id.* at 570.
193 Graham v. Florida, 130 S. Ct. 2011, 2026-27 (2010).
194 *Id.* at 2028.
195 *Id.* (citation omitted).
196 *Id.* at 2029-30.

Roper and *Graham* both focused on a type of sentence being unconstitutional when applied to juveniles. *Roper* prohibited the death penalty for all juveniles,[197] while *Graham* prohibited life without parole for juveniles who did not commit a homicide offense.[198] *Miller* focused on a type of sentence being unconstitutional when it was mandatorily applied.[199] Even though the constitutional provision in question in *Miller* is still the Eighth Amendment, the constitutional deficiency arises out of the lack of process afforded the juvenile when life without parole is mandatorily applied.[200] In rendering its decision, the *Miller* Court began with the premise that "*Roper* and *Graham* establish that children are constitutionally different from adults for purposes of sentencing."[201] The *Miller* Court focused on the fact that the mandatory process

> removv[es] youth from the balance—by subjecting a juvenile to the same life-without-parole sentence applicable to an adult—[which] prohibit[s] a sentencing authority from assessing whether the law's harshest term of imprisonment proportionately punishes a juvenile offender. That contravenes *Graham's* (and also *Roper's*) foundational principle: that imposition of a State's most severe penalties on juvenile offenders cannot proceed as though they were not children.[202]

In holding that a mandatory sentence was unconstitutional when applied to juveniles, the Court recognized that previous cases held that "a sentence which is not otherwise cruel and unusual does not becom[e] so simply because it is mandatory."[203] However, "a sentencing rule permissible for adults may not be so for children."[204]

Likewise, the *Apprendi* "conviction exception," as it currently stands, may be viewed as a sentencing rule that is permissible for adults with prior adult convictions. It does not necessarily follow that the same sentencing rule must be constitutionally sound for adults with prior juvenile adjudications. The *Roper* line of cases stressed the lessened culpability of juveniles while *Graham* held that the sentencing process itself must take into account the lessened culpability of youth when such a severe sentence was imposed.[205] These cases recognize

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197 *Roper*, 543 U.S. at 568 (2005).
198 *Graham*,130 S. Ct. 2011, 2034 (2010).
199 Miller v. Alabama, 132 S. Ct. 2455, 2460 (2012).
200 *Id.*
201 *Id.* at 2464.
202 *Id.* at 2466.
203 *Id.* at 2470 (alteration in original) (internal quotation marks omitted).
204 *Id.*
205 *See supra* notes 191-200.

that the conviction of a juvenile, even within the adult system, is constitutionally different than the conviction of an adult for the same offense. *Graham* specifically held that even though a punishment may be constitutionally permissible, a sentencing process that does not take into account the lessened culpability of the juvenile can create a constitutional violation.[206] Such reasoning implicates the use of juvenile adjudications for sentencing enhancements. While the sentence itself may be constitutionally permissible, a process that does not take into account the lessened culpability of a juvenile is constitutionally deficient.

CONCLUSION

There has long been an argument against using juvenile adjudications as sentencing enhancements because they were obtained without a right to a jury trial guarantee.[207] Scholars argue that the language of *Apprendi* presupposes a jury trial guarantee in the prior proceeding and, additionally, juvenile adjudications may not be as reliable as previously assumed.

But there is a second basis on which juvenile adjudications should not count as convictions for the purpose of sentencing enhancement—one that stands regardless of whether *McKeiver* is overturned. Recent Supreme Court jurisprudence in *Miller* and *Graham* focuses on the nature of juveniles as fundamentally distinct from adults. A juvenile adjudication cannot simply be equated with an adult criminal conviction. A juvenile adjudication is obtained within a system that exists precisely to recognize a categorical distinction between children and adults. Even if such a system were supported by a jury trial guarantee, counting juvenile adjudications as convictions falling within the "conviction exception" of *Apprendi* violates the constitutionally guaranteed due process rights of the defendants. The Supreme Court has already provided the framework for this decision. All that remains now is for the Court to be presented with the correct set of facts.

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[206] *Graham*,130 S. Ct. 2011, 2034 (2010).

[207] *See supra* notes 161-78.

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