JUVENILE ADJUDICATIONS AND THE ARMED CAREER CRIMINAL ACT

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INTRODUCTION

In 2000, the Supreme Court decided *Apprendi v. New Jersey*,[1] and revolutionized federal sentencing law. Post-*Apprendi*, lower courts struggled with areas of ambiguity arising from the case. This paper deals with one such lingering controversy. Under *Apprendi*, "other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."[2] The Court had previously indicated that the exception for prior convictions stemmed at least in part from the fact that the procedural safeguards required by *Apprendi*, proof beyond a reasonable doubt and trial by jury, had already been fulfilled during the prior criminal proceeding. Thus, there was no need for them to be imposed again during sentencing for the later offense.[3]

The Armed Career Criminal Act of 1984 ("ACCA") permits enhancing the sentence for a violation of federal firearms laws[4] beyond the statutory maximum to fifteen years if the offender has committed three or more "violent felonies" or "serious drug offenses."[5] Juvenile adjudications for such crimes qualify as predicate felonies.[6] However, the Supreme Court has held that there is no constitutional right to a jury trial in juvenile adjudications.[7] The question therefore arises: do juvenile adjudications fall within the prior convictions exception in *Apprendi*, even though those juvenile adjudications lack all the procedural safeguards accorded to adult criminal convictions?

Most, but not all, circuits that have considered this question have answered in the affirmative.[8] A number of legal commentators, however, have critiqued the

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1. 530 U.S. 466 (2000).
2. *Id.* at 490.
3. *See* Jones v. United States, 526 U.S. 227, 249 (1999) (explaining that one reason for treating recidivism as a sentencing factor was that certain due process guarantees, including the right to trial by jury, had already attached in the previous proceeding).
4. *See* 18 U.S.C. § 922(g) (2006).
5. 18 U.S.C. § 924(e) (2006).
6. *See* 18 U.S.C. § 924(e)(2)(C) (2006) (the set of qualifying predicate felonies "includes a finding that a person has committed an act of juvenile delinquency involving a violent felony.").
7. McKeiver v. Pennsylvania, 403 U.S. 528 (1971).
8. *See infra* part III.

majority view.[9] Some commentators have gone a step further, using their determination that juryless juvenile adjudications should not be used for the enhancement of adult convictions as a springboard from which to advocate the recognition of a jury trial right in juvenile adjudications.[10] This paper sides with the majority of appellate courts in concluding that juryless juvenile adjudications contain sufficient procedural safeguards to satisfy the reliability concerns articulated in *Apprendi*. Therefore they should continue to be used in the application of the sentence enhancement provision of the ACCA.

In Part II, this article deals with some pertinent background: an overview of the evolution of the juvenile adjudication system, a brief treatment of the legislative history of the ACCA, and an overview of the Supreme Court sentencing law precedent which informs the lower courts' decisions. Part III summarizes lower courts' rationales on both sides of this issue. Part IV evaluates the relative merits of those arguments. Part V concludes.

I. BACKGROUND

A. The Development of the Juvenile Justice System

In the early 20th century, states began creating separate juvenile court systems.[11] Proliferation of juvenile justice systems was rapid: by 1917, forty-seven states and the District of Columbia had juvenile justice courts.[12] Today all states use juvenile courts.[13] The early advocates for juvenile courts were progressive reformers who believed juveniles lacked the maturity to be fully responsible for their actions, so trying them in adult criminal courts was inappropriate.[14] Instead, these advocates promoted the view that juvenile delinquents were children in need of the state's help, not criminals, and they designed the juvenile court system to achieve rehabilitation, not punishment.[15]

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9. *See, e.g.,* Jason Abbott, Note, *The Use of Juvenile Adjudications Under the Armed Career Criminal Act*, 85 B.U. L. REV. 263 (2005) (use of nonjury juvenile adjudications under the ACCA is unconstitutional); Emily Edwards, Comment, *But I'm Just a Kid: Juvenile Adjudications and Sentencing Enhancements*, 51 S. TEX. L. REV. 205, 227 (2009) (if juveniles do not receive the right to a jury trial, they face "the worst of both worlds"); Ellen Marrus, *"That Isn't Fair, Judge": The Costs of Using Prior Juvenile Delinquency Adjudications in Criminal Court Sentencing*, 40 HOUS. L. REV. 1323, 1351, 1356–57 (2004) (arguing that juryless juvenile adjudications are less accurate, so either they should not be used as a basis for adult criminal sentences or the juvenile system should be scrapped entirely); Brian 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, 601 (2004) (only those juvenile adjudications which have been tried before a jury should be used for adult criminal sentencing, to avoid violating "one of the fundamental liberties," the right to a jury trial).

10. *See, e.g.,* Thill, *supra* note 9; Sara Kropf, Comment, *Overturning McKeiver v. Pennsylvania: The Unconstitutionality of Using Prior Convictions to Enhance Adult Sentences under the Sentencing Guidelines*, 87 GEO. L.J. 2149, 2158–59 (1999).

11. *See* Kropf, *supra* note 10, at 2158–59; Brian Kennedy, Note, *Nonjury Juvenile Adjudications as Prior Convictions under Apprendi*, 2004 U. ILL. L. REV. 267, 274–75 (2004).

12. *See* Kropf, *supra* note 10, at 2158–59.

13. *Id.*

14. *Id.*

15. *Id.*

This rehabilitative focus is clear from the euphemistic language of the juvenile court system, developed with the intent to protect juveniles from the stigma associated with a criminal prosecution.[16] For instance, juveniles have hearings, not trials, and they are "adjudicated delinquent," not convicted.[17] The language reflects early reformers' emphasis on using the juvenile courts as a setting for the state to intervene in the lives of troubled youths, to determine what lay at the base of their delinquent behavior, and to provide social services to address those underlying problems.[18] The juvenile adjudication process was deliberately kept informal, vesting judges with enormous discretion to encourage individualized responses to each juvenile's unique issues.[19]

In keeping with this rehabilitative goal, initially juveniles were not accorded due process rights because the juvenile proceeding was characterized as purely beneficial for the child.[20] Children were entitled "not to liberty, but to custody."[21] The state's intervention, even compulsory placement in a state juvenile institution, was therefore not viewed as a deprivation of the child's rights, but a fulfillment of that "right to custody."[22]

However, when the Supreme Court took a critical look at the juvenile system in 1967, in *In re Gault*, it concluded that "failure to observe the fundamental requirements of due process has resulted in instances, which might have been avoided, of unfairness to individuals and inadequate or inaccurate findings of fact and unfortunate prescriptions of remedy."[23] In Gerald Gault's case, the Court noted that the consequences of the boy's crime, making a lewd prank call to a neighbor, would have been much less severe if he had been an adult.[24] If Gerald had been eighteen instead of fifteen, the maximum punishment he could have received would have been either a fine of five to fifty dollars or imprisonment for at most two months.[25] Instead, he was involuntarily committed to a state institution for a period of years, without any of the procedural protections which would have been present in an adult criminal trial.[26]

In order to remedy the risk of arbitrary and unfair results such as Gault's, the Court held that a juvenile has the right to notice of the charges against him,[27] to the assistance of counsel,[28] to confront and cross-examine witnesses,[29] and to the privilege against self-incrimination.[30] Later cases expanded the application of

16. *Id.*
17. *Id.*
18. *Id.*
19. *Id.*
20. *See In re* Gault, 387 U.S. 1, 16 (1967) (describing the evolution of the juvenile justice system and the rationale behind early denial of due process to juvenile adjudicants).
21. *Id.* at 17.
22. *Id.*
23. *Id.* at 19–20.
24. *Id.* at 29.
25. *Id.*
26. *Id.*
27. *Id.* at 33–34.
28. *Id.* at 41.
29. *Id.* at 57.
30. *Id.* at 55.

adult criminal rights to juvenile adjudications in what appeared to be an unceasing march toward parity.[31]

However, in *McKeiver v. Pennsylvania*, that march ended when the Supreme Court held that trial by jury was not constitutionally required in juvenile adjudications.[32] In a plurality opinion, Justice Blackmun explained that past Supreme Court decisions had explicitly declined to decide whether juvenile adjudications were purely criminal or civil.[33] Instead, the Court traditionally evaluated whether a given right was essential to ensure a fundamentally fair proceeding.[34] To that end, the Court had placed an emphasis on those procedural rights which enhanced "fact-finding procedures"[35] so that the child would not "receive the worst of both worlds."[36] The plurality stated that a jury would "not strengthen greatly, if at all, the fact-finding function."[37] Instead, a jury trial would actually have a negative effect since it would "remake the juvenile proceeding into a fully adversary process and [would] put an effective end to what has been the idealistic prospect of an intimate, informal protective proceeding."[38] The Court feared that the use of juries would bring "the traditional delay, the formality, and the clamor of the adversary system and, possibly, the public trial," ending a flawed but still valuable system. [39] Although it encouraged states to experiment with the use of jury trials in juvenile court, the Court refused to find that a jury trial was a constitutional right in juvenile cases.[40]

Justice Douglas wrote a dissenting opinion in *McKeiver*, joined by Justices Black and Marshall.[41] Douglas argued that since juveniles are already treated as criminals subject to punishments tantamount to incarceration, they should receive all the protections the Bill of Rights affords adults.[42] He contended that the addition of the juvenile trial right would not fundamentally change the nature of the juvenile system,[43] would mitigate the risk of judicial prejudice, and

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31. *See In re* Winship, 397 U.S. 358 (1970) (establishing proof beyond a reasonable doubt as standard in juvenile adjudications); Breed v. Jones, 421 U.S. 519 (1975) (double jeopardy attaches to juvenile adjudications).

32. 403 U.S. 528 (1971).

33. *Id.* at 541.

34. *Id.* at 543.

35. *Id.*

36. Kent v. United States, 383 U.S. 541, 556 (1966) ("There is evidence, in fact, that there may be grounds for concern that the child receives the worst of both worlds: that he gets neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children.").

37. *McKeiver*, 403 U.S. at 547.

38. *Id.* at 545.

39. *Id.* at 550.

40. *Id.* Not many states have undertaken such a policy, however. As of 2008, ten states provided a juvenile jury right in all circumstances, ten in some circumstances, and thirty under no circumstances. *See* Linda A. Szymanski, *Juvenile Delinquents' Right to a Jury Trial (2007 Update)*, NATIONAL CENTER FOR JUVENILE JUSTICE, 1 (Feb. 2008), http://www.njdc.info/pdf/2008_right_to_jury_snapshot.pdf (in 2007, only nine states provided a juvenile jury trial as of right); *In re* L.M., 186 P.3d 164 (Kan. 2008) (holding that juveniles had a right to a jury trial in all circumstances, changing Szymanski's tally to that listed above).

41. *McKeiver*, 403 U.S. at 557 (Douglas, J., dissenting).

42. *Id.* at 561.

43. *Id.* at 561–63.

would aid in the juvenile's rehabilitation by adding a greater appearance of legitimacy to the process.[44]

B. The Armed Career Criminal Act

In 1981, Senator Arlen Specter, a former District Attorney, introduced legislation which would later become the ACCA.[45] Given recent evidence which suggested that a few habitual offenders were responsible for a significant portion of crime, Specter was concerned that habitual offenders were being inadequately deterred and incapacitated.[46] The original bill made robbery or burglary a federal crime after two prior convictions for robbery or burglary and imposed a mandatory fifteen-year sentence for the third such offense.[47] Although it passed the House and Senate in 1983, President Reagan pocket vetoed the legislation.[48] He may have done so out of federalism concerns triggered by the bill's transfer of robbery and burglary prosecutions, traditional state-law crimes, to federal jurisdiction.[49]

Those federalism concerns were addressed in the amended version of the bill, which implemented a mandatory minimum of fifteen years for an offender who "receives, possesses, or transports in commerce or affecting commerce any firearm" (a purely federal crime) who has three or more prior convictions for robbery or burglary.[50] This version of the Armed Career Criminal Act was enacted in 1984.[51] It made no mention of juvenile adjudications, however, since it defined robbery and burglary purely as felony convictions.[52] In 1986, the statute was amended to broaden the list of predicate offenses from felony robbery or burglary convictions to violent felonies or serious drug offenses.[53] Today the statute explicitly includes juvenile adjudications for equivalent crimes.[54] It now states that the sentence for a violation of federal firearms laws[55] shall be increased beyond the statutory maximum to fifteen years if the offender has committed three or more "violent felonies" or "serious drug offenses."[56]

C. Sentencing

In *Almendarez-Torres v. United States*,[57] the Court examined a law which increased the maximum penalty for reentry to the United States following

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44. *Id.*
45. *See* James Levine, Note, *The Armed Career Criminal Act and the U.S. Sentencing Guidelines: Moving Towards Consistency*, 46 HARV. J. ON LEGIS. 537, 545 (2009).
46. *See id.*
47. *See id.* at 546.
48. *Id.*
49. *See id.*
50. Pub. L. No. 98–473, ch. XVIII, 98 Stat. 1837 (1984).
51. *Id.*
52. *Id.*
53. Levine, *supra* note 45, at 547.
54. 18 U.S.C. § 924(e)(2)(C) (2006).
55. *See* 18 U.S.C. § 922(g).
56. 18 U.S.C. § 924(e).
57. 523 U.S. 224 (1998).

deportation from two to twenty years if the deportation was triggered by a conviction for an aggravated felony.[58] The issue raised was whether the penalty-increase subsection constituted a new crime or merely enhanced the sentence for the crime of illegal reentry.[59] If the prior aggravated felony was an element of a different crime, then it had to be included in the indictment; if, on the other hand, the prior conviction was merely a sentencing factor, it did not need to be included in the indictment or proven at trial.[60] Sentencing factors, unlike elements of a crime, are facts that only enter into the court's calculation of sentence length and may be unrelated to the jury's determination of guilt or innocence.

The Court determined that the prior conviction represented a sentence enhancement, so its omission from the indictment was constitutional.[61] It began by noting that recidivism is "as typical a sentencing factor as one might imagine."[62] The Court had traditionally considered recidivism as related only to punishment, not to the offense itself, so recidivism should be characterized as a sentencing factor.[63] This characterization was also supported by congressional intent.[64] Finally, the Court remarked upon the unfairness to defendants because mandatory inclusion of the aggravated felony in the indictment would inevitably prejudice the jury against them.[65]

In *Jones v. United States*,[66] the Court was confronted with provisions in a federal carjacking statute which increased the maximum sentence from fifteen to twenty-five years if serious bodily injury resulted, or to life in prison if death resulted.[67] As in *Almendarez-Torres*, the issue before the Court was whether the sentence enhancement provisions should be characterized as creating new crimes or as sentencing factors for one crime.[68] The Supreme Court held that the subsections which connected sentence length to the severity of a victim's injuries constituted separate crimes requiring description in the indictment and proof to a jury beyond a reasonable doubt.[69] Part of this holding stemmed from the doctrine of constitutional doubt; the language of the statute was less clear-cut than that of the law at issue in *Almendarez-Torres* and susceptible of two possible constructions, one of which raised serious constitutional questions and so was to be avoided.[70]

In *Apprendi*, the Supreme Court held that any fact, other than the fact of a prior conviction, which increases the penalty beyond the statutory maximum must be proven to a jury beyond a reasonable doubt, and proof to a judge during

58. *Id.* at 226.
59. *Id.*
60. *Id.* at 228.
61. *Id.* at 226–27.
62. *Id.* at 230.
63. *Id.* at 243–44.
64. *Id.* at 235.
65. *Id.*
66. 526 U.S. 227 (1999).
67. *Id.* at 229.
68. *Id.*
69. *Id.* at 229.
70. *Id.* at 240.

the sentencing phase of a trial by a preponderance of the evidence was constitutionally insufficient.[71] At issue was a New Jersey statute which enhanced the maximum sentence for possession of a firearm for an unlawful purpose from ten to twenty years if a judge found, by a preponderance of the evidence, that the defendant was motivated by racial bias.[72] *Apprendi* contended that his due process rights under the Sixth and Fourteenth Amendments were violated, and the Court agreed.[73]

Because sentencing factors, if proven, increased the "loss of liberty and the stigma attaching to the offense," just as the proof of the elements of a crime did, the same procedural concerns arose during the sentencing phase as during the guilt phase of a trial.[74] The heightened stakes associated with the additional fact meant the defendant should still enjoy all the procedural protections which attached during trial for the underlying offense since that same risk to the defendant's liberty was what motivated the development of procedural protections during trial.[75] The Court also articulated a longstanding concern that without the ruling attaching procedural protections to this additional sentence-enhancing fact, states would manipulate criminal statutes to make prosecution easier.[76] States might characterize a fact necessary to prove one offense as merely a sentencing factor attached to another offense, thus procuring a conviction without proving all the elements of the crime beyond a reasonable doubt.[77]

II. THE CIRCUIT SPLIT

A. United States v. Tighe: The Minority View

The Ninth Circuit Court of Appeals was the first appellate court confronted with the issue of whether juvenile adjudications qualified as predicate felonies for the purposes of sentence enhancement under the ACCA. In *United States v. Tighe*,[78] the Ninth Circuit determined that the use of Tighe's 1988 juvenile adjudication as one of his three predicate felonies for imposing the ACCA sentence enhancement violated *Apprendi*.[79] The court quoted the Supreme Court's language in *Jones*: "One basis for that constitutional distinctiveness [of prior convictions] is not hard to see . . . *a prior conviction must itself have been established through procedures satisfying the fair notice, reasonable doubt and jury trial guarantees*."[80] The Ninth Circuit determined that fair notice, proof beyond a reasonable doubt, and the right to a jury trial constituted a "fundamental

71. Apprendi v. New Jersey, 530 U.S. 466, 474 (2000).

72. *Id.* at 469.

73. *Id.* at 474.

74. *Id.* at 484.

75. *Id.*

76. *See id.* at 485 (citing Mullaney v. Wilbur, 421 U.S. 684, 697–98 (1975) (state could not shift burden of proof of intent to defendant by characterizing intent as relevant only to punishment since intent was an element of the offense of murder)).

77. *See id.*

78. 266 F.3d 1187 (2001).

79. *Id.* at 1194.

80. *Id.* at 1193 (quoting Jones v. United States, 526 U.S. 227, 249 (1999) (original emphasis in *Tighe*)).

triumvirate" of procedural safeguards which must all attach for a proceeding to qualify as a prior conviction.[81]

The court also relied on language from *Apprendi* which reiterated the importance of procedural protections to the prior convictions exception.[82] The Ninth Circuit interpreted the Court's reluctance to expand upon the rationale of *Almendarez-Torres* in *Apprendi* as a directive to narrowly interpret the prior convictions exception.[83] Since juvenile adjudications lack all elements of the "fundamental triumvirate," the majority reasoned, they fall outside the prior convictions exception.[84]

Judge Brunetti dissented.[85] He characterized the majority's inference from the Supreme Court's language in *Jones* to the existence of a "fundamental triumvirate of rights" without which a juvenile adjudication could not qualify as a prior conviction as a "quantum leap."[86] Judge Brunetti reasoned that as long as the defendant "received all the process that was due when he was convicted of the predicate crime," the predicate crime was a prior conviction.[87] "For adults, this would indeed include the right to a jury trial. For juveniles, it does not."[88] Finally, he predicted that the majority's decision would in fact negatively impact defendants, since prosecutors would simply prove the fact of the juvenile adjudication to the jury, resulting in prejudice to the defendant.[89]

B. United States v. Smalley: The Majority View

A year later, in *United States v. Smalley*,[90] the Eight Circuit considered the same issue and arrived at the opposite result.[91] The Eighth Circuit framed the issue differently, refusing to make the same "quantum leap"[92] from the Supreme Court's statement in *Jones* to a mandatory requirement of fair notice, a jury trial, and proof of guilt beyond a reasonable doubt for qualification as a prior conviction.[93] Instead, the Eighth Circuit characterized the Court's language in *Jones* as indicating that those three safeguards were *sufficient* to satisfy the requirements of *Apprendi*, but were not *necessary* to do so.[94] They conceived the set of procedural safeguards as lying on a continuum between "two poles": at one pole was what the Court had established in *Jones* and *Apprendi* to be clearly

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81. *Id.*

82. *Id.* at 1194 (quoting *Apprendi*, 530 U.S. at 496 ("there is a vast difference between accepting the validity of a prior judgment of conviction entered in a proceeding in which the defendant had the right to a jury trial and the right to require the prosecutor to prove guilt beyond a reasonable doubt, and allowing the judge to find the required fact under a lesser standard of proof.")).

83. *Id.*

84. *Id.*

85. *Id.* at 1198 (Brunetti, J., dissenting).

86. *Id.* at 1200.

87. *Id.*

88. *Id.*

89. *Id.* at 1200–01.

90. 294 F.3d 1030 (8th Cir. 2002).

91. *Id.* at 1031.

92. *Tighe*, 266 F.3d at 1200.

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

94. *Id.*

constitutionally adequate (a jury trial, the reasonable doubt standard of proof, and fair notice), and at the other, what was constitutionally inadequate (a lower standard of proof, no jury trial).[95] The situation presented by juvenile adjudications lay in the gray area between those two poles, so Supreme Court precedent was not directly on point.[96]

The *Smalley* court determined that the due process rights which attached to juvenile adjudications placed the juvenile adjudication closer to the clearly constitutional pole.[97] The court noted that "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."[98] Instead of looking for the presence of a particular bundle of rights, as the Ninth Circuit had, the Eighth Circuit asked whether the rights which *did* attach to juvenile adjudications were "sufficient to ensure the reliability that *Apprendi* requires."[99] In finding juvenile adjudications were sufficiently reliable, the *Smalley* court noted that one of the reasons the Supreme Court held that the right to a jury trial did not attach in juvenile adjudications was that it would "not strengthen greatly, if at all, the fact-finding function."[100]

C. Other Courts: Consensus Emerges

The rest of the circuit courts to consider this issue have followed the Eight Circuit's rationale and held that juvenile adjudications were prior convictions under *Apprendi*.[101] Recently, in *Welch v. United States*, the Seventh Circuit took the majority position.[102] The *Welch* majority held that "the protections juvenile defendants receive—notice, counsel, confrontation and proof beyond a reasonable doubt—ensure that the proceedings are reliable," and since they are reliable, they satisfy *Apprendi*.[103]

Judge Posner dissented.[104] He first noted that juvenile adjudications are not technically "convictions" and are best described as "quasi-criminal."[105] Because

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95. *Id.*
96. *Id.*
97. *Id.* at 1033.
98. *Id.* (citing *In re* Winship, 397 U.S. 358 (1970)).
99. *Id.* at 1033.
100. *Id.* (quoting McKeiver v. Pennsylvania, 403 U.S. 528, 547 (1971)).
101. *See* United States v. Wright, 594 F.3d 259 (4th Cir. 2010) (*McKeiver* "squarely foreclosed" Wright's claim that nonjury juvenile adjudications could not be used as prior convictions since if those adjudications were sufficiently reliable to deprive a juvenile of his liberty, they were reliable enough for the ACCA); United States v. Crowell, 493 F.3d 744, 750 (6th Cir. 2007) (rejecting the Ninth Circuit's view as a "narrow parsing of words," following the Eight and Third Circuits in holding that juvenile adjudications were prior convictions); United States v. Burge, 407 F.3d 1183, 1190 (11th Cir. 2005) (procedural safeguards in a juvenile adjudication met the "minimum" requirement for due process); United States v. Jones, 332 F.3d 688 (3d Cir. 2003) (following the Eighth Circuit in holding that as long as the juvenile had received all the process to which he was due, his prior adjudications qualified as prior convictions); *see also* United States v. Matthews, 498 F.3d 25 (1st Cir. 2007) (although Massachusetts grants a juvenile jury trial right, the First Circuit indicated its support for the Eight Circuit's interpretation).
102. 604 F.3d 408 (7th Cir. 2010).
103. *Id.* at 429.
104. *Id.* (Posner, J., dissenting).

juvenile adjudications have a different purpose and arise in a different context than adult criminal convictions,

> 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 also stated that the Supreme Court's holding in *Apprendi* indicated the inherent importance of the jury trial right beyond its role as a safeguard of reliability.[107] Finally, Judge Posner argued that in fact juvenile adjudications may not be as factually reliable as adult criminal proceedings, citing studies which imply a greater likelihood of wrongful conviction in juvenile court than in the adult criminal system.[108]

State courts, albeit in slightly different procedural contexts, have been more equally divided. Kansas, Indiana, and California indicated their support for the majority view.[109] Oregon and Louisiana, however, held that nonjury juvenile adjudications could not be used for sentence enhancement without violating *Apprendi*.[110]

III. ANALYSIS

The contention that juryless juvenile adjudications can be used to enhance a sentence beyond the statutory maximum has received widespread support in federal and state courts alike. Its reception among academics and law student commentators, however, has been far colder.[111] Some dissent stems from the belief that *McKeiver* should be overturned, either (1) because it was wrongly decided in 1971 or (2) because the juvenile system has since strayed even further

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105. *Id.* at 430.

106. *Id.* at 430–31.

107. *See id.* at 431 ("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 the Court just say that the fact must be found by a reliable means?").

108. *Id.* at 432 (citing Steven A. Drizin & Greg Luloff, *Are Juvenile Courts a Breeding Ground for Wrongful Convictions?* 34 N. KY. L. REV. 257 (2007)); 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, 1161–77 (2003); Martin Guggenheim & Randy Hertz, *Reflections on Judges, Juries, and Justice: Ensuring the Fairness of Juvenile Delinquency Trials*, 33 WAKE FOREST L. REV. 553, 564–82 (1998); Bluhm Legal Clinic, *Why Youth Contributes to Wrongful Convictions*, http://cwcy.org/WhyYouthContributes.aspx (visited Apr. 8, 2010).

109. *See* People v. Nguyen, 46 Cal. 4th 1007 (Cal. 2009) (juvenile adjudications may be used as "strikes" for the Three Strikes law); Ryle v. State, 842 N.E.2d 320, 322 (Ind. 2005) (juvenile adjudications qualify for habitual offender sentence enhancement); State v. Hitt, 273 Kan. 224 (Kan. 2002) (upholding the use of juvenile adjudications for adult sentence enhancements).

110. *See* State v. Harris, 339 Or. 157 (Or. 2005) (juryless juvenile adjudications could not be used for sentencing because the jury served as a bulwark between people and government which had no substitute in juvenile adjudications); State v. Brown, 879 So.2d 1276, 1288 (La. 2004) (juvenile adjudications are not reliable enough for use in sentence enhancement during adult criminal proceedings).

111. *See supra* note 9 and accompanying text.

from its initial focus on rehabilitation so that it is now comparable to the adult criminal system in its punitive purpose, requiring comparable procedural rights.[112] Other disagreement rests with the application of the framework provided by the Eighth Circuit in *Smalley*.[113] Some commentators argue that the relevant inquiry should instead be whether the prior adjudication was a result of a jury trial and that a focus only on reliability is too broad.[114]

This paper contends, like the majority of courts, that the use of juvenile adjudications to trigger the ACCA sentence enhancement does not violate due process. First, *Apprendi* holds that any fact, other than a prior conviction, which increases a sentence beyond the statutory maximum must be proven to a jury beyond a reasonable doubt. Nowhere does the Court state that a prior conviction must itself have been proven to a jury. The inquiry adopted by the Ninth Circuit and others is thus a misinterpretation of constitutional law. Therefore, the framework presented by the Eighth Circuit—whether the prior proceeding carries sufficient procedural guarantees of reliability[115]—is most in line with the Supreme Court precedent. Second, juryless juvenile adjudications are sufficiently reliable to qualify as prior convictions. They carry a multiplicity of procedural safeguards intended to produce a fair, factually accurate result.[116] Third, categorizing juryless juvenile adjudications as prior convictions under *Apprendi* serves both the interests of the state and the defendant. Defendants would be disadvantaged if the contrary position, juvenile adjudications are sufficiently reliable for disposition of a juvenile case but not for adult sentence enhancement, were to be implemented.[117]

It is a misinterpretation of Supreme Court precedent to construe the prior convictions exception as requiring a jury trial for a prior proceeding to qualify. The Ninth Circuit's analysis rests almost entirely on one sentence in *Jones v. United States*, in which the Supreme Court explained that "one basis" for treating sentence enhancements based on recidivism differently was that procedural rights, including a jury trial, had attached in the prior proceeding.[118] The Ninth

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112. *See* Abbott, *supra* note 9, at 268 ("The McKeiver Court did not adequately consider the role of a jury, nor did the Court adequately account for a juvenile adjudication's criminal nature when it decided that juveniles are not entitled to a jury trial"); Kropf, *supra* note 10, at 2150 (reasoning that because the juvenile court system has become more punitive in nature since *McKeiver* was decided in 1971, and because nonjury juvenile adjudications are used for federal sentencing purposes, *McKeiver* should be overruled).

113. United States v. Smalley, 294 F.3d 1030, 1032–33 ("We conclude 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.").

114. *See, e.g.*, Thill, *supra* note 9, at 593 (using reliability as the benchmark introduces a slippery slope problem).

115. *Smalley*, 294 F.3d at 1032–33.

116. *See In re* Winship, 397 U.S. 358 (1970) (standard of proof in juvenile proceedings is beyond a reasonable doubt); *In re* Gault, 387 U.S. 1 (1967) (establishing juvenile right to notice, counsel, confrontation and cross-examination of witnesses, and privilege against self-incrimination).

117. *See, e.g.*, United States v. Tighe, 266 F.3d 1187, 1200–01 (Brunetti, J., dissenting) (expressing concern that a defendant will face the "Hobson's choice" of either stipulating to facts which will prejudice a jury against him or allowing the prosecution to prove those facts to the jury).

118. *Id.* at 1193 (majority opinion).

Circuit's reliance on this sentence is a logical stretch because it jumps from "one basis" to the existence of a "fundamental triumvirate of procedural protections."[119] It also omits the other possible reasons recidivism is treated differently in Supreme Court jurisprudence: the traditional use of recidivism as a sentencing factor,[120] and the fact that recidivism does not relate to the offense, but only to punishment, "so may be subsequently decided."[121] Even though, as several courts have pointed out, *Almendarez-Torres* is perhaps on shaky ground,[122] it still remains good law, and the uniqueness of recidivism as articulated in *Almendarez-Torres* has been affirmed in later cases. In *Jones v. United States*,[123] the Supreme Court explained that recidivism's traditional use as a sentencing factor was one explanation for its constitutional distinctiveness. In *Apprendi*, the Court distinguished the recidivism enhancement provision at issue in *Almendarez-Torres* from New Jersey's hate crime statute by noting again that recidivism is unrelated to the offense while a consideration into the defendant's motive during the offense, such as racial bias, is closely related.[124]

Supreme Court precedent on an analogous issue supports the majority view as the California Supreme Court stated in *Nguyen*.[125] In *Nichols v. United States*, the Court held that "a prior constitutionally valid uncounseled misdemeanor conviction could be employed in a subsequent federal felony proceeding to increase the defendant's criminal history score, and thus his maximum punishment, for the felony offense."[126] Under *Scott v. Illinois*, a defendant charged with a misdemeanor only has the right to counsel if his conviction results in imprisonment.[127] Since Nichols's misdemeanor conviction did not result in imprisonment, all of his due process rights had been satisfied, even though he never waived his right to counsel.[128]

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119. *See id.* at 1200 (Brunetti, J., dissenting).

120. *See* Jones v. United States, 526 U.S. 227, 249 (1999) ("the holding last Term rested in substantial part on the tradition of regarding recidivism as a sentencing factor"); Almendarez-Torres v. United States, 523 U.S. 224, 243 (1998) (recidivism is "a traditional, if not the most traditional, basis for a sentencing court's increasing an offender's sentence").

121. *Almendarez-Torres*, 523 U.S. at 244 (also stating that "The Court has not deviated from this view.").

122. *See* Apprendi v. New Jersey, 530 U.S. 466, 489 (2000) ("Even though it is arguable that *Almendarez-Torres* was incorrectly decided"); State v. Harris, 339 Or. 157, 170 (2005) (noting that prior convictions remain exceptions "for now") (citing Shepard v. United States, 125 S.Ct. 1254, 1264 (2005) (Thomas, J., concurring); *see also* Shepard v. United States, 125 S. Ct. 1254, 1264 (2005) (Thomas, J., concurring) ("*Almendarez-Torres*. . . has been eroded by this Court's subsequent Sixth Amendment jurisprudence, and a majority of the Court now recognizes that *Almendarez-Torres* was wrongly decided. The parties do not request it here, but in an appropriate case, this Court should reconsider *Almendarez-Torres'* continuing viability.").

123. *See Jones*, 526 U.S. at 248 (explaining that *Almendarez-Torres* did not control the issue in *Jones* "not merely because we are concerned with the Sixth Amendment right to jury trial and not alone the rights to indictment and notice as claimed by *Almendarez-Torres*, but because the holding last Term rested in substantial part on the tradition of regarding recidivism as a sentencing factor.").

124. *Apprendi*, 530 U.S. at 496.

125. People v. Nguyen, 46 Cal.4th 1007, 1026 (Cal. 2009).

126. *Id.* at 1026 (citing Nichols v. United States, 511 U.S. 738 (1994)).

127. 440 U.S. 367 (1979).

128. *Nichols*, 511 U.S. 738, 741 (1994).

This lack of a procedural safeguard, the right to counsel, did not preclude the use of the misdemeanor conviction to increase a later sentence because another safeguard did apply; the misdemeanor was proven beyond a reasonable doubt.[129] In addition, the court recognized that recidivism is different. Recidivism only involves demonstrating characteristics of the offender, not the offense, and it has traditionally played an important role in sentencing.[130] As the California Supreme Court saw, there is a clear parallel between the uncounseled misdemeanor conviction in *Nichols* and the juryless juvenile adjudications at issue here.[131]

Since the Ninth Circuit's construction of the question is inconsistent with Supreme Court precedent on the uniqueness of recidivism as a sentencing factor,[132] the Eighth Circuit's framework more accurately reflects the state of sentencing law. Because *Apprendi* requires that prior convictions be imbued with enough procedural rights to secure their reliability, the appropriate question is whether the lack of a jury trial renders juvenile convictions unreliable. Here, Supreme Court precedent supplies a clear answer. The Court repeatedly affirmed the factual accuracy of juryless juvenile adjudications in *McKeiver*.[133] This assertion makes sense given the number of other procedural safeguards granted to juveniles: the right to notice, the right to counsel, the highest standard of proof, the protection from double jeopardy, the right against self-incrimination, and the right to confront and cross-examine witnesses.[134]

In addition, a contrary holding, that juvenile adjudications are sufficiently reliable for their own purposes but not for sentence enhancements for adult criminal convictions, has several problems. Not only does it directly contradict the Supreme Court's assertion that nonjury juvenile proceedings are factually accurate,[135] it conflicts with the Court's conception of the seriousness of an adjudication of delinquency since it may well result in a deprivation of the juvenile's liberty.[136] The Supreme Court granted procedural guarantees to juveniles because the seriousness of the consequences of a juvenile adjudication was in some ways comparable to imprisonment.[137] Holding that a lower level of factual accuracy is acceptable in juvenile adjudications despite their serious consequences flies in the face of the Supreme Court's rationale.[138]

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129. *Nguyen*, 46 Cal. 4th at 1026 (citing *Nichols*, 511 U.S. at 744–48).

130. *Id.*

131. *Id.*

132. *See, e.g.*, Almendarez-Torres v. United States, 523 U.S. 224, 243–44 (1998) (establishing Court's continued commitment to recidivism as a sentencing factor because of its traditional use and because it relates to the punishment, not the offense); *Nichols*, 511 U.S. at 747 (noting the traditional importance of recidivism at sentencing); Oyler v. Boles, 368 U.S. 448, 503 (1962) (defendant does not have the right to advance notice of recidivist enhancement).

133. McKeiver v. Pennsylvania, 403 U.S. 528, 547 (1971) (jury is not necessary for "accurate factfinding").

134. *See supra* note 40 and accompanying text.

135. *McKeiver*, 403 U.S. 528.

136. *See In re* Gault, 387 U.S. 1, 27 (1967) (describing similarities between placement in a juvenile facility and imprisonment).

137. *Id.*

138. *Id.*; *In re* Winship, 397 U.S. 358, 365–66 (1970) (juvenile adjudications, which also result in loss of liberty, are comparable in seriousness to criminal prosecutions).

In addition, following the Ninth Circuit's decision in *Tighe* may in fact run counter to the interests of adult criminal defendants. As the dissent in *Tighe* noted,[139] holding that juvenile adjudications fall outside the prior convictions exception of *Apprendi* does not mean that juvenile adjudications will have no impact on an adult defendant's sentencing under the ACCA. The defendant would have to choose between stipulating to the prior convictions or allowing the prosecutor to prove them beyond a reasonable doubt in front of the jury.[140] If this proof requires more than documentary evidence of the fact that the juvenile adjudication occurred, then the defendant is still prejudiced, perhaps to an even greater degree, because due process might only be satisfied by having the truth of the juvenile adjudication re-litigated before the jury empanelled for the adult offense.[141]

Litigating an old crime involves logistical difficulties, such as the unavailability of witnesses or the loss of evidence, which may burden defendants more than it would the government.[142] The prosecution will be able to use juvenile court documents to support its case and may more easily be able to track down witnesses for the state. These witnesses may be able to testify about an old case in greater detail than lay witnesses. The defendant, however, may have difficulty tracking down lay witnesses, who might, even if found, have more difficulty recalling the events in question.

The difficulty of finding witnesses to testify on his behalf may lead to greater pressure on the defendant himself to testify simply out of necessity, a litigation strategy many defendants prefer to forego. Stipulation to the truth of the juvenile adjudication avoids the difficulty of litigating an old case but not the prejudice to the jury. Whether the defendant chooses to stipulate or re-litigate the juvenile adjudication, the jury will already have heard evidence concerning the adult firearms offense to which the ACCA enhancement will be applied. They may thus be predisposed to see the defendant as a criminal and find it easier to believe he began his criminal career early in life. Although this serious risk of prejudice to the defendant could be mitigated by the use of sentencing juries, as the *Tighe* majority noted,[143] the use of sentencing juries in noncapital criminal

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139. United States v. Tighe, 266 F.3d 1187, 1200–01 (2001) (Brunetti, J., dissenting) ("Thus, a defendant with a prior juvenile adjudication will be put to the Hobson's choice of stipulating to the priors or parading them before a jury.").

140. The Indiana and Kansas Supreme Courts both expressed concern over the practical effects on the judicial system of a rule requiring proof of the existence of a juvenile adjudication to a jury. *See* Ryle v. State, 842 N.E.2d 320, 323 (Ind. 1970) (describing the court's fear that an "untold number" of defendants would "clog" the courts on remand); State v. Hitt, 273 Kan. 224, 235 (2002) (explaining that holding that juvenile adjudications were not "prior convictions" would require "the resentencing of many").

141. *See* People v. Nguyen, 209 P.3d 946, 961 (Cal. 2009) (Kennard, J., dissenting) (construes *Apprendi* as requiring "a jury trial not only on the 'fact' of the existence of a prior adjudication, as the majority does, but also, unlike the majority, as requiring a jury trial on the conduct that led to that adjudication.").

142. *See Ryle*, 824 N.E.2d at 323 ("requiring a jury to decide whether a defendant was a juvenile delinquent beyond a reasonable doubt by hearing stale evidence no more ensures reliability than allowing the trial judge to make a decision based upon a properly admitted record of conviction.").

143. *Tighe*, 266 F.3d at 1195 n.5.

cases is almost unheard of and would require sweeping reform of questionable political and administrative feasibility.[144]

Likewise, juvenile adjudicants could also be disadvantaged if juvenile adjudications were held to fall outside the bounds of the prior conviction exception. If the underlying rationale for their exclusion from the exception is that nonjury juvenile adjudications are insufficiently reliable, as the Louisiana Supreme Court held in *State v. Brown*,[145] the message sent to juveniles about the legitimacy of the juvenile court system is a bleak one. The perception that imprisonment-like institutionalization is the result of a process that is constitutionally permitted to be less reliable than an adult criminal conviction would surely not aid rehabilitation.[146]

If nonjury juvenile adjudications are in fact less reliable than adult criminal trials, as some commentators and dissenting judges have implied,[147] the problem is much larger than simply whether juvenile adjudications should continue to be used under the ACCA. Wholesale reform of the juvenile justice system would appear to be the only fair response, given the serious consequences of juvenile adjudication.[148] It is not clear, though, that the lack of a jury is what causes this ostensible unreliability and that the introduction of a jury would cure it. Judge Posner contends in his dissent in *Welch* that

> the literature finds that judges are more likely to convict in juvenile cases than juries are in criminal cases. 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 decisions lack the benefits of group deliberation.[149]

But these contentions are all debatable. For instance, judges may be more prone to convict in juvenile court than juries in criminal court, but the issue here is whether judges are more prone to convict in juvenile court than juries *in juvenile court*, so Posner's evidence is not on point. In addition, the fact that criminal court juries are more lenient than juvenile court judges might be a reflection of other features of the juvenile system than this supposed judicial bias. Perhaps juvenile court judges are harsher because juvenile court defense attorneys are less zealous in their advocacy, a trend Posner also bemoans.[150] They

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144. *See, e.g.*, Morris B. Hoffman, *The Case for Jury Sentencing*, 52 DUKE L.J. 951, 953 (2003) (noting that forty-five states and the federal government do not permit juries to make sentencing decisions in noncapital felony cases).

145. 879 So. 2d 1276, 1288 (La. 2004).

146. *See In re* Gault, 387 U.S. 1, 26 (1967) (proceedings which both are and appear fair will be more therapeutic for the child); McKeiver v. Pennsylvania, 403 U.S. 528, 562 (1971) (Douglas, J., dissenting) (the appearance of due process and fairness will help juveniles perceive their incarceration to be legitimate).

147. *See, e.g.*, Welch v. United States, 604 F.3d 408, 429 (7th Cir. 2010) (Posner, J., dissenting); *Brown*, 879 So. 2d at 1289; Thill, *supra* note 9.

148. *See supra* notes 136, 138.

149. *Welch*, 604 F.3d at 432 (Posner, J., dissenting).

150. *Id.*

file fewer pretrial motions and "appear reluctant to file appeals."[151] It is unclear that the presence of a jury alone would encourage more zealous advocacy unless the jury was tasked with punishment, not, as the juvenile court judge is, with providing a solution which encourages rehabilitation. What may encourage more aggressive advocacy, however, is the potential for future use of a juvenile adjudication in a criminal proceeding.[152]

Indeed, juvenile court juries might conceivably be *less* fair than juvenile court judges, particularly when confronted with a juvenile accused of a serious violent felony or drug trafficking offense. Juries may be more susceptible than judges to negative media coverage of juvenile delinquents, and media coverage of juvenile delinquents leads viewers to drastically overestimate the likelihood that juveniles commit serious crimes.[153] Jurors may thus find it harder than a juvenile court judge, one who is familiar with and committed to the rehabilitative focus of juvenile court, to approach juveniles without bias. Juvenile court jurors might also have difficulty sympathizing with a juvenile delinquent because minors do not serve on juries. In a real sense, juveniles cannot access a jury of their peers. Perhaps it is for that reason that juveniles have generally declined to take advantage of their right to a jury trial in those states in which it exists.[154]

It is also possible, though, that the infrequent use of juvenile court juries in states which provide them is more an indicator of the poor quality of representation which juveniles are alleged to receive.[155] Juvenile court attorneys, overwhelmed by high caseloads, are inattentive to the basics of trial practice, often relying on juveniles or their families to contact witnesses for the juvenile, and "rarely" filing pretrial motions or appeals.[156] These overloaded attorneys may also be reluctant to take on the added time and effort required for a jury trial. If their reluctance is at the root of the low rate of juvenile jury trials in jurisdictions which grant them, then those numbers may not reflect juveniles' considerations of whether a jury trial is in their best interest.

However, while this article contends, like most courts, that a juryless juvenile adjudication is sufficiently reliable to be used for the ACCA, a jury trial may have other benefits beyond its role as a procedural safeguard. There may be other arguments for incorporating a jury trial into the juvenile justice system beyond the risk that a juvenile adjudication will later serve as the basis for an adult sentence enhancement. In his dissent, Judge Posner construed Supreme Court precedent as reflecting the unique importance of the jury trial as more than just "a reliable means."[157] Indeed, since juveniles themselves may already view

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151. *Id.*

152. *See* Edwards, *supra* note 9, at 1354–55 (describing how the use of juvenile adjudications as sentence enhancements will encourage more zealous juvenile court advocacy).

153. *See* Vincent Schiraldi, *Juvenile Crime is Decreasing – It's Media Coverage That's Soaring*, L.A. TIMES, Nov. 22, 1999, http://articles.latimes.com/1999/nov/22/local/me-36357.

154. *See* Abbott, *supra* note 9, at 290 n. 207 (citing surveys which show that only between one and three percent of juvenile cases are decided by juries in those states which make them available).

155. *See, e.g., Welch*, 604 F.3d at 432 (Posner, J., dissenting) (describing factors which render juvenile court attorneys unlikely to be able to represent their clients' interests adequately).

156. *Id.*

157. *See id.* at 431 ("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 . . . ?").

the juvenile court system as "formal and adversarial,"[158] they may expect to see a jury and doubt the legitimacy of the proceedings when one is not present.[159] Since proceedings which appear fair to juveniles are more likely to encourage rehabilitation, the lack of a jury trial in juvenile court may in fact detract from the courts' rehabilitative goal.[160] This perception of unfairness might also distinguish juvenile court adjudications from adult criminal convictions.

CONCLUSION

Federal appellate courts, state supreme courts, and commentators alike have wrestled with this issue: do juvenile adjudications qualify as prior convictions even though there is no constitutional right to a jury trial in juvenile court? This article concludes that the majority of courts are correct. In the absence of a clear mandate from the Supreme Court on this issue (which it has repeatedly declined to provide),[161] the framework first provided by the Eighth Circuit in *Smalley*[162] should guide the analysis because it is most consistent with Supreme Court precedent on multiple constitutional issues. Based on the special place recidivism has as a sentencing factor in Supreme Court jurisprudence, the many procedural rights which do attach in juvenile adjudications, and the Supreme Court's determination in *McKeiver* that a jury trial would not enhance the accuracy of a juvenile adjudication,[163] this paper reasons that juvenile adjudications are sufficiently reliable indicators of recidivism to be used under the ACCA.

If they are *not* sufficiently reliable, as Louisiana held in *State v. Brown*,[164] to be used for adult criminal sentence enhancement, then the procedures in place in juvenile adjudications do not adequately ensure a factually accurate result.[165] The lack of a jury may leave the juvenile adjudication so likely to produce a wrongful "conviction" that it cannot be used as a reliable indicator of past criminal activity. If this is the case, then surely the use of juvenile adjudications for sentence enhancements is the least of our problems; the validity of the entire juvenile system is called into question. Merely prohibiting the use of juvenile adjudications in adult sentence enhancements would be a woefully inadequate remedy.

Although the juvenile system has its flaws, it seems unlikely that the addition of another procedural right, the jury trial, would be a magic bullet. Additional training for judges or educating juvenile attorneys about the collateral consequences of juvenile adjudications might directly address the

158. *See* Marrus, *supra* note 9, at 2170 ("It is unlikely that the juveniles involved in the juvenile court system—brought before judges, held in prison cells prior to a judicial hearing, counseled by attorneys—view it as anything but formal and adversarial.").

159. *Id.*

160. *Id.*

161. *See* Smalley v. United States, 537 U.S. 1114 (2003) (cert denied); Jones v. United States, 540 U.S. 1150 (2004) (cert denied); Burge v. United States, 546 U.S. 981 (2005) (cert denied); Crowell v. United States, 552 U.S. 1105 (2008) (cert denied); Wright v. United States, __ U.S. __, 131 S. Ct. 507 (Nov. 1, 2010) (cert denied).

162. 294 F.3d 1030, 1032–33 (8th Cir. 2002).

163. *See supra* note 153 and accompanying text.

164. 879 So. 2d 1276 (La. 2004).

165. *See* United States v. Wright, 594 F.3d 259, 264 (4th Cir. 2010).

concerns over the juvenile court's reliability. Further, it is unclear as a policy matter that the outcome urged by the Ninth Circuit and by many commentators who argue that juvenile adjudications should not be considered prior convictions (but should be proven to a jury) would in fact benefit either defendants facing ACCA sentencing or forward-looking juvenile adjudicants. And, as the Supreme Court recognized in *McKeiver*,[166] the policy reasons *for* judge-only juvenile adjudications (that juryless adjudications encourage confidentiality, informality, and flexibility without compromising fact-finding accuracy) are laudable; they are closely related to the value of having a juvenile justice system at all.

Likewise, there are strong policy reasons for using juvenile adjudications as a measure of recidivism under the ACCA. The purpose of the bill was to "curb armed career criminals," and its development was spurred by the need to target habitual offenders.[167] Like all habitual offender statutes, the ACCA attempts to fight crime by increasing the level of deterrence provided by the law in order to target criminals who have shown themselves to be insufficiently deterred by a lower level of punishment. It also reduces crime by incapacitating those offenders who resist rehabilitation or deterrence. Finally, enhancing a sentence for recidivism satisfies the goal of retribution, since it is more blameworthy to continue committing violent felonies despite repeated warnings from society. The use of juvenile adjudications as ACCA predicate offenses allows judges to identify and incapacitate career criminals sooner, thus preventing more crimes, and it enables courts to accurately judge a defendant's blameworthiness. For reasons of policy and precedent, then, the majority of courts have it right: juvenile adjudications come with enough procedural safeguards to ensure their reliability so their use in enhancing adult sentences under the ACCA is constitutional.

166. 403 U.S. 528, 551 (1971).

167. *See* Levine, *supra* note 46, at 546.