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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. Under ordinary circumstances, Washington would have faced a maximum of 10 years incarceration for such offenses. 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.” 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. Not only had the juvenile offense been dismissed, it had occurred when Washington was 16 years old, nearly 20 years prior. 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.
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. Under the mandatory requirements of the ACCA, the court sentenced Washington to a minimum term of imprisonment of 15 years.

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. 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.” Failure to submit and prove such facts to a jury constitutes a violation of the defendant’s right to due process. The exclusion of convictions from this requirement has been commonly referred to as a “conviction exception” or the “Apprendi exception.” 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.

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.
10 Id.
A significant number of circuit courts have held that a juvenile adjudication counts as a conviction. 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. 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

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.

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


\(^{15}\) 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.\textsuperscript{19} The facts of \textit{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.\textsuperscript{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.”\textsuperscript{21} The facts of \textit{Gault} exhibited such a glaring departure from the benevolent and rehabilitative ideal of the juvenile court that it spurred major constitutional change.\textsuperscript{22} Three years later, the Court held, in \textit{In re Winship}, that juveniles are constitutionally entitled to the same criminal trial standard of “proof beyond a reasonable doubt.”\textsuperscript{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.\textsuperscript{24} Thus, in both \textit{Gault} and \textit{Winship}, the Court “emphasized the dual functions of constitutional criminal procedures to ensure accurate fact-finding and to protect against governmental oppression.”\textsuperscript{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.\textsuperscript{26}

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

\textsuperscript{19} \textit{In re Gault}, 387 U.S. 1, 4-58 (1967).
\textsuperscript{20} \textit{Id.} at 29.
\textsuperscript{21} \textit{Id.} at 30 (quoting STANTON WHEELER & LEONARD S. COTTRELL, JUVENILE DELINQUENCY: ITS PREVENTION AND CONTROL 35 (1996)).
\textsuperscript{22} \textit{Feld, supra} note 14, at 99-100.
\textsuperscript{23} \textit{In re Winship}, 397 U.S. 358, 367-68 (1970). Several years before \textit{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.” \textit{Feld, supra} note 14, at 99 (1999).
\textsuperscript{24} \textit{Feld, supra} note 14, at 101.
\textsuperscript{25} \textit{Id.} at 104.
\textsuperscript{26} \textit{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. 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. 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.

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.

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

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. The Court’s avoidance of an explicit Sixth Amendment analysis suggests it was uncomfortable with classifying juvenile

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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

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) (“Under 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.\textsuperscript{41} The Court in\textit{Apprendi} made a point of stressing that in\textit{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.”\textsuperscript{42}

The \textit{Apprendi} Court’s discussion of a “sentencing factor” was necessary for it to clarify how its decision fit in with \textit{Almendarez-Torres v. United States}, decided two years before\textit{Apprendi}.\textsuperscript{43} In \textit{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.\textsuperscript{44} Therefore, it did not violate due process or other constitutional provisions.\textsuperscript{45} The \textit{Almendarez-Torres} holding applied only to criminal indictments and was not concerned with sentencing procedures. At issue in \textit{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.\textsuperscript{46}

The \textit{Apprendi} Court explained that,

[b]ecause Almendarez-Torres had \textit{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.\textsuperscript{47}

The \textit{Almendarez-Torres} decision focused on the general characterization of recidivism as a “sentencing factor” that did not need to be charged in the indictment.\textsuperscript{48} As Almendarez-Torres admitted to prior convictions for aggravated felonies, the Court never reached the question of what constituted a

\begin{itemize}
  \item \textsuperscript{41} \textit{Apprendi}, 530 U.S. 466 at 485-86. See \textit{McMillan v. Pennsylvania}, 477 U.S. 79 (1986).
  \item \textsuperscript{42} \textit{Apprendi} v. New Jersey, 530 U.S. 466, 486 (2000) (citations omitted).
  \item \textsuperscript{43} \textit{Almendarez-Torres} v. United States, 523 U.S. 224, 226 (1998).
  \item \textsuperscript{44} \textit{Id.} at 226-27.
  \item \textsuperscript{45} \textit{Id.} at 226.
  \item \textsuperscript{46} \textit{Id.} at 224. See 8 U.S.C. § 1326(a) & (b)(2) (2012).
  \item \textsuperscript{47} \textit{Apprendi}, 530 U.S. 466 at 488.
  \item \textsuperscript{48} \textit{See Almendarez-Torres}, 523 U.S. 224, 230 (1998).
\end{itemize}
“conviction” under the statute in issue. 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. 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.

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. Therefore, “any fact that increases the mandatory minimum is an ‘element’ that must be submitted to the jury.” 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.”

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. 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.

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. The act defines “conviction” as “includ[ing] a finding that a person has committed an act of juvenile delinquency involving a violent felony.” 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. The courts have also been faced with the same constitutional question in light of similar state laws.

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).
57 Id. § 924(e)(2)(B) (2012).
58 Id.
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


\[^{62}\] *See*, e.g., Smalley, 294 F.3d at 1051-33; 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.


\[^{65}\] *Id.*

\[^{66}\] *See* Tighe, 266 F.3d 1187 at 1194-95.
violent felony. 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.” 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.”

The Ninth Circuit looked carefully at United States v. Jones, a Supreme Court case decided just before Apprendi and upon which the Apprendi court relied. 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.” 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.

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. The Tighe court then

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).
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. 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.”

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. In Smalley, the defendant had multiple prior juvenile adjudications which the trial court counted as “convictions” to increase his sentence. 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.” The court then went on to describe the holding of Tighe, noting it was the only federal court case on point.

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.

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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

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.”
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.


90 Id.


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*. In *Boyd*, the state court considered the defendant’s prior nonjury juvenile adjudication in deciding to increase his sentence. 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.

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. The court also acknowledged that subsequent federal appellate court decisions in other circuits disagreed with their interpretation. 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.

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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. 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.

In terms of different procedures, Judge Posner begins by recognizing that a juvenile adjudication “is best described as ‘quasi-criminal.’” 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, but 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.

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

[otherwise[,] 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.[103]


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

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).
112 Id. at 488.
distinct from the procedures of the juvenile system. 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. 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.

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. Posner points to subsequent research suggesting that this is not the case. 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.” 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 suggestive 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.  

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. 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” 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. He concludes with a call to the Supreme Court, as “only the [Court] can decide authoritatively what its decisions mean.”

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. 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.

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.\textsuperscript{125}

In \textit{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.\textsuperscript{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.”\textsuperscript{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.\textsuperscript{128} The Court argued that these differences mean that juveniles’ “irresponsible conduct is not as morally reprehensible as that of an adult.”\textsuperscript{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.”\textsuperscript{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.\textsuperscript{131}

Five years later, in \textit{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.\textsuperscript{132} The \textit{Graham} Court summarized \textit{Roper} as “establish[ing] that because juveniles have lessened culpability they are less deserving of the most severe punishments.”\textsuperscript{133} In determining whether the punishment was proportional to the crime under the Eighth

\textsuperscript{125} See generally Miller, 132 S. Ct. 2445; Graham, 130 S. Ct. 2011; Roper, 543 U.S. 551.
\textsuperscript{126} \textit{Roper}, 543 U.S. at 568 (2005).
\textsuperscript{127} \textit{Id.} at 569.
\textsuperscript{128} \textit{Id.} at 569-70.
\textsuperscript{129} \textit{Id.} at 570 (internal citation omitted).
\textsuperscript{130} \textit{Id.}
\textsuperscript{131} \textit{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. \textit{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.” \textit{Id.} at 557.
\textsuperscript{133} \textit{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

134 Id. at 2027 (emphasis added).
135 Id. at 2028.
136 Id. (citations omitted) (quoting Roper v. Simmons, 543 U.S. 551, 571 (2005)).
138 Id.
139 Id. (citations omitted).
Roper and Graham “that children are constitutionally different from adults for purposes of sentencing.”\textsuperscript{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.\textsuperscript{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.”\textsuperscript{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.\textsuperscript{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.\textsuperscript{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,”\textsuperscript{145} justifications upon which the juvenile

\textsuperscript{140} Id. at 2464.

\textsuperscript{141} Id. at 2464-65.

\textsuperscript{142} Id. (alteration in original) (citations omitted).

\textsuperscript{143} Id. at 2466.

\textsuperscript{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.

\textsuperscript{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.”).
The court system was originally founded. 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." 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. 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.

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

See Feld, supra note 14, at 60.


Id.


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. 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, 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. This is noteworthy because *Miller* deemed a process that equated juveniles and adults in terms of sentencing constitutionally offensive. What does this mean then for 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.

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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).

treated 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

160 See infra note 165.
162 See e.g., Feld, supra note 13; Abbott, supra note 13; Schneider supra note 13; Thill, supra note 13.
was only concerned with accurate fact-finding in order for the adjudication to be constitutionally sound. 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. 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.

But many critics, including Judge Posner, have challenged the factual basis of the McKeiver court’s assumption that judges are just as reliable as juries, leading others to argue that the unreliability of juvenile adjudications prohibit equating them with adult convictions. 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.

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

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.” 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.” Other scholars have been disturbed by the high incidence of waiver of counsel in the juvenile courts 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. 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. 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. She described juvenile courts as “an area of the law where the appellate role and transparency to the public is overwhelmingly absent.” 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.

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

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

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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.
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

185 Id.
186 FE LD, supra note 14 at 60.
188 FE LD, 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.

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 retribution.\(^{191}\) 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.

\(^{190}\) Roper v. Simmons, 543 U.S. 551, 570 (2005).
\(^{191}\) Id. at 571.
\(^{192}\) Id. at 570.
\(^{194}\) 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, while Graham prohibited life without parole for juveniles who did not commit a homicide offense. Miller focused on a type of sentence being unconstitutional when it was mandatorily applied. 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. 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.” The Miller Court focused on the fact that the mandatory process removed 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.

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 become so simply because it is mandatory.” However, “a sentencing rule permissible for adults may not be so for children.”

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. These cases recognize

197 Roper, 543 U.S. at 568 (2005).
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. \textit{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.\textsuperscript{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.

\section*{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.\textsuperscript{207} Scholars argue that the language of \textit{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 \textit{McKeiver} is overturned. Recent Supreme Court jurisprudence in \textit{Miller} and \textit{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 \textit{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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\textsuperscript{206} \textit{Graham}, 130 S. Ct. 2011, 2034 (2010).

\textsuperscript{207} \textit{See supra} notes 161-78.

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