

A Compromised Solution: Balancing the Constitutional Consequences and the Practical Benefits of Using Juvenile Adjudications for Sentence Enhancement Purposes

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*But justice, though due to the accused, is due to the accuser also. The concept of fairness must not be strained till it is narrowed to a filament. We are to keep the balance true.*¹

I. INTRODUCTION

Our nation has long struggled to maintain a balance between protecting an individual's constitutional rights and protecting society's interests in safety and justice. In its development of constitutional law, the United States Supreme Court has often employed balancing tests.² The struggle currently continues as our courts balance the constitutional consequences with the practical benefits of using juvenile adjudications for sentence enhancement purposes. Despite America's respect for an individual's civil liberties, our judicial system often enhances criminal sentences without ensuring that the prosecution acquired the prior adjudication with the right to a jury trial. Consider the case of Cager Spates, who pleaded guilty to aggravated assault.³ Spates did not have any prior adult convictions, but he did have a juvenile adjudication for aggravated battery that the prosecution obtained without the use of a jury.⁴ Based on this non-jury juvenile adjudication, the court doubled his adult sentence for the aggravated

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1. *Snyder v. Massachusetts*, 291 U.S. 97, 122 (1934).

2. *See, e.g.*, *United States v. Leon*, 468 U.S. 897, 924 (1984) (creating the "good faith" exception to the exclusionary rule by balancing the individual's constitutional rights against society's interest in punishing criminals); *Delaware v. Prouse*, 440 U.S. 648, 658-61 (1979) (explaining that the constitutionality of a regulatory search is determined by balancing the intrusion on the individual's Fourth Amendment rights against the government's legitimate interest in the search); *Chimel v. California*, 395 U.S. 752, 765 (1969) (explaining that a police officer can validly search the area within the immediate control of an arrestee because the court balances the suspect's Fourth Amendment rights and society's interests in safely arresting the suspect and saving evidence from destruction).

3. *See State v. Spates*, 36 P.3d 839, 840 (Kan. Ct. App. 2001).

4. *Id.* Without the juvenile adjudication, Spates' criminal history score would have been I and his sentencing range would have been between eleven and thirteen months. *See KAN. STAT. ANN.* § 21-4704 (Supp. 2004). Instead, the court used the adjudication to determine that his criminal history score was D and sentenced him to twenty-two months. *Spates*, 36 P.3d at 840.

assault.⁵ Both federal and state laws allow the use of non-jury juvenile adjudications to enhance a subsequent adult sentence.⁶

In *Apprendi v. New Jersey*,⁷ the United States Supreme Court held that the prosecution must prove to a jury beyond a reasonable doubt any fact used to enhance a sentence beyond the statutory maximum.⁸ The Court recognized prior convictions as an exception to this rule because the prosecution obtains prior convictions with sufficient procedural safeguards to ensure the reliability and fairness of the conviction's subsequent use for sentence enhancement.⁹ The Court only allows the use of this exception in cases that adequately recognize the defendant's right to a jury trial.¹⁰ Because the government does not grant juveniles the right to a jury trial, courts should not treat juvenile adjudications as prior convictions under *Apprendi*. In 1970, the Supreme Court ruled that juveniles were not entitled to jury trials.¹¹ This case, however, was decided before the criminalization of the juvenile justice system and before legislatures passed laws allowing courts to use juvenile adjudications for sentence enhancement.¹² Although juvenile adjudications may be reliable enough to determine the culpability of a juvenile, the lack of procedural safeguards makes them unreliable for sentence enhancement. Thus, the current use of juvenile adjudications for sentence enhancement without submission to a jury is unconstitutional.

Despite the numerous constitutional concerns posed by the use of juvenile adjudications for sentence enhancement, many states and federal jurisdictions allow their use.¹³ Several courts and state governments have decided that juvenile adjudications are similar enough to adult criminal convictions to constitutionally justify their use as sentence enhancers.¹⁴ In fact, juvenile adjudications are vastly different from adult convictions because the prosecution obtains them with fewer procedural safeguards. Juveniles do not have the right to a jury trial and do not have an adequately-recognized right to counsel.¹⁵ Nonetheless, there are numerous practical reasons why the govern-

5. *Spates*, 36 P.3d at 840.

6. See Joseph B. Sanborn, Jr., *Striking Out on the First Pitch in Criminal Court*, 1 BARRY L. REV. 7, 17 (2000). For example, in Oregon, a defendant had his sentence increased by four months based on a non-jury juvenile adjudication. *State v. Stewart*, 892 P.2d 1013, 1014 (Or. 1995).

7. 530 U.S. 466 (2000).

8. *Id.* at 490.

9. *Id.* at 488-90.

10. *Id.* at 488.

11. *McKeiver v. Pennsylvania*, 403 U.S. 528, 545 (1971).

12. 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, 1156-57 (2003).

13. See *infra* Part IV.

14. See *infra* Part IV.

15. See *infra* Part V.A-B.

ment should use juvenile adjudications to enhance a criminal defendant's sentence. Not only does it protect the public from the continued criminality of a repeat offender, but it also recognizes the increased culpability of a repeat offender and punishes him accordingly. Still, to reap the benefit of using juvenile adjudications as sentence enhancers, the government must obtain them in a manner that comports with the requirements of due process.

This note addresses the constitutionality of using prior juvenile adjudications to enhance a criminal sentence beyond the statutory maximum. Part II of this note explains both the *Apprendi* rule requiring the prosecution to prove any fact that enhances a sentence beyond a reasonable doubt to a jury and the prior conviction exception to this rule. Part III offers a brief history of the juvenile justice system, including a description of the system's traditional purposes, the evolution of juveniles' due process rights, and the effect of get-tough-on-crime legislation. Part IV explains the split that exists both between the federal circuit courts and between state courts about the treatment of juvenile adjudications as prior convictions. Part V outlines the constitutional dilemmas that arise when courts use juvenile adjudications for sentence enhancement. Finally, this note offers a compromised solution in Part V.C that recognizes both criminal defendants' constitutional rights and society's need to protect itself from repeat criminal offenders.

II. SENTENCE ENHANCEMENT AND THE RIGHT TO A JURY TRIAL

A. *Apprendi and the Prior Conviction Exception*

On December 22, 1994, Charles C. Apprendi, Jr. fired a gun into the home of an African-American family living in an "all-white" community in New Jersey.¹⁶ After the defendant pleaded guilty, the trial judge found by a preponderance of the evidence that he committed the offense to intimidate members of another race.¹⁷ Using the state's hate crime law, the judge increased the defendant's sentence.¹⁸ Appealing the sentence, the defendant argued that the Due Process

16. *Apprendi v. New Jersey*, 530 U.S. 466, 469 (2000). The police arrested the defendant shortly after the crime was committed, and he admitted to being the shooter. *Id.* During questioning, Apprendi explained that he shot into the house because he did not want "blacks" living in his neighborhood. *Id.* The defendant entered a plea agreement with the state in which he "pleaded guilty to two counts . . . of second-degree possession of a firearm for an unlawful purpose." *Id.* Under state law, a second-degree offense carried a penalty of five to ten years; however, the state reserved the right to request a higher sentence under a hate crime statute. *Id.* at 470.

17. *Id.* at 471.

18. *Id.* Without the sentence enhancement, the maximum punishment the judge could have ordered would have been a ten-year imprisonment term. *Id.* at 474. The racial-bias enhancer doubled the maximum range, and the judge sentenced Apprendi to a twelve-year term. *Id.* Both the Appellate Division of the Superior Court of New Jersey and the New Jersey Supreme Court upheld the sentence enhancement. *Id.* at 471-72.

Clause of the Fourteenth Amendment requires a jury to find racial bias beyond a reasonable doubt.¹⁹ The Supreme Court held that due process and the right to a jury require the prosecution to prove every element of the charged crime beyond a reasonable doubt to a jury.²⁰

The Court explained that the conviction of a crime and the subsequent sentencing could result in deprivation of liberty and stigmatization of the criminal defendant.²¹ To ensure that such deprivations do not occur erroneously, the government must provide criminal defendants with certain procedural protections.²² These procedural protections include the right to a jury trial and the requirement that the prosecution prove the crime beyond a reasonable doubt.²³ The Constitution affords such protections not only to the determination of a criminal defendant's culpability, but also to the determination of the length of his sentence.²⁴ The Court concluded that before a judge relies upon a fact to increase a criminal sentence beyond the statutory maximum, the prosecution must prove that fact beyond a reasonable doubt to a jury.²⁵ Because the finding of racial bias doubled the defendant's maximum sentence, the prosecution should have proved the racial bias element beyond a reasonable doubt to a jury.²⁶

The Court recognized one exception to the general rule, holding that a court does not have to submit the fact of a prior conviction to a jury when the court is using the conviction for sentence enhancement.²⁷ The Court relied on its decisions in *Almendarez-Torres v. United States*²⁸ and *Jones v. United States*²⁹ to explain both the origin and validity of the prior conviction exception.³⁰ In *Almendarez-Torres*, the Court addressed the issue of whether a court should treat a prior conviction as a sentencing factor rather than as an element of the charged crime.³¹ If a fact is an element of a crime, the prosecution must state it in the indictment and prove it beyond a reasonable doubt to a jury.³² Ultimately, the Court decided that a prior conviction is a sentencing factor and not an element of a crime.³³ To justify treating a

19. *Id.* at 471.

20. *Id.* at 490. The Supreme Court reversed the New Jersey Supreme Court's decision by a 5-4 vote. *Id.* at 468.

21. *Id.* at 484.

22. *Id.*

23. *Id.* at 483-84.

24. *Id.* at 484.

25. *Id.* at 490.

26. *Id.* at 497.

27. *Id.* at 490.

28. 523 U.S. 224 (1998).

29. 526 U.S. 227 (1999).

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

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

32. *Id.* at 239.

33. *Id.* at 243. In *Almendarez-Torres*, the Court determined that a statute authorizing an increased prison sentence for an alien who re-entered the United States after deportation for the conviction of an aggravated felony was constitutional. *Id.* at 226-27. The Court rejected Al-

prior conviction as a sentencing factor, the Court based its decision, in part, on the fact that recidivism is a traditional sentencing factor that judges have regularly used to enhance defendants' sentences.³⁴

In *Jones*, the Supreme Court clarified its rationale from *Almendarez-Torres* that treated a prior conviction as a sentencing factor rather than an element of an offense.³⁵ The Court explained that using the fact of a prior conviction to enhance a sentence is constitutionally distinct from the use of other facts.³⁶ When enhancing a sentence, the use of a prior conviction does not raise the same due process and Sixth Amendment concerns as the use of other facts because "a prior conviction must itself have been established through procedures satisfying the fair notice, reasonable doubt, and jury trial guarantees."³⁷ A prior conviction is sufficiently reliable because the prosecution obtains the conviction in a manner that ensures factual accuracy and reliability.³⁸ The Court would not have recognized the prior conviction exception if its reliability could not be guaranteed by the use of procedural protections.³⁹

B. *An Affirmation of the Importance of the Jury: Ring and Blakely*

Since its decision in *Apprendi*, the Supreme Court has applied its holding in various cases. In *Ring v. Arizona*,⁴⁰ the Court addressed

mendez-Torres' argument that the fact of a conviction is an element of the charged crime that the prosecution should state in the indictment. *Id.* at 242-43.

34. *Id.* at 243. America has a long tradition, dating back to colonial times, of laws punishing criminals for recidivism. *Id.* (citing *Parke v. Raley*, 506 U.S. 20, 26 (1992)). Citing various prior Supreme Court decisions, the Court in *Almendarez-Torres* explained that courts treat recidivism as a sentencing factor to increase punishment. *Id.* at 244. Because recidivism relates to the punishment of a crime rather than the commission of a crime, courts should treat recidivism as a sentencing factor that does not have to be proved beyond a reasonable doubt to a jury. *Id.*

35. *Jones v. United States*, 526 U.S. 227, 249 (1999). In *Jones*, the Court addressed the constitutionality of a statute that authorized a higher maximum sentence using a fact that the prosecution neither charged in the indictment nor proved to a jury beyond a reasonable doubt. *Id.* at 231-32.

36. *Id.* at 249.

37. *Id.*

38. *Apprendi v. United States*, 530 U.S. 466, 488 (2000).

39. *See id.* at 488-90.

40. 536 U.S. 584 (2002). The defendant was accused of murdering the driver of an armored van and stealing approximately \$562,000 in cash and \$271,000 in checks. *Id.* at 589. The jury convicted him of felony murder committed during the course of a robbery. *Id.* at 592. At trial, the prosecution was unable to prove beyond a reasonable doubt that the defendant was an active participant in the robbery or in the murder of the driver. *Id.* at 591. Between the end of his trial and the beginning of his sentencing hearing, one of his alleged co-conspirators pleaded guilty and agreed to testify against Ring. *Id.* at 593. This co-conspirator testified that the defendant actively planned the robbery and was the one who actually shot and murdered the driver. *Id.* The judge concluded that the defendant was the person who had actually committed the murder, even though the jury was unable to reach that conclusion, and sentenced Ring to death. *Id.* at 594-95. The Arizona Supreme Court upheld the verdict because the United States Supreme Court had previously upheld Arizona's sentencing scheme in *Walton v. Arizona*, 497 U.S. 639 (1991). *Ring*, 536 U.S. at 595-96. The United States Supreme Court, however, overruled *Walton* and held that to comply with the Sixth Amendment the prosecution must prove to the jury beyond a reasonable doubt any factual determination that increases a defendant's sentence. *Id.* at 589.

the constitutionality of an Arizona sentencing scheme, which required a judge to determine the presence of aggravating circumstances that he later used to decide whether the defendant should receive the death penalty.⁴¹ The Court ruled that the sentencing scheme was unconstitutional because it allowed an increased sentence based on facts never submitted to a jury.⁴² Invoking *Apprendi*, the Court explained that when a judge increases a defendant's sentence based on a fact, that fact must be proved beyond a reasonable doubt to a jury.⁴³ The Constitution entitles a criminal defendant to the guarantees of a jury trial when he desires one, even when a non-jury determination is arguably more efficient or fair.⁴⁴ The judiciary should fully honor the right to a jury trial because the United States Constitution clearly grants this right.⁴⁵ The Court in *Ring* concluded that if a criminal defendant's sentence is increased based on the finding of a fact, then the Sixth Amendment requires the prosecution to prove that fact beyond a reasonable doubt to a jury.⁴⁶

The Court applied *Apprendi* again in *Blakely v. Washington*.⁴⁷ Washington's sentencing scheme allowed a judge to impose an "exceptional sentence" beyond the statutory sentencing range.⁴⁸ In *Blakely*, the Court reversed a criminal defendant's sentence, that a judge had increased by thirty-seven months beyond the statutory maximum, because the State had not submitted the facts to a jury.⁴⁹ With its decision, the Court reiterated the importance of the right to a jury and its function in the criminal justice system. Following *Blakely*, the Court applied the same reasoning to invalidate the federal sentencing guidelines.⁵⁰ The Court explained that its strict adherence to *Apprendi* was necessary to recognize the right to a jury trial as a fundamental part of America's constitutional structure rather than a mere

41. *Ring*, 536 U.S. at 584.

42. *Id.* at 585.

43. *Id.* at 602.

44. *Id.* at 607. The right to a jury trial is not dependant on "relative rationality, fairness, or efficiency of potential fact finders." *Id.*

45. *Id.* at 609.

46. *Id.*

47. 124 S. Ct. 2531 (2004). After his wife filed for divorce, Robert Howard Blakely, Jr. kidnapped his wife at knifepoint. *Id.* at 2534. He took her to a friend's house in Montana where the police arrested him. *Id.* The defendant pleaded guilty to second-degree kidnapping. *Id.* at 2534-35. Based on the facts admitted by the defendant, Washington law allowed for a maximum sentence of fifty-three months. *Id.* at 2535. Washington law also allowed the judge to issue a sentence exceeding the statutory maximum if he found "substantial and compelling reasons" for doing so. *Id.* After hearing testimony from Blakely's wife at the sentencing hearing, the judge decided to impose an "exceptional sentence" of ninety months on the basis that the defendant acted with "deliberate cruelty." *Id.* The Court of Appeals of Washington affirmed, and the Washington Supreme Court denied discretionary review. *Id.* at 2536.

48. *Id.* at 2535.

49. *Id.* at 2537.

50. *United States v. Booker*, 125 S. Ct. 738, 747-48, 756 (2005).

procedural formality.⁵¹ These decisions illustrate the Court's commitment to the Sixth Amendment guarantee of the right to a jury trial.⁵²

III. HISTORY OF THE JUVENILE JUSTICE SYSTEM

A. *The Traditional Purpose of Juvenile Justice*

Illinois created the first separate juvenile court system with the passage of the Illinois Juvenile Court Act (IJCA) in 1899.⁵³ The IJCA articulated the main purposes of the juvenile courts as being "the protection and proper development of children, the protection of society, and the establishment of respect for, and protection of the family."⁵⁴ Nearly every state had a separate juvenile court by 1925.⁵⁵ The majority of states identified the most important interest of the juvenile court as the protection of children.⁵⁶ Reformers viewed early juvenile courts as a place to protect children from the stigma and harsh sentences of conviction in the adult criminal system.⁵⁷ By the 1920s, states began to separate juvenile offenders from adult criminal offenders.⁵⁸ The 1920s also brought agreement among juvenile justice experts about what practices juvenile courts should standardize.⁵⁹ These standardized practices included "broad and exclusive jurisdiction until at least age eighteen, private hearings, the complaint system, detention, probation, confidential records, clinical exams, and individualized treatment."⁶⁰

Traditionally, juvenile courts used informal and nonadversarial proceedings.⁶¹ Early dispositional guidelines were indeterminate and gave judges wide discretion to order individualized sanctions that served to correct the juvenile's behavior rather than to punish him.⁶² Juvenile courts rejected traditional theories that punishment should be a form of retribution and incapacitation.⁶³ The procedural informality and broad judicial discretion of the juvenile court created a

51. *Blakely*, 124 S. Ct. at 2538-39. Just as the people retain control over the legislative branch through elections, the people retain control over the judiciary through juries. *Id.* at 2539.

52. *Id.* at 2538.

53. David S. Tanenhaus, *The Evolution of Juvenile Courts in the Early Twentieth Century: Beyond the Myth of Immaculate Construction*, in *A CENTURY OF JUVENILE JUSTICE* 42, 42 (Margaret K. Rosenheim et al. eds., 2002).

54. CHRISTOPHER P. MANFREDI, *THE SUPREME COURT AND JUVENILE JUSTICE* 28 (1998).

55. Tanenhaus, *supra* note 53, at 45. In 1925, Maine and Wyoming were the only states that did not have a separate juvenile court. *Id.*

56. MANFREDI, *supra* note 54, at 28.

57. Tanenhaus, *supra* note 53, at 43.

58. *Id.* at 69.

59. *Id.*

60. *Id.* at 69-70.

61. MANFREDI, *supra* note 54, at 31.

62. *Id.*

63. *Id.*

system in which juvenile offenders could be rehabilitated both for the well-being of the juvenile and of society.⁶⁴

B. *The Evolution of Juveniles' Due Process Rights*

During the late 1960s and the early 1970s, the Supreme Court heard many cases regarding juveniles' constitutional rights because of the perceived ineffectiveness and unfairness of the juvenile justice system.⁶⁵ The Court first recognized that the Constitution guaranteed juveniles due process rights in *Kent v. United States*.⁶⁶ Without formal notice or a hearing, the juvenile court transferred Morris Kent to the adult criminal court system.⁶⁷ In *Kent*, the Court held that juveniles were entitled to due process rights, including a hearing, before being transferred to the adult criminal court system.⁶⁸ Because the waiver process could potentially force a juvenile into the severe adult system, due process protections were necessary to protect juveniles' rights.⁶⁹

Kent is significant because the Court dismissed *parens patriae* as a justification for procedural arbitrariness.⁷⁰ Many states were incapable, due to scarce resources and personnel, of acting as *parens patriae* to juveniles accused of violating the law.⁷¹ When reviewing the operation of juvenile courts, the Court expressed "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."⁷²

64. *Id.*

65. *Id.* at 32; see *Breed v. Jones*, 421 U.S. 519, 520 (1975); *McKeiver v. Pennsylvania*, 403 U.S. 528, 530 (1971); *In re Winship*, 397 U.S. 358, 359 (1970); *In re Gault*, 387 U.S. 1, 4 (1967); *Kent v. United States*, 383 U.S. 541, 542-43 (1966). The informality of traditional juvenile courts caused the public to view the courts as unfair and ineffective. MANFREDI, *supra* note 54, at 31-32.

66. See *Kent*, 383 U.S. at 562.

67. *Id.* at 546. *Kent*, at the age of sixteen, was accused of robbery and rape. *Id.* at 543. The juvenile court refused to rule on *Kent's* request to view the social records on which the judge supposedly based his waiver decision. *Id.* at 546. In addition, the juvenile court judge did not provide a justification as to why he waived *Kent* to adult status. *Id.*

68. *Id.* at 561. The Court explained that the hearing could be informal, as long as it complied with the "essentials of due process and fair treatment." *Id.* at 562. The Court further required judges to give juveniles' counsel access to the records that the judges relied upon in making the waiver decision. *Id.* at 561. Judges also must provide a brief statement of the facts that they considered when making the waiver decision. *Id.*

69. *Id.* at 560.

70. *Id.* at 554-55. The Court swept aside the states' argument that juvenile justice proceedings were civil, not criminal, in nature because the state was acting on behalf of the juvenile's best interest under the concept of *parens patriae*. *Id.* *Parens patriae* is the concept that the state has the responsibility to care for and protect children from their parents and other adults. PRESTON ELROD & R. SCOTT RYDER, *JUVENILE JUSTICE: A SOCIAL, HISTORICAL, AND LEGAL PERSPECTIVE* 357 (1999). The concept of *parens patriae* emerged from the paternalistic legal theory that children are dependent on others and incapable of making decisions. Elizabeth S. Scott, *The Legal Construction of Childhood*, in *A CENTURY OF JUVENILE JUSTICE* 113, 115 (Margaret K. Rosenheim et al. eds., 2002). To provide for children and protect them from their own poor decisions, it was legally acceptable that adults and the state have authority to control children's lives. *Id.*

71. *Kent*, 383 U.S. at 556.

72. *Id.*

After its landmark decision in *Kent*, the Court decided another important case, *In re Gault*.⁷³ In its decision, the Supreme Court held that juvenile courts' informal procedures amounted to a denial of juveniles' fundamental due process rights.⁷⁴ Although the Court recognized that juvenile courts were attempting to help juveniles, it reasoned that this worthy purpose did not justify informal procedure, particularly when a juvenile's liberty was threatened.⁷⁵ To ensure that juveniles receive the essentials of fair treatment during an adjudicatory hearing, the Court found that they were entitled to certain due process rights under the United States Constitution.⁷⁶ These rights include the right to reasonable notice of the charges, the right to notice of counsel, the right to confrontation, and the right against self-incrimination.⁷⁷

By 1970, the Supreme Court had ruled that the due process notion of fundamental fairness entitled juveniles to various procedural protections in juvenile courts.⁷⁸ In *McKeiver v. Pennsylvania*,⁷⁹ however, the Court held that juveniles did not have the right to a jury trial when being adjudicated in the juvenile justice system.⁸⁰ That the majority of states did not grant juveniles the right to a jury trial was important, but not conclusive, in helping the Court determine that juveniles did not have a fundamental right to a jury trial.⁸¹ Further justifying its decision, the Court expressed doubt that imposing the right to a jury trial would improve juvenile courts' fact-finding ability.⁸² The Court claimed that imposing the right to a jury trial, if anything, would jeopardize the unique nature of the juvenile justice system.⁸³ The non-criminal juvenile justice system in place at the time provided certain rehabilitative benefits to juveniles.⁸⁴ Granting juveniles the right to a jury trial would threaten these rehabilitative

73. 387 U.S. 1 (1967). The police took Gerald Gault, when he was fifteen, into custody for allegedly making a lewd and obscene phone call to a neighbor. *Id.* at 4. Neither of his parents received notice that the police had taken Gault into custody. *Id.* at 5. Gault's mother only found out that Gault was in custody when she returned home from work and sent Gault's brother to look for him. *Id.* Gault's brother learned from friends that Gault was in custody. *Id.* When Gault's mother picked him up at the detention home, an officer told her that there would be a hearing the following day. *Id.* At the hearing, the accuser was not present, the judge did not swear anyone in, and the court did not make a record of the proceeding. *Id.* At a subsequent hearing, the judge found Gault to be a juvenile delinquent and committed him to an "industrial school" until the age of twenty-one. *Id.* at 7. Because state law did not allow Gault to appeal the decision, he filed a habeas corpus petition. *Id.* at 8.

74. *Id.* at 30-31.

75. *Id.* at 26-27.

76. *Id.* at 30-31.

77. *Id.* at 31-43.

78. *Id.* at 30-31.

79. 403 U.S. 528 (1971).

80. *Id.* at 545.

81. *Id.* at 548.

82. *Id.* at 547.

83. *Id.*

84. *Id.*

benefits by creating delay, imposing formality, forcing juvenile courts to be more adversarial, and possibly even resulting in public trials.⁸⁵ Because granting juveniles the right to a jury trial would destroy the juvenile justice system by turning it into the adult criminal system, the Court refused to extend this right to juveniles.⁸⁶

After *McKeiver*, the Supreme Court decided two additional cases addressing the due process rights of juveniles.⁸⁷ In *In re Winship*,⁸⁸ the Court held that the prosecution must prove all the elements of the juvenile offense beyond a reasonable doubt.⁸⁹ In *Breed v. Jones*,⁹⁰ the Court held that double jeopardy attaches during a juvenile adjudication.⁹¹ Since its many decisions on the subject in the 1970s, the Court has not recently addressed the due process rights of juveniles.⁹²

C. *The Modern Approach to Juvenile Justice*

To address the public's concern about crimes committed by juveniles, state legislatures began to reform the juvenile justice system.⁹³ Several states adopted get-tough polices that mandated a more punitive response to juvenile offenders.⁹⁴ Instead of rehabilitation, states began to identify other purposes of the juvenile justice system, such as public safety, accountability, and punishment.⁹⁵ This get-tough legislation included provisions that provided for a waiver process to move juveniles into adult criminal court,⁹⁶ presumptive sentencing,⁹⁷ more severe punishments,⁹⁸ and an increase of the juvenile

85. *Id.* at 550.

86. *Id.* at 551.

87. *Breed v. Jones*, 421 U.S. 519, 541 (1975); *In re Winship*, 397 U.S. 358, 368 (1970).

88. 397 U.S. 358 (1970).

89. *Id.* at 368.

90. 421 U.S. 519 (1975).

91. *Id.* at 541.

92. Jeffrey A. Butts & Ojmarrh Mitchell, *Brick by Brick: Dismantling the Border Between Juvenile and Adult Justice*, in 2 CRIMINAL JUSTICE 2000: BOUNDARY CHANGES IN CRIMINAL JUSTICE ORGANIZATIONS 167, 202 (Charles M. Friel ed., 2000).

93. Michael F. Aloisi, *Emerging Trends and Issues in Juvenile Justice*, in JUVENILE DELINQUENCY: HISTORICAL, THEORETICAL, AND SOCIETAL REACTIONS TO YOUTH 424, 427 (Paul M. Sharp & Barry W. Hancock eds., 2d ed. 1998).

94. *Id.*

95. *Id.*

96. *Id.* To comply with due process, waiver legislation must provide the procedural formalities required by *Kent*. See *Kent v. United States*, 383 U.S. 541, 560-62 (1966). There are generally three different methods by which juveniles are waived into the adult criminal system: (1) Traditional waivers allow a judge, after a hearing, to make the waiver decision; (2) Prosecutorial waivers vest the waiver decision in the executive branch; and (3) Legislative waivers are statutory provisions that require juveniles who commit specific offenses to be tried in the adult criminal system. ELROD & RYDER, *supra* note 70, at 10.

97. Aloisi, *supra* note 93, at 427.

98. ELROD & RYDER, *supra* note 70, at 392. Many states have laws that require a mandatory sentence when a juvenile commits a specified serious crime. *Id.* States also have laws that allow a court to impose both a juvenile and an adult sentence. *Id.*

court's jurisdiction.⁹⁹ These provisions created a system that punitively punished a juvenile as a criminal without increasing the procedural safeguards due to the juvenile.¹⁰⁰ Notably, the Supreme Court decided *McKeiver* before the criminalization of the juvenile justice system.¹⁰¹

IV. A JUVENILE ADJUDICATION AS A PRIOR CONVICTION

A. *Federal Circuit Split*

The use of juvenile adjudications for sentence enhancement purposes has recently been the focus of much debate on the federal circuit due to the Armed Career Criminal Act (ACCA).¹⁰² The ACCA mandates a minimum of ten years in prison for any person who violates the felon-in-possession statute; in addition, the Act allows a judge to increase the defendant's sentence an additional five years when the defendant has three previous violent felony or serious drug convictions.¹⁰³ Congress defined conviction to include "a finding that a person has committed an act of juvenile delinquency involving a violent felony."¹⁰⁴ Many defendants have challenged the courts' ability to use a juvenile adjudication as a prior conviction under the ACCA.¹⁰⁵ There is no consensus among the federal circuit courts on this issue. The majority view allows courts to use juvenile adjudications for sentence enhancement.¹⁰⁶ Only the United States Court of Appeals for the Ninth Circuit holds that a juvenile adjudication is not a prior conviction and does not allow its use as a sentence enhancer.¹⁰⁷

1. Minority View

In *United States v. Tighe*,¹⁰⁸ the defendant argued that it was unconstitutional to increase his sentence under the ACCA on the basis that he committed a violent offense as a juvenile.¹⁰⁹ The court's analysis focused on whether juvenile adjudications are prior convictions under *Apprendi*.¹¹⁰ According to the Ninth Circuit, there are impor-

99. *Id.* By lowering the age limit at which juveniles can first enter the system and by raising the age limit at which juveniles are released from the system, state legislators have increased juvenile courts' jurisdiction. *Id.*

100. Feld, *supra* note 12, at 1156.

101. *Id.* at 1156-57.

102. 18 U.S.C. § 924(e) (2000 & Supp. II 2002).

103. *Id.* § 924(a)(2), (e)(1).

104. *Id.* § 924(e)(2)(C).

105. *See, e.g.,* *United States v. Burge*, 407 F.3d 1183, 1185 (11th Cir. 2005); *United States v. Jones*, 332 F.3d 688, 689 (3d Cir. 2003), *cert. denied*, 540 U.S. 1150 (2004); *United States v. Smalley*, 294 F.3d 1030, 1031 (8th Cir. 2002), *cert. denied*, 537 U.S. 1114 (2003).

106. *See Burge*, 407 F.3d at 1191; *Jones*, 332 F.3d at 696; *Smalley*, 294 F.3d at 1033.

107. *United States v. Tighe*, 266 F.3d 1187, 1194-95 (9th Cir. 2001).

108. 266 F.3d 1187 (9th Cir. 2001).

109. *Id.* at 1191.

110. *Id.* at 1189-90.

tant constitutional and reliability differences between adult criminal convictions and non-jury juvenile adjudications.¹¹¹ After evaluating *Jones* and *Apprendi*, the Ninth Circuit interpreted *Apprendi's* prior conviction exception as being limited to convictions the prosecution acquired after proving its case beyond a reasonable doubt to a jury.¹¹² Because the prosecution does not acquire juvenile adjudications by the use of a jury trial, the court found that the adjudications do not comply with due process.¹¹³

The Ninth Circuit concluded that the prior conviction exception was a narrow exception to the general rule espoused in *Apprendi*.¹¹⁴ The prior conviction exception, therefore, was only applicable if the government acquired the conviction through a proceeding that afforded the constitutional necessities of due process and a jury trial.¹¹⁵ Because the government obtains juvenile adjudications in a manner that does not satisfy these constitutional imperatives, the Ninth Circuit concluded that courts cannot use them for sentence enhancement.¹¹⁶

2. Majority View

The United States Courts of Appeals for the Third, Eighth and Eleventh Circuits have heard factually similar cases involving a criminal defendant's sentence enhancement under the ACCA based on a prior juvenile adjudication.¹¹⁷ These courts decided that a juvenile adjudication is a prior conviction under *Apprendi* because the Supreme Court has never identified the specific procedural safeguards that must attach to an adjudication before it can qualify for the prior con-

111. *Id.* at 1192-93.

112. *Id.* at 1194.

113. *Id.* at 1194-95.

114. *Id.*

115. *Id.*

116. *Id.* at 1195.

117. See *United States v. Burge*, 407 F.3d 1183 (11th Cir. 2005); *United States v. Jones*, 332 F.3d 688 (3d Cir. 2003), *cert. denied*, 540 U.S. 1150 (2004); *United States v. Smalley*, 294 F.3d 1030 (8th Cir. 2002), *cert. denied*, 537 U.S. 1114 (2003).

In *Smalley*, the defendant pleaded guilty to being a felon in possession of a firearm. *Smalley*, 294 F.3d at 1031. The district court enhanced his sentence under the ACCA, relying upon his prior juvenile adjudications. *Id.* The defendant appealed and the Eighth Circuit framed the issue as whether a juvenile adjudication is a prior conviction under *Apprendi*. *Id.*

In *Jones*, the defendant pleaded guilty to a felon in possession of a firearm charge. *Jones*, 332 F.3d at 690. The district court enhanced his sentence under the ACCA after finding that he had two adult felony drug convictions and a juvenile adjudication. *Id.* The defendant appealed the decision arguing that his juvenile adjudication could not qualify for the *Apprendi* prior conviction exception because the prosecution obtained it without its submission to a jury. *Id.*

In *Burge*, the defendant pleaded guilty to being a felon in possession of a firearm. *Burge*, 407 F.3d at 1185. Because he had two prior adult burglary convictions and one prior juvenile adjudication, the district court enhanced his sentence under the ACCA. *Id.* at 1186. The defendant appealed, arguing that the use of his prior juvenile adjudication for sentence enhancement purposes violated *Apprendi*. *Id.*

viction exception.¹¹⁸ Thus, the Third, Eighth, and Eleventh Circuits allow the use of a juvenile adjudication as a sentence enhancer without requiring the prosecution to prove the adjudication beyond a reasonable doubt to a jury.¹¹⁹

The Eighth Circuit was the first circuit court to decide that juvenile adjudications qualify as sentence enhancers.¹²⁰ In *United States v. Smalley*,¹²¹ the Eighth Circuit explicitly rejected *Tighe*, finding that the absence of the right to a jury trial does not automatically prohibit a court from treating the juvenile adjudication as a prior conviction under the *Apprendi* exception.¹²² The court decided that the procedural safeguards afforded to juveniles, including the right to counsel, the right to notice, the right to cross-examine witnesses, the privilege against self-incrimination, and the guarantee that an adjudication must be proved beyond a reasonable doubt, are sufficient to result in a reliable adjudication.¹²³ The court in *Smalley* reasoned that juvenile adjudications, like adult convictions, are reliable enough for courts to use for sentence enhancement without violating due process.¹²⁴ Both the Third and Eleventh Circuits adopted the *Smalley* approach that courts can use a juvenile adjudication as a sentence enhancer if the government obtained it with all the constitutional protections due to the juvenile.¹²⁵

B. State Split

States have adopted different approaches for allowing the use of juvenile adjudications as sentence enhancers.¹²⁶ One approach, used by many states, allows courts to consider a prior juvenile adjudication as part of the defendant's criminal history.¹²⁷ Another approach

118. *Burge*, 407 F.3d at 1191; *Jones*, 332 F.3d at 696; *Smalley*, 294 F.3d at 1032.

119. *Burge*, 407 F.3d at 1191; *Jones*, 332 F.3d at 696; *Smalley*, 294 F.3d at 1033.

120. *See Smalley*, 294 F.3d at 1033.

121. 294 F.3d 1030 (8th Cir. 2002).

122. *Id.* at 1033.

123. *Burge*, 407 F.3d at 1191; *Jones*, 332 F.3d at 696; *Smalley*, 294 F.3d at 1033.

124. *Smalley*, 294 F.3d at 1033.

125. *Burge*, 407 F.3d at 1191; *Jones*, 332 F.3d at 696.

126. Ellen Marrus, "That Isn't Fair, Judge": *The Costs of Using Prior Juvenile Delinquency Adjudications in Criminal Court Sentencing*, 40 Hous. L. Rev. 1323, 1345 & n.144 (2004); Sanborn, *supra* note 6, at 20. Twenty-four jurisdictions allow courts to use juvenile adjudications to enhance a criminal sentence beyond the statutory maximum. Sanborn, *supra* note 6, at 22. Although this note only addresses the unconstitutionality of courts' use of juvenile adjudications to enhance a sentence beyond the statutory maximum, it is important to remember the potential unconstitutionality of the use of juvenile adjudications in a criminal court for any purpose. Very few states completely bar the use of prior juvenile adjudications for any purpose in adult criminal courts. Marrus, *supra* at 1344; Sanborn, *supra* note 6, at 21.

127. Sanborn, *supra* note 6, at 23. Some legal commentators argue that such statutory schemes do not actually allow courts to use juvenile adjudications for sentence enhancement purposes. Marrus, *supra* note 126, at 1343. These commentators argue that this practice merely allows a court to sentence the absolute statutory maximum based on a prior juvenile adjudication. *Id.* In reality, however, the addition of juvenile adjudications to a defendant's criminal history ultimately results in an enhanced sentence. *See* Sanborn, *supra* note 6, at 23.

treats juvenile adjudications as aggravating factors that can both increase a sentence and trigger consecutive sentences.¹²⁸ Finally, some states have “three strikes” provisions that allow a juvenile adjudication to serve as a strike, as long as it is not the third one.¹²⁹

The majority of states that have addressed the constitutionality of such provisions have found that as long as juveniles receive all the process they are constitutionally due in the juvenile system, an adult court can treat a juvenile adjudication as a prior conviction for sentence enhancement.¹³⁰ In *State v. Brown*,¹³¹ however, the Louisiana Supreme Court adopted the minority view and held that courts cannot use a juvenile adjudication as a sentence enhancer.¹³² The defendant pleaded guilty to one count of robbery, and a jury found him guilty of a separate count of armed robbery.¹³³ After his conviction, the State charged the defendant under its habitual offender law and enhanced his sentence based on a prior juvenile adjudication.¹³⁴ He challenged the sentence and argued that the trial court’s use of his juvenile adjudication for sentence enhancement violated *Apprendi*.¹³⁵ The Louisiana Supreme Court distinguished civil adjudications from criminal convictions, noting that juvenile courts afford juveniles less due process, which results in a proceeding that is more civil than criminal.¹³⁶ The court decided that even though juvenile adjudications are sufficiently reliable for use in the juvenile court system, the absence of the right to a jury trial makes juvenile adjudications too unreliable for use as an adult sentence enhancer.¹³⁷

V. JUVENILE ADJUDICATIONS ARE NOT PRIOR CONVICTIONS UNDER *APPRENDI*

The legal issue with using juvenile adjudications as sentence enhancers is not the constitutional validity of the adjudication itself, but instead the constitutional validity of the adjudication’s subsequent use in an adult criminal court. It is clearly constitutional for the government to adjudicate a juvenile for an offense in a justice system that

128. Sanborn, *supra* note 6, at 23-24.

129. *Id.* at 24. “Three Strikes” states treat first-time adult offenders as habitual offenders if they have two prior juvenile adjudications. *Id.* After three strikes, a defendant can receive a life sentence. *Id.*

130. *See, e.g.*, *People v. Bowden*, 125 Cal. Rptr. 2d 513, 518 (Cal. Ct. App. 2002); *Ryle v. State*, 819 N.E.2d 119, 123 (Ind. Ct. App. 2004); *State v. Hiitt*, 42 P.3d 732, 740 (Kan. 2002), *cert. denied*, 537 U.S. 1104 (2003).

131. 879 So. 2d 1276 (La. 2004), *cert. denied*, 125 S. Ct. 1310 (2005).

132. *Id.* at 1290.

133. *Id.* at 1278.

134. *Id.* Louisiana’s habitual offender law provides that any person who has previously been convicted of a felony or adjudicated as a juvenile of a serious drug or violent offense will receive an enhanced sentence if convicted of a second felony. *Id.* at 1279.

135. *Id.* at 1278.

136. *Id.* at 1289.

137. *Id.* at 1290.

does not afford the juvenile all the rights that it would afford an adult.¹³⁸ Juvenile adjudications, however, should not be used for enhancement purposes because the government obtains them without giving juveniles the right to a jury trial and without recognizing juveniles' right to counsel.¹³⁹ A juvenile punishment only restricts a juvenile's freedom for a limited amount of time, while the use of a juvenile adjudication for sentence enhancement may result in a substantially longer term of imprisonment.¹⁴⁰ The government does not obtain juvenile adjudications with sufficient due process to warrant this more serious curtailment of freedom.¹⁴¹

To understand why courts should not treat a juvenile adjudication as a prior conviction, the history of the prior conviction exception is important.¹⁴² The court in *Almendarez-Torres* initially recognized the exception on the basis that recidivism is a traditional sentencing factor used by the courts.¹⁴³ Historically, prior juvenile criminality was not used as a sentencing factor because records of juvenile adjudications were confidential and often expunged.¹⁴⁴ The Court created the prior conviction exception because the government obtains convictions in a manner that satisfies the requirements of fair notice, proof beyond a reasonable doubt, and the right to a jury trial.¹⁴⁵ The case that initially recognized the prior conviction exception, *Almendarez-Torres*, was decided by a five to four vote.¹⁴⁶ In *Apprendi*, the majority remained suspect about the validity of the prior conviction exception, calling its future into question.¹⁴⁷

With the changing Supreme Court, it is difficult to predict whether the Court would still view *Almendarez-Torres* as good law.¹⁴⁸ Refusing to hear cases that address whether to treat juvenile adjudications as prior convictions under *Apprendi*, the Supreme Court has denied petitions for writ of certiorari both in cases that have adopted the

138. Sanborn, *supra* note 6, at 42.

139. *See infra* Part V.A-B.

140. *See infra* notes 152-53 and accompanying text. Between the ages of eighteen and twenty-three, most juvenile courts lose jurisdiction over an adjudicated juvenile, which means that the juvenile's sentence ends when he reaches the specified age. *See infra* note 152 and accompanying text.

141. *See Brown*, 879 So. 2d at 1289.

142. According to the Court in *Apprendi*, the fact of a prior conviction is vastly different from other kinds of facts because the fact of a prior conviction has the necessary procedural safeguards in place to mitigate any due process or jury trial concerns. *Apprendi v. New Jersey*, 530 U.S. 466, 488 (2000).

143. *Almendarez-Torres v. United States*, 523 U.S. 224, 243 (1998).

144. *See Tanenhaus*, *supra* note 53, at 69-70.

145. *Apprendi*, 530 U.S. at 488; *Jones v. United States*, 526 U.S. 227, 249 (1999).

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

147. *Apprendi*, 530 U.S. at 489; *see* Kevin R. Reitz, *The New Sentencing Conundrum: Policy and Constitutional Law at Cross-Purposes*, 105 COLUM. L. REV. 1082, 1099-1100 (2005).

148. Reitz, *supra* note 147, at 1100. The current makeup of the Supreme Court has changed with the death of Chief Justice William H. Rehnquist and the retirement of Justice Sandra Day O'Connor. With the appointment of two new Justices, it is difficult to predict the Court's future position.

majority view and in cases that have adopted the minority view.¹⁴⁹ Even if the Court were to uphold the prior conviction exception, it is unlikely that it would treat juvenile adjudications as prior convictions because the government does not acquire juvenile adjudications with the same procedural safeguards that it uses to acquire adult convictions.¹⁵⁰

A. *Juvenile Courts Do Not Provide Juveniles the Right to a Jury Trial*

Although the Supreme Court has held that juveniles do not have a constitutional right to a jury trial,¹⁵¹ the prosecution's subsequent use of a non-jury juvenile adjudication for sentence enhancement raises concerns about whether the adjudication is sufficiently reliable and fair. When a court adjudicates a juvenile, his disposition is limited to the time that the juvenile court retains jurisdiction over him.¹⁵² A juvenile adjudication can only result in a limited curtailment of freedom that must end once the juvenile turns a certain age; however, the subsequent use of a juvenile adjudication for sentence enhancement can result in an increased sentence.¹⁵³

The use of juvenile adjudications as sentence enhancers threatens an individual's liberty to such an extent that the government should obtain the underlying juvenile adjudication after complying with the

149. *United States v. Jones*, 332 F.3d 688 (3d Cir. 2003), *cert. denied*, 540 U.S. 1150 (2004); *United States v. Smalley*, 294 F.3d 1030 (8th Cir. 2002), *cert. denied*, 537 U.S. 1114 (2003); *State v. Hitt*, 42 P.3d 732 (Kan. 2002), *cert. denied*, 537 U.S. 1104 (2003); *State v. Brown*, 879 So. 2d 1276 (La. 2004), *cert. denied*, 125 S. Ct. 1310 (2005).

150. *See United States v. Tighe*, 266 F.3d 1187, 1194-95 (9th Cir. 2001); *Brown*, 879 So. 2d at 1289. Because a juvenile adjudication is not a prior conviction, it would have to comply with the requirements of *Apprendi*. For the court to use a juvenile adjudication for sentence enhancement purposes, the prosecution would have to submit the juvenile adjudication to a jury and prove its case beyond a reasonable doubt. Proving the fact of a juvenile adjudication presents many practical and constitutional concerns. It specifically raises the question of how the prosecution should submit this fact to the jury. For instance, the Ninth Circuit expressed concern that the submission of this fact to the jury could prejudice the jury against a criminal defendant. *Tighe*, 266 F.3d at 1194 n.5. In response to this concern, the Ninth Circuit suggested that there should be two juries, one to determine guilt and one to determine sentencing. *Id.*

151. *See McKeiver v. Pennsylvania*, 403 U.S. 528, 545 (1971).

152. Juvenile courts only retain jurisdiction over the juvenile until he reaches a certain age, usually eighteen. *See, e.g., ARIZ. REV. STAT. ANN. § 8-246A* (Supp. 2005); *IOWA CODE ANN. § 232.53* (West Supp. 2005); *N.J. STAT. ANN. § 2A:4A-47* (West Supp. 2005); *WIS. STAT. ANN. § 938.355* (West Supp. 2004). Some states retain juvenile jurisdiction until the age of nineteen. *See, e.g., ALASKA STAT. § 47.12.160* (2004); *MINN. STAT. ANN. § 260B.193(5)* (West Supp. 2005). Other states retain jurisdiction until the juvenile turns twenty-one. *See, e.g., ALA. CODE § 12-15-32* (LexisNexis Supp. 2004); *FLA. STAT. ANN. § 985.313* (West 2001); *GA. CODE ANN. § 15-11-70(d)* (2005); *705 ILL. COMP. STAT. ANN. 405/5-755* (West 1999); *IND. CODE ANN. § 31-30-2-1* (West Supp. 2005); *MASS. GEN. LAWS ch. 119, § 58* (2002); *VA. CODE ANN. § 16.1-285* (2003). Kansas retains jurisdiction over juvenile offenders until they turn twenty-three. *KAN. STAT. ANN. § 38-1604(d)* (2000).

153. *See 18 U.S.C. § 924(e)(1)* (2000 & Supp. II 2002) (enhancing a sentence by five years on the basis of a juvenile adjudication); *State v. Spates*, 36 P.3d 839, 840 (Kan. Ct. App. 2001) (doubling the defendant's sentence on the basis of a juvenile adjudication); Sanborn, *supra* note 6, at 24 (explaining that a juvenile adjudication can be used as a strike in a "Three Strikes" state and result in a life sentence).

right to a jury trial. Juries provide a unique “checking function,” which guarantees that justice is administered fairly and ensures factual accuracy.¹⁵⁴ Studies show that judges are more likely to convict criminal defendants than juries and tend to construe facts in favor of the prosecution.¹⁵⁵ In juvenile courts, some judges adjudicate juveniles just to ensure that they receive social services while serving their sentences.¹⁵⁶ Moreover, when the judge, rather than the jury, determines the guilt of a juvenile, the determination may be “subject to error and bias.”¹⁵⁷ If juveniles were granted the right to a jury trial, the possibility that juveniles would invoke the right to a jury trial would act as a check against overcharging by prosecutors and questionable factual and evidentiary findings by judges.¹⁵⁸

When the Supreme Court decided that juveniles did not have the right to a jury trial, it did so to maintain the civil and rehabilitative nature of the juvenile justice system.¹⁵⁹ In the 1970s, juvenile adjudication hearings were closed to the public, the system was informal, and the records of juvenile adjudications were confidential and not relied upon in criminal prosecutions.¹⁶⁰ Currently, juvenile adjudication hearings are open to the public, the system is more formal, and juvenile adjudications are frequently relied upon in criminal prosecutions.¹⁶¹ The increasingly criminal nature of the juvenile justice system calls into question the validity of the Court’s holding in *McKeiver* that juveniles are not entitled to the right to a jury trial.¹⁶² Although a judicial finding that a juvenile committed an offense may be sufficiently reliable to warrant limited sanctions under juvenile laws, the same judicial finding is not sufficiently reliable to sustain the imposition of more significant criminal punishment in the adult system.¹⁶³ In

154. BARRY C. FELD, *BAD KIDS: RACE AND THE TRANSFORMATION OF THE JUVENILE COURT* 154 (1999); Feld, *supra* note 12, at 1145.

155. Martin Guggenheim & Randy Hertz, *Reflections on Judges, Juries, and Justice: Ensuring the Fairness of Juvenile Delinquency Trials*, 33 WAKE FOREST L. REV. 553, 562-63, 569 (1998).

156. Marrus, *supra* note 126, at 1350. When determining a juvenile’s disposition, a juvenile court judge has many placement options that provide social services to the juvenile. Group homes provide juveniles with counseling, academic instruction, and vocational skills training. ELROD & RYDER, *supra* note 70, at 280. Juvenile detention centers offer educational and behavior management services. *Id.* at 300. Even state training schools, the equivalent to adult prisons, provide vocational education programs, recreational programs, counseling programs, and behavior modification programs. *Id.* at 309-10.

157. Marrus, *supra* note 126, at 1350. The absence of a jury trial may even affect the reliability of a juvenile’s plea. Although many juveniles plead guilty, the absence of the right to a jury trial likely influences juveniles’ decisions. Richard E. Redding, *Using Juvenile Adjudications for Sentencing Enhancement Under the Federal Sentencing Guidelines: Is It Sound Policy?*, 10 VA. J. SOC. POL’Y & L. 231, 242 (2002).

158. Feld, *supra* note 12, at 1150.

159. *McKeiver v. Pennsylvania*, 403 U.S. 528, 547 (1971).

160. See Butts & Mitchell, *supra* note 92, at 190-91; Feld, *supra* note 12, at 1147.

161. See *supra* Part III.C.

162. Feld, *supra* note 12, at 1156-57.

163. Colleen P. Murphy, *The Use of Prior Convictions After Apprendi*, 37 U.C. DAVIS L. REV. 973, 1016 (2004).

both *Apprendi* and *Jones*, the Supreme Court indicated that to qualify for the prior conviction exception the government must have obtained a prior conviction with sufficient procedural safeguards, including the right to a jury trial.¹⁶⁴ Because the government obtains juvenile adjudications without the use of jury trials, courts should not treat them as prior convictions under *Apprendi*.

B. *Juvenile Courts Do Not Adequately Recognize Juveniles' Right to Counsel*

Juveniles have the right to be notified that they may obtain counsel or have counsel appointed to them if they cannot afford counsel.¹⁶⁵ Nonetheless, juveniles are often unrepresented in proceedings.¹⁶⁶ Less than fifty percent of the juveniles appearing in juvenile court have counsel.¹⁶⁷ Studies of juvenile defender systems have shown that juveniles are unable to gain access to effective counsel because attorneys in the public defender system are inadequately compensated, carry huge caseloads, and lack adequate access to experts.¹⁶⁸

In *Gideon v. Wainwright*,¹⁶⁹ the Supreme Court explained that in the criminal justice system it is impossible to have a fair trial without counsel's assistance.¹⁷⁰ The lack of counsel increases the likelihood that the prosecution did not obtain the adjudication in a fair or reliable manner.¹⁷¹ Providing counsel ensures fairness and prevents the conviction of innocent people.¹⁷² When juveniles do not have access to effective counsel, they are unable to properly defend themselves or to make intelligent decisions about plea bargains because of their inability to consider the legal consequences of their actions.¹⁷³

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

165. *In re Gault*, 387 U.S. 1, 41 (1967).

166. See N. Lee Cooper et al., *Fulfilling the Promise of In re Gault: Advancing the Role of Lawyers for Children*, 33 WAKE FOREST L. REV. 651, 655-56 (1998).

167. Redding, *supra* note 157, at 247.

168. *Id.* at 250.

169. 372 U.S. 335 (1963).

170. *Id.* at 344.

171. Feld, *supra* note 12, at 1169-71.

172. Norman Lefstein, *In Search of Gideon's Promise: Lessons from England and the Need for Federal Help*, 55 HASTINGS L.J. 835, 838 (2004). Inadequate legal representation is a major contributor to wrongful convictions and adjudications. *Id.* at 860.

173. Judith B. Jones, *Access to Counsel*, JUV. JUST. BULL. (U.S. Dep't of Justice, Wash. D.C.) June 2004, at 5, available at <http://www.ncjrs.gov/pdffiles1/ojjdp/204063.pdf>. In *Boykin v. Alabama*, the Supreme Court held that the prosecution must affirmatively show that a guilty plea was both intelligent and voluntary. 395 U.S. 238, 242 (1969). The court explained that a criminal defendant waives many important rights, including the right to a jury trial and the right to confrontation, when pleading guilty. *Id.* at 243. For this waiver to comport with the requirements of the due process clause, it must be an intentional relinquishment of a known right. *Id.* at 242. Accordingly, the court has a duty to explain the legal consequences of the waiver to the defendant. *Id.* at 243-44. The Supreme Court has not explicitly applied the *Boykin* rule to juvenile courts. Sanborn, *supra* note 6, at 38. Many states do not require courts to inform juveniles of their rights and the legal consequences of waiving those rights before the juvenile enters a guilty plea. *Id.*

Juveniles' right to counsel is further jeopardized by the relaxed manner in which courts allow juveniles to waive the right.¹⁷⁴ Juveniles often do not understand their right to counsel either because the prosecution failed to inform them of it or because the prosecution pressured them to waive the right.¹⁷⁵ It is likely, therefore, that juveniles do not knowingly waive their right to counsel.¹⁷⁶

The United States Supreme Court has held that it is unconstitutional for the government to enhance a sentence based on a conviction obtained without the aid of legal counsel or without the defendant adequately waiving the right to counsel.¹⁷⁷ Yet, juvenile courts are still struggling to give true meaning to juveniles' right to counsel.¹⁷⁸ Because of the number of unrepresented juveniles, their inability to knowingly waive their right to counsel, and juvenile courts' general disregard for this right, it is constitutionally improper to use juvenile adjudications for sentence enhancement purposes.¹⁷⁹

C. *A Compromised Legislative Solution*

It is unfortunate that the modern juvenile justice system has abandoned the possibility that the state can rehabilitate our nation's youth while protecting both juveniles and society from continued criminality.¹⁸⁰ Still, this note recognizes the current state of the juvenile justice system and proposes a compromised solution that acknowledges both the practical benefits and the constitutional consequences of using juvenile adjudications for sentence enhancement.¹⁸¹ Despite the constitutional problems, there are many valid reasons why courts should use a defendant's prior juvenile adjudication as a sentence enhancer.¹⁸² First, a defendant with a criminal his-

174. See Cooper, *supra* note 166, at 662.

175. *Id.*; Redding, *supra* note 157, at 247. Juveniles are in desperate need of a legal advocate because of their inability to understand the complex legal process. FELD, *supra* note 154, at 129.

176. Redding, *supra* note 157, at 247.

177. Feld, *supra* note 12, at 1177-78.

178. Lefstein, *supra* note 172, at 838.

179. Feld, *supra* note 12, at 1177.

180. Although it is difficult to prove that the state can fully rehabilitate juvenile offenders, it is clear that some rehabilitative programs do work for some juvenile offenders under the appropriate circumstances. FELD, *supra* note 154, at 280, 282. Despite the possibility of treatment, most states currently do not even attempt to provide rehabilitative services. *Id.* at 283. Rather than provide treatment services, most states opt to punish juvenile offenders with incarceration. *Id.*

181. A recent student note advocated that juvenile adjudications should never be used for sentence enhancement purposes. See Jason Abbot, Note, *The Use of Juvenile Adjudications Under the Armed Career Criminal Act*, 85 B.U. L. REV. 263 (2005). Although Abbot's note recognizes the unconstitutionality of using non-jury juvenile adjudications as sentence enhancers, it does not recognize the benefits of such a use. *Id.* at 291-92. Using juvenile adjudications for sentence enhancement purposes protects law-abiding citizens from the criminal actions of repeat offenders. See U.S. SENTENCING GUIDELINES MANUAL ch. 4, pt. A, introductory cmt. (2004). Our legal system has a responsibility to recognize both society's need for public safety and an individual's civil liberties. This note seeks to achieve such a balance.

182. U.S. SENTENCING GUIDELINES MANUAL ch. 4, pt. A, introductory cmt. (2004).

tory is “more culpable than a first [time] offender” and arguably deserves a greater punishment.¹⁸³ Second, to deter criminal conduct, society must clearly indicate that society will harshly punish repeated criminal conduct.¹⁸⁴ Third, the state should incarcerate repeat criminal offenders to protect the public from the likelihood that the defendant will commit future crimes.¹⁸⁵ Finally, an extensive criminal history indicates that the defendant is an unlikely candidate for rehabilitation, leaving prolonged incarceration as the only viable option.¹⁸⁶

A rational sentencing policy should allow courts to consider a defendant’s complete criminal history, including crimes committed as a juvenile.¹⁸⁷ Nonetheless, it is inconsistent to use juvenile adjudications that are procedurally deficient and factually unreliable to enhance a criminal defendant’s sentence when a similar adult conviction could not be used for the same purpose.¹⁸⁸ To use juvenile adjudications for sentence enhancement, the government should afford juveniles the same due process protections given to adults.¹⁸⁹ Specifically, the government should only allow the use of a juvenile adjudication as a sentence enhancer when the juvenile had the right to a jury trial and the court adequately recognized the juvenile’s right to counsel.¹⁹⁰ The presence of these procedural protections will ensure that adjudications obtained in the juvenile justice system are both fair and reliable. Legislatures should identify the juvenile offenses that qualify for sentence enhancement and require that juveniles accused of these offenses receive sufficient due process protections.¹⁹¹ The ACCA, for instance, already provides that only serious drug offenses and violent felonies will count as prior convictions, and the Act clearly defines which crimes are included in these categories.¹⁹² As demonstrated by the ACCA, it would be relatively simple to define which adjudications qualify as sentence enhancers.

183. *Id.*

184. *Id.*

185. *Id.*

186. *Id.*

187. Feld, *supra* note 12, at 1194.

188. *Id.* at 1224.

189. Historically, the government viewed juvenile law as a covenant between juveniles and the government, whereby the juvenile “agreed to receive less due process in juvenile court in exchange for a more informal, nonstigmatizing, and nonpermanent disposition.” Butts & Mitchell, *supra* note 92, at 191. When the government uses juvenile adjudications to increase a criminal sentence, it breaches this covenant.

190. *See supra* Part V.A-B.

191. Juvenile offenses that are not identified as possible sentence enhancers will be processed by juvenile courts in the same manner that they are currently processed and should not be used for sentence enhancement purposes.

192. 18 U.S.C. § 924(e)(1) (2000 & Supp. II 2002). The ACCA includes specific definitions that explain what crimes denote a serious drug offense or a violent felony. *Id.* § 924(e)(2)(A-B).

Serious criminal activity by a juvenile is the most reliable predictor of serious adult criminality.¹⁹³ After one or two encounters with the juvenile justice system, many juvenile offenders do not reenter the system.¹⁹⁴ After five or more contacts with the juvenile justice system, however, a juvenile offender is likely to continue engaging in criminal activity.¹⁹⁵ It is critical for a court to consider a defendant's entire criminal history when determining whether he has developed a pattern of criminality.¹⁹⁶ Accordingly, this approach allows the government to hold serious repeat offenders responsible for their continued criminality.

This option is economically feasible because it does not require juvenile courts to provide full procedural protections to every accused juvenile offender. Only juveniles accused of serious or violent offenses that qualify as sentence enhancers would receive the necessary procedural protections. Many states already have access to extended juvenile jurisdiction prosecution, which allows states to identify serious juvenile offenders and afford them full procedural protections.¹⁹⁷ When prosecuted under extended juvenile jurisdiction, the juvenile receives all the procedural protections and rights afforded to an adult criminal defendant, including the right to a jury trial and the right to counsel.¹⁹⁸ Extended juvenile jurisdiction proves that it is possible for juvenile courts to afford accused juvenile offenders the constitutional protections afforded to adults without destroying the entire juvenile justice system.

States should adopt legislation that requires the government to obtain a qualifying juvenile adjudication for sentence enhancement. Qualifying juvenile adjudications must be predicated on the right to a jury trial and the right to counsel. By giving juveniles the same procedural protections afforded adults, such legislation would remove the constitutional concerns of using juvenile adjudications for sentence enhancement. It also benefits society by punishing continued criminality and protecting the public.

193. Barry C. Feld, *Juvenile and Criminal Justice Systems' Responses to Youth Violence*, 24 CRIME & JUST. 189, 213 (1998); T. Marcus Funk, *Considering Juvenile Crime Records in Criminal Sentencing*, 2 FED. SENT'G REP. 282, 283 (1999).

194. Feld, *supra* note 12, at 1182.

195. *Id.*

196. See U.S. SENTENCING GUIDELINES MANUAL ch. 4, pt. A, introductory cmt. (2004).

197. See Chauncey E. Brummer, *Extended Juvenile Jurisdiction: The Best of Both Worlds?*, 54 ARK. L. REV. 777, 778 (2002). Extended juvenile jurisdiction statutes allow juvenile court judges to impose both a juvenile disposition and an adult sentence. *Id.* The court stays the adult sentence as long as the juvenile does not violate the terms of the juvenile disposition. *Id.*

198. *Id.*

VII. CONCLUSION

The current use of juvenile adjudications to enhance a criminal sentence beyond the statutory maximum is unconstitutional. The juvenile justice system must grant juveniles the right to a jury trial and clearly recognize their right to counsel. Guaranteeing these rights ensures that juvenile adjudications are fair and reliable, allowing their use as sentence enhancers. Along with protecting an individual's civil liberties, both as adults and as juveniles, our nation's justice system must recognize that allowing courts to use juvenile adjudications for sentence enhancement purposes also yields distinct advantages. This note's compromised solution balances these two concerns and proposes that the states and the federal government introduce legislation to solve the issue. Such legislation would identify specific juvenile offenses that qualify as sentence enhancers and would afford juveniles accused of these offenses full procedural protections. This approach maintains the appropriate balance between society's interest in preserving constitutional liberties and its interest in protecting its members from repeated criminality.