

No. \_\_\_\_\_

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**In the Supreme Court of the United States**

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THE STATE OF OHIO,  
*Petitioner,*

v.

ADRIAN L. HAND, JR.,  
*Respondent.*

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*On Petition for Writ of Certiorari  
to the Supreme Court of Ohio*

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**PETITION FOR WRIT OF CERTIORARI**

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**QUESTION PRESENTED**

In *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000), this Court held that “[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.” In this case, the Ohio Supreme Court found that juvenile adjudications fall outside *Apprendi*’s prior-conviction exception because the right to trial by jury is not available in juvenile court, in contradiction with the opinions from a majority of federal circuit courts and several state courts of last resort. The question presented is:

Whether the absence of the right to trial by jury in juvenile delinquency proceedings results in a juvenile adjudication falling outside the prior-conviction exception set out in *Apprendi v. New Jersey*.

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## OPINIONS BELOW

The Opinion of the Supreme Court of Ohio, filed on August 25, 2016, in Case No. 2014-1814, is reported as *State v. Hand*, Slip Opinion No. 2016-Ohio-5504, and reproduced at App. 1.

The Opinion of the Court of Appeals of Ohio, Second Appellate District, Montgomery County, filed on September 5, 2014, is reported as *State v. Hand*, 2d Dist. Montgomery No. 25840, 2014-Ohio-3838, 2014 WL 4384131, and reproduced at App. 29.

The Decision and Entry of the Common Pleas Court of Montgomery County, Ohio, filed on July 16, 2013, is unreported and is reproduced at App. 44.

## JURISDICTIONAL STATEMENT

The Opinion of the Supreme Court of Ohio was entered on August 25, 2016. Jurisdiction is invoked under 28 U.S.C. § 1257(a).

## CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment of the United States Constitution provides in relevant part: “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . .”

Section One of the Fourteenth Amendment to the United States Constitution provides in relevant part, “No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . .”

## STATEMENT OF THE CASE

This case raises the question of whether a juvenile delinquency adjudication qualifies as a prior conviction for purposes of enhancing beyond the statutory minimum a later sentence imposed upon the offender for crimes committed as an adult. Both the trial court and the Ohio Second District Court of Appeals held yes. App. 32-33, 46-47. The Supreme Court of Ohio held no, because juveniles are not afforded the right to trial by jury at the time of adjudication. App. 20.

Adrian Hand was indicted by a Grand Jury on charges of aggravated robbery, aggravated burglary and kidnapping, all felonies of the first degree under Ohio law; two counts of felonious assault, felonies of the second degree under Ohio law; and specifications attendant to each count that alleged Hand committed his crimes with a firearm. At the time he committed these offenses, Hand was 20 years old. He eventually pleaded no contest as charged and, as part of a sentencing agreement with the prosecutor, agreed to serve six years in prison—three years for the merged firearm specifications, consecutive to three years for the underlying felonies. App. 44-45.

Prior to sentencing, both Hand and the prosecutor filed sentencing memoranda to address the question of what part of Hand's prison sentence was mandatory. The prosecutor argued that the entire sentence was mandatory, while Hand argued that only the sentence attributed to the firearm specification was mandatory. The trial court agreed with the prosecutor and found that Hand's entire sentence was mandatory. App. 46. In so doing, the trial court noted that as a juvenile Hand was adjudicated delinquent for having committed



aggravated robbery, a first-degree felony if committed by an adult, thereby making his sentence here, for subsequent first and second-degree felonies, mandatory under Ohio Revised Code §§ 2901.08(A) and 2929.13(F)(6). App. 45.

Hand appealed his sentence to the Ohio Second District Court of Appeals, contending that the trial court's use of his prior juvenile delinquency adjudication to enhance his sentence from a non-mandatory to a mandatory prison term violated his due process rights and *Apprendi v. New Jersey*, 530 U.S. 466 (2000). The court of appeals disagreed and rejected Hand's claim that treating a juvenile delinquency adjudication as a prior conviction violates due process simply because the defendant was not afforded a jury trial in juvenile court. App. 31-33. The court of appeals held instead that, despite the absence of the right to trial by jury in juvenile court, a prior juvenile delinquency adjudication nevertheless falls within *Apprendi's* prior-conviction exception. *Id.*

In a sharply-divided 4-3 decision, the Supreme Court of Ohio reversed. At the heart of its decision was its consideration of the constitutionality of Ohio Revised Code § 2901.08(A), which provides that a previous adjudication as a delinquent child shall be considered a prior conviction "for purposes of determining the offense with which the person should be charged and, if the person is convicted of or pleads guilty to an offense, the sentence to be imposed upon the person relative to the conviction or guilty plea." In deciding whether a juvenile adjudication falls within *Apprendi's* prior-conviction exception, the majority compared Ohio's statute to 18 U.S.C. § 924(e)(1), the

Armed Career Criminal Act, which provides that a defendant convicted of certain offenses shall be sentenced to a mandatory prison sentence if the offender has three previous convictions for a violent felony. The act defines the term “conviction” to include “a finding that a person has committed an act of juvenile delinquency involving a violent felony.” 18 U.S.C. § 924(e)(2)(C).

The Ohio Supreme Court recognized that most federal circuit courts that have applied *Apprendi* to juvenile adjudications, including the Sixth Circuit Court of Appeals of which Ohio is a part, have held that the lack of a right to trial by jury in the juvenile-court system does not prevent a court from treating an adjudication as a prior conviction for purposes of enhancing a subsequent sentence under 18 U.S.C. § 924. Despite this, the majority chose to adopt the contrary position taken by the Ninth Circuit in *United States v. Tighe*, 266 F.3d 1187 (9th Cir. 2001). App. 14-17. Relying on the reasoning in *Tighe*, the majority concluded that a prior adjudication falls outside *Apprendi*’s prior-conviction exception because, in the majority’s view, “at the heart of *Apprendi*’s narrow exception is the concept that the prior conviction was the result of 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.” App. 17. Because the juvenile-court system does not afford the right to trial by jury during the adjudication process, the majority concluded that Ohio Revised Code § 2901.08(A) violates the Due Process Clauses of both the Ohio and United States Constitutions because “it is fundamentally unfair to treat a juvenile adjudication as a previous conviction that enhances either the degree

of or the sentence for a subsequent offense committed as an adult.” App. 20.

The State of Ohio asks this Court to review the ruling of the Supreme Court of Ohio.

### **REASONS FOR GRANTING THE WRIT**

In holding that the use of a prior nonjury juvenile adjudication to enhance a later-imposed sentence violates due process and runs afoul of this Court’s decision in *Apprendi*, the Ohio Supreme Court decided an important federal question in a way that conflicts with the decisions of seven United States courts of appeals and several state courts of last resort, yet conforms with that of the Ninth Circuit alone. If allowed to stand, the Ohio Supreme Court’s ruling would mean that treatment of a prior juvenile adjudication to enhance a later sentence is permissible under federal law as it has been interpreted by a majority of federal courts, but it would not be permissible under federal law as interpreted by the Ohio Supreme Court. Granting the petition for writ of certiorari would allow this Court to consider this important question and resolve the conflict of opinions that exist in the federal circuits and state courts.

This Court held in *Apprendi* that “[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.” (Emphasis added.) 530 U.S. at 490. *See also Alleyne v. United States*, 570 U.S. \_\_\_, 133 S. Ct. 2151 (2013) (extending *Apprendi* to also include facts that increase statutory minimum sentences). The continued validity of *Apprendi*’s prior-

conviction exception as a recidivism factor that trial courts can rely on in increasing an offender's sentence, outside of the jury's verdict, has been recognized by this Court several times. *See, e.g., Blakely v. Washington*, 542 U.S. 296 (2004); *Oregon v. Ice*, 555 U.S. 160 (2009); *Alleyne*, 133 S. Ct. at 2168 (Roberts, C.J., dissenting). And it is *Apprendi*'s prior-conviction exception that is at the heart of the Ohio Supreme Court's decision.

In reversing Hand's sentence and finding it unconstitutional to treat Hand's previous juvenile delinquency adjudication as a prior conviction for purposes of making mandatory a later sentence imposed for crimes he committed as an adult, the Ohio Supreme Court concluded that a prior juvenile delinquency adjudication falls outside *Apprendi*'s prior conviction exception because juveniles are not afforded the right to trial by jury during the adjudicative process. App. 18. In the Ohio Supreme Court's view, to qualify as a prior conviction under *Apprendi* it is necessary that the conviction be obtained in a proceeding in which the defendant was afforded a right to trial by jury because "it is logical to conclude that [the United States Supreme Court] meant to limit [*Apprendi*'s] prior-conviction exception to prior proceedings that satisfied the jury-trial guarantee." App. 18, 20. The Ohio Supreme Court's reasoning, however, is unpersuasive.

First, neither *Apprendi*, nor any other decision by this Court that has applied or interpreted *Apprendi*, holds that the prior-conviction exception is limited only to convictions obtained during proceedings in which the defendant was given the right to trial by jury.

Moreover, among federal circuit courts of appeals, only the Ninth Circuit has held that *Apprendi*'s prior-conviction exception is limited only to convictions obtained through proceedings that included the right to trial by jury. See *United States v. Tighe*, 266 F.3d 1187 (9th Cir. 2001). But every other federal circuit court that has addressed the issue has expressly rejected *Tighe*'s rationale and found that using a juvenile delinquency adjudication as a sentencing enhancement, even though the adjudication was obtained without a jury trial, does not violate a defendant's right to due process or run afoul of *Apprendi*. See *United States v. Matthews*, 498 F.3d 25 (1st Cir. 2007); *United States v. Jones*, 332 F.3d 688 (3d Cir. 2003); *United States v. Wright*, 594 F.3d 259 (4th Cir. 2010); *United States v. Crowell*, 493 F.3d 744 (6th Cir. 2007); *Welsh v. United States*, 604 F.3d 408 (7th Cir. 2010); *United States v. Smalley*, 294 F.3d 1030 (8th Cir. 2002); *United States v. Burg*, 407 F.3d 1183 (11th Cir. 2005).<sup>1</sup>

The Ninth Circuit in *Tighe* held that juvenile delinquency adjudications should not be included in *Apprendi*'s prior-conviction exception because, unlike convictions obtained against adults, adjudications lack a fundamental procedural protection necessary to guarantee their reliability: the right to trial by jury. *Tighe*, 266 F.3d at 1193-1194. This Court, however, has held that "trial by jury in the juvenile court's adjudicative stage is not a constitutional requirement,"

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<sup>1</sup> The Fifth Circuit Court of Appeals has never addressed the issue. The Second and Tenth Circuits, while recognizing both sides of the issue, have nevertheless explicitly chosen to take no position. See *United States v. Santiago*, 76 Fed. Appx. 397 (2d Cir. 2003); *Gardner v. McKune*, 242 Fed. Appx. 594 (10th Cir. 2007).

and all that is constitutionally required in juvenile court proceedings is fundamental fairness in the fact-finding process. *McKeiver v. Pennsylvania*, 403 U.S. 528, 543-545 (1971) (Plurality Opinion). “But one cannot say that in our legal system the jury is a necessary component of accurate factfinding.” *Id.* at 543.

Beyond the Ninth Circuit, every other federal circuit court of appeals that has considered the issue has recognized that, even absent trial by jury, the procedural protections that are afforded juveniles during delinquency proceedings—the right to notice, the right to counsel, the right to confront and cross-examine witnesses, the right to introduce evidence on his or her own behalf, the privilege against self-incrimination, protection against double jeopardy, and proof beyond a reasonable doubt—are “more than sufficient to ensure the reliability that *Apprendi* requires.” *Smalley*, 294 F.3d at 1033. Given the other procedural safeguards afforded to juveniles during delinquency proceedings, the Eighth Circuit concluded in *Smalley* that the absence of a jury does not undermine the reliability of a juvenile adjudication in any significant way “because we think that the use of a jury in the juvenile context would ‘not strengthen greatly, if at all, the fact-finding function’ and is not constitutionally required.” *Id.*, quoting *McKeiver*, 403 U.S. at 547.

The Third and Sixth Circuits also agree that, rather than relying on the “narrow parsing of words” that would create a bright-line requirement of proof beyond a reasonable doubt, fair notice, *and a right to trial by jury* before a delinquency adjudication can qualify

under the *Apprendi* exception, “a court should instead consider ‘the reliability of the actual juvenile adjudication [ ] to determine whether [it is] sufficiently reliable so as to not offend constitutional rights if used to qualify for the *Apprendi* exception.’ ” *Crowell*, 493 F.3d at 750, quoting *Jones*, 332 F.3d at 695-96. *See also Smalley*, 294 F.3d at 1033. The Sixth Circuit reasoned that “[j]uvenile adjudications, where the defendant has the right to notice, the right to counsel, the right against self-incrimination, the right to confront and cross-examine witnesses, and the right to a finding of [delinquency] beyond a reasonable doubt, provide sufficient procedural safeguards to satisfy the reliability requirement that is at the heart of *Apprendi*,” even without a jury trial. *Crowell, supra*.

Other federal circuit courts have likewise found that, despite *Tighe*’s (and now the Ohio Supreme Court’s) holding to the contrary, the absence of jury trials in juvenile court does not diminish the factual integrity of juvenile court proceedings. *See Welsh*, 604 F.3d at 429 (“We agree with other circuits that the protections juvenile defendants receive—notice, counsel, confrontation and proof beyond a reasonable doubt—ensure that the proceedings are reliable. Therefore, because juvenile adjudications are reliable, they are not subject to the *Apprendi* rule.”); *Matthews*, 498 F.3d at 35 (“For purposes of *Apprendi*’s recidivism exception, we see no distinction between juvenile adjudications and adult convictions; both reflect the sort of proven prior conduct that courts historically have used in sentencing.”); *Burge*, 407 F.3d at 1191, quoting *Jones*, 332 F.3d at 696 (“Accordingly, ‘[a] prior nonjury adjudication that was afforded all constitutionally-required procedural safeguards can

properly be characterized as a prior conviction for *Apprendi* purposes.’ ”); *Wright*, 594 F.3d at 263-264 (finding that because juveniles are accorded many procedural safeguards, “there is no reason to hold that an adjudication that is constitutionally sufficient to commit a juvenile to confinement, in some instances until age twenty-one, is somehow off limits for sentencing consideration if that same juvenile later violates § 924(e)’s armed career criminal prohibition”).

Beyond the federal courts, a handful of state courts of last resort have also considered the appropriate treatment of juvenile adjudications under *Apprendi*, and most agree that juvenile delinquency adjudications fall within *Apprendi*’s prior-conviction exception and may be used to enhance a later sentence. The California Supreme Court, for example, adopted the view of the majority of federal and state courts and held that “the absence of a constitutional or statutory right to jury trial under the juvenile law does not, under *Apprendi*, preclude the use of a prior juvenile adjudication of criminal misconduct to enhance the maximum sentence for a subsequent adult felony offense by the same person.” *People v. Nguyen*, 209 P.3d 946, 959 (Cal. 2009). The Supreme Court of Illinois likewise found the majority position persuasive and concluded that “a prior juvenile adjudication of delinquency falls within *Apprendi*’s prior-conviction exception[.]” *People v. Jones*, \_\_ N.E.3d \_\_, 2016 IL 119391, 2016 WL 6137236 (Il. 2016), ¶ 28. The *Jones* court reasoned that, despite not having the right to trial by jury in delinquency proceedings, because juveniles are afforded all other procedural rights of adults in criminal proceedings “[t]he presence of such process in juvenile proceedings forecloses any



conclusion that a juvenile adjudication is not the equivalent of a prior conviction under *Apprendi*.” *Id.* at ¶ 29.

Other state courts have likewise held that juvenile adjudications fall within *Apprendi*’s prior-conviction exception. *See, e.g., Ryle v. State*, 842 N.E.2d 320, 323 (Ind. 2005) (holding that a juvenile adjudication falls within *Apprendi*’s prior-conviction exception because “[t]he main concern [with the exception] was whether the prior conviction’s procedural safeguards ensured a reliable result, not that there had to be a right to trial by jury”); *State v. Hitt*, 42 P.3d 732, 740 (Kan. 2002) (“Juvenile adjudications are included within the historical cloak of recidivism and enjoy ample procedural safeguards; therefore, the *Apprendi* exception for prior convictions encompasses juvenile adjudications.”); *State v. Weber*, 149 P.3d 646, 653 (Wash. 2006) (“In the absence of authoritative instruction from the United States Supreme Court that juvenile adjudications are not prior convictions, . . . we hold that juvenile adjudications are convictions for purposes of *Apprendi*’s prior conviction exception.”).

On the other hand, prior to the Ohio Supreme Court here, the only other state supreme courts to go against the majority view were Louisiana, *State v. Brown*, 879 So.2d 1276, 1289 (La. 2004) (adopting the Ninth Circuit’s rationale in *Tighe*), and Oregon, *State v. Harris*, 118 P.3d 236, 245-246 (Or. 2005) (finding the Eighth Circuit’s rationale in *Smalley* unpersuasive, partially on independent state law grounds).

In sum, the Ohio Supreme Court’s conclusion that prior juvenile delinquency adjudications fall outside *Apprendi*’s prior-conviction exception, as well as its

reasoning in arriving at that conclusion, are at odds with the opinions of a majority of federal and state courts that have previously considered the issue. This Court should grant review, therefore, to resolve the clear split in authority and to clarify the extent to which *Apprendi*'s prior-conviction exception applies to juvenile delinquency adjudications.

### CONCLUSION

This Court should grant the petition for writ of certiorari.

Respectfully submitted,

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## **APPENDIX**

**APPENDIX**

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App. 1

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**APPENDIX A**

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**SUPREME COURT OF OHIO**

**No. 2014-1814**

**[Filed August 25, 2016]**

**[Until this opinion appears in the Ohio Official Reports advance sheets, it may be cited as *State v. Hand*, Slip Opinion No. 2016-Ohio-5504.]**

**NOTICE**

This slip opinion is subject to formal revision before it is published in an advance sheet of the Ohio Official Reports. Readers are requested to promptly notify the Reporter of Decisions, Supreme Court of Ohio, 65 South Front Street, Columbus, Ohio 43215, of any typographical or other formal errors in the opinion, in order that corrections may be made before the opinion is published.

**SLIP OPINION NO. 2016-OHIO-5504**

**THE STATE OF OHIO, APPELLEE,  
v. HAND, APPELLANT.**

**[Until this opinion appears in the Ohio Official Reports advance sheets, it may be cited as *State v. Hand*, Slip Opinion No. 2016-Ohio-5504.]**

App. 2

*R.C. 2901.08(A) violates the Due Process Clauses of Article I, Section 16 of the Ohio Constitution and the Fourteenth Amendment to the United States Constitution because it is fundamentally unfair to treat a juvenile adjudication as a previous conviction that enhances either the degree of or the sentence for a subsequent offense committed as an adult—A juvenile adjudication cannot be used to increase a sentence beyond a statutory maximum or mandatory minimum.*

(No. 2014-1814—Submitted December 1, 2015—  
Decided August 25, 2016.)

APPEAL from the Court of Appeals for Montgomery  
County, No. 25840, 2014-Ohio-3838.

**SYLLABUS OF THE COURT**

1. R.C. 2901.08(A) violates the Due Process Clauses of Article I, Section 16 of the Ohio Constitution and the Fourteenth Amendment to the United States Constitution because it is fundamentally unfair to treat a juvenile adjudication as a previous conviction that enhances either the degree of or the sentence for a subsequent offense committed as an adult.
2. Because a juvenile adjudication is not established through a procedure that provides the right to a jury trial, it cannot be used to increase a sentence beyond a statutory maximum or mandatory minimum. (*Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), and *Alleyne v. United States*, — U.S. —, 133 S.Ct. 2151, 186 L.Ed.2d 314 (2013), followed.)

**LANZINGER, J.**

{¶ 1} In this case, we are asked to determine whether it is a violation of due process to treat a juvenile adjudication as the equivalent of an adult conviction for purposes of enhancing a penalty for a later crime. We hold that it is.

**Case Background**

{¶ 2} Appellant, Adrian Hand Jr., entered no-contest pleas in Montgomery County Common Pleas Court in case No. 2012-CR-00650/2 to three first-degree felonies—aggravated burglary in violation of R.C. 2911.11(A)(2), aggravated robbery in violation of R.C. 2911.01(A)(1), and kidnapping in violation of R.C. 2905.01(A)(2)—and two second-degree felonies—felonious assault in violation of R.C. 2903.11 (A)(1) and (A)(2). Each count had a three-year firearm specification attached to it, and Hand also entered no-contest pleas to the specifications.

{¶ 3} During the plea hearing, the trial court noted that the parties agreed to a total six-year prison term with three of the years being mandatory because they are related to the merged firearm specifications, R.C. 2929.14 and 2941.145, but that the parties disputed whether the three years for the other offenses was also a mandatory term. The question was whether Hand's prior juvenile adjudication for aggravated robbery under R.C. 2911.01(A)(3) should operate as a first-degree-felony conviction to enhance his sentence. R.C. 2929.13(F)(6) requires a mandatory prison term for a first- or second-degree felony if the offender has previously been convicted of or pled guilty to a first- or second-degree felony.

App. 4

{¶ 4} After the parties briefed the sentencing issue, the trial court relied on R.C. 2901.08(A) and ruled that Hand's prior juvenile adjudication required imposition of mandatory prison terms under R.C. 2929.13(F). The trial court merged the allied offenses and sentenced him to a mandatory three-year prison term for each of the aggravated-burglary, aggravated-robbery, and felonious-assault counts. These sentences were to be served concurrently with each other but consecutively to the mandatory three-year prison term for the firearm specification, for an aggregate six-year mandatory term of incarceration.

{¶ 5} Hand appealed his sentence. He agreed that the three-year term for the firearm specification was a mandatory term, but he argued that the three-year term for the other offenses should not be mandatory. The Second District Court of Appeals affirmed the trial court's judgment. The appellate court, in a two-to-one decision, rejected Hand's arguments that treating his juvenile adjudication as a prior conviction violated his due-process rights because he was not afforded the right to a jury trial in juvenile court. The court also did not find a violation of *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000).

{¶ 6} Hand appealed to this court, and we accepted jurisdiction on the following proposition of law:

The use of a prior juvenile adjudication to enhance an adult sentence violates a defendant's right to due process as guaranteed by the Fourteenth Amendment to the United States Constitution and Article I, Section 16 of the Ohio Constitution, and the right to trial by jury as guaranteed by the Sixth Amendment to the



App. 5

United States Constitution and Article I, Section  
5 of the Ohio Constitution.

142 Ohio St.3d 1409, 2015-Ohio-1099, 27 N.E.3d 539.

**Analysis**

{¶ 7} The question here is whether a statute that permits a previous juvenile adjudication to count as a prior conviction that enhances a later adult sentence by requiring a mandatory prison term violates due process under *Apprendi*. The statutory language must be examined along with existing case law before we turn to the constitutional question of due process.

*The Statutes Involved:*  
*R.C. 2929.13(F)(6) and 2901.08(A)*

{¶ 8} For Hand's first-degree- and second-degree-felony convictions, the trial court was required to impose a mandatory prison term if Hand had previously been convicted of a first- or second-degree felony. R.C. 2929.13(F) provides:

Notwithstanding divisions (A) to (E) of this section, the court shall impose a prison term or terms under sections 2929.02 to 2929.06, section 2929.14, section 2929.142, or section 2971.03 of the Revised Code and \* \* \* shall not reduce the term or terms pursuant to section 2929.20, section 2967.19, section 2967.193, or any other provision of Chapter 2967. or Chapter 5120. of the Revised Code for any of the following offenses:

\* \* \*

App. 6

(6) Any offense that is a first or second degree felony and that is not set forth in division (F)(1), (2), (3), or (4) of this section, *if the offender previously was convicted of or pleaded guilty to aggravated murder, murder, any first or second degree felony, or an offense under an existing or former law of this state, another state, or the United States that is or was substantially equivalent to one of those offenses.*

(Emphasis added.)

{¶ 9} R.C. 2929.13 does not define the term “convicted,” so in determining whether Hand’s prior juvenile adjudication should be counted as a prior conviction, the trial court relied on R.C. 2901.08(A), which provides:

If a person is alleged to have committed an offense and if the person previously has been adjudicated a delinquent child or juvenile traffic offender for a violation of a law or ordinance, \* \* \* *the adjudication as a delinquent child or as a juvenile traffic offender is a conviction* for a violation of the law or ordinance for purposes of determining the offense with which the person should be charged and, if the person is convicted of or pleads guilty to an offense, the sentence to be imposed upon the person relative to the conviction or guilty plea.

(Emphasis added.) Thus, when read together, the two statutes say a juvenile adjudication counts as a previous conviction that can enhance either the degree of a later offense or a subsequent sentence to include mandatory prison time.

{¶ 10} This court has mentioned R.C. 2901.08 in its opinions only four times, and the statute was actually at issue in only one of them. *See State v. Adkins*, 129 Ohio St.3d 287, 2011-Ohio-3141, 951 N.E.2d 766; *In re C.P.*, 131 Ohio St.3d 513, 2012-Ohio-1446, 967 N.E.2d 729; *State v. Howard*, 134 Ohio St.3d 467, 2012-Ohio-5738, 983 N.E.2d 341; *State v. Bode*, 144 Ohio St.3d 155, 2015-Ohio-1519, 41 N.E.3d 1156. In *Adkins*, we held that a juvenile adjudication could count as one of the five offenses used to enhance a charge of operating a motor vehicle while under the influence of alcohol (“OVI”) under R.C. 4511.19(A)(1)(a). In that case, however, the issue was whether R.C. 2901.08 was unconstitutionally retroactive, and we held that it was not, because the OVI statute did not add an additional punishment to the juvenile disposition but rather punished the defendant for the current offense. *Id.* at ¶ 15. The juvenile adjudication was unaffected and remained a juvenile adjudication. *Id.* at ¶ 19. *Howard*, *In re C.P.*, and *Bode* did no more than mention the holding in *Adkins*, and none of the four cases provided an analysis of due process. Hand, however, contends that treating his juvenile adjudication as a conviction violates his due-process rights under the Ohio and United States Constitutions and is inconsistent with *Apprendi*.

#### *Due Process and the Juvenile Court*

{¶ 11} Hand asserts that his right to due process was violated when his past juvenile adjudication was used to make his prison term mandatory. Article I, Section 16 of the Ohio Constitution provides: “All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall

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have remedy by due course of law, and shall have justice administered without denial or delay.” The “due course of law” provision is the equivalent of the “due process of law” provision in the Fourteenth Amendment to the United States Constitution. *Direct Plumbing Supply Co. v. Dayton*, 138 Ohio St. 540, 544, 38 N.E.2d 70 (1941).

{¶ 12} “For all its consequence, ‘due process’ has never been, and perhaps can never be, precisely defined.” *Lassiter v. Dept. of Social Servs. of Durham Cty., North Carolina*, 452 U.S. 18, 24, 101 S.Ct. 2153, 68 L.Ed.2d 640 (1981). It is a flexible concept that varies depending on the importance attached to the interest at stake and the particular circumstances under which the deprivation may occur. *Walters v. Natl. Assn. of Radiation Survivors*, 473 U.S. 305, 320, 105 S.Ct. 3180, 87 L.Ed.2d 220 (1985). “Applying the Due Process Clause is therefore an uncertain enterprise which must discover what ‘fundamental fairness’ consists of in a particular situation by first considering any relevant precedents and then by assessing the several interests that are at stake.” *Lassiter* at 24-25.

{¶ 13} The court of appeals rejected Hand’s due-process claims with little analysis. The dissenting appellate judge, however, commented that “[t]here are a significant number of law review articles which question on due process grounds whether juvenile court adjudications should be considered the equivalent of criminal convictions for purposes of sentence enhancement statutes.” 2d Dist. Montgomery No. 25840, 2014-Ohio-3838, at ¶ 11 (Donovan, J., dissenting). She concluded that it is inconsistent to

deem juvenile adjudications civil for some purposes but criminal for the purpose of classifying them as prior convictions for sentencing enhancements. *Id.* at ¶ 12. When we examine the nature of the juvenile system, the accuracy of this statement becomes apparent. Juvenile law and criminal law are not synonymous.

{¶ 14} Juvenile courts hold a “unique place in our legal system.” *In re C.S.*, 115 Ohio St.3d 267, 2007-Ohio-4919, 874 N.E.2d 1177, ¶ 65. They are legislative creatures that “eschewed traditional, objective criminal standards and retributive notions of justice.” *Id.* at ¶ 66. The overriding purposes for juvenile dispositions “are to provide for the care, protection, and mental and physical development of children subject to [R.C. Chapter 2152], protect the public interest and safety, hold the offender accountable for the offender’s actions, restore the victim, and rehabilitate the offender.” R.C. 2152.01(A). In contrast, the purposes of felony sentencing “are to protect the public from future crime by the offender and others and to punish the offender.” R.C. 2929.11(A). In summary, juvenile adjudication differs from criminal sentencing—one is civil and rehabilitative, the other is criminal and punitive.

{¶ 15} Although juvenile-court proceedings are civil in nature, *In re Anderson*, 92 Ohio St.3d 63, 65, 748 N.E.2d 67 (2001), the state’s role as *parens patriae* in juvenile court has become clouded as increased penalties restrict the personal liberty of juveniles, *In re C.S.* at ¶ 66-70; *State v. D.H.*, 120 Ohio St.3d 540, 2009-Ohio-9, 901 N.E.2d 209, ¶ 40. As a result, we have held that “numerous constitutional safeguards normally reserved for criminal prosecutions are equally applicable to juvenile delinquency proceedings.” *State*

*v. Walls*, 96 Ohio St.3d 437, 2002-Ohio-5059, 775 N.E.2d 829, ¶ 26. Those constitutional safeguards are rooted in the Due Process Clauses of Article I, Section 16 of the Ohio Constitution and the Fourteenth Amendment to the United States Constitution. *D.H.* at ¶ 44; *In re C.P.*, 131 Ohio St.3d 513, 2012-Ohio-1446, 967 N.E.2d 729, ¶ 70.

{¶ 16} We have recognized that juveniles have the right to counsel during juvenile proceedings, *In re C.S.* at ¶ 79, and that the state may not use a prior, uncounseled juvenile adjudication to enhance a sentence for a later violation of R.C. 4511.19, unless there is evidence of a valid waiver of counsel, *State v. Bode*, 144 Ohio St.3d 155, 2015-Ohio-1519, 41 N.E.3d 1156, syllabus. Juvenile proceedings are also covered by the constitutional protections against self-incrimination and double jeopardy. *See In re D.S.*, 111 Ohio St.3d 361, 2006-Ohio-5851, 856 N.E.2d 921, ¶ 17; *In re A.J.S.*, 120 Ohio St.3d 185, 2008-Ohio-5307, 897 N.E.2d 629, ¶ 26.

{¶ 17} We have held that automatic imposition of the most serious sex-offender classification, Tier III, on a juvenile offender who received a serious-youthful-offender disposition undercuts the rehabilitative purpose of Ohio's juvenile system and violates due process. *In re C.P.* at ¶ 85. We recently held that the statutory presumption of voluntariness of a recorded custodial statement is unconstitutional as applied to juveniles. *State v. Barker*, \_\_\_Ohio St.3d \_\_\_, 2016-Ohio-2708, \_\_N.E.3d \_\_\_, ¶ 44.

{¶ 18} Our state jurisprudence does not run afoul of the United States Supreme Court's. "[N]either the Fourteenth Amendment nor the Bill of Rights is for

adults alone.” *In re Gault*, 387 U.S. 1, 13, 87 S.Ct. 1428, 18 L.Ed.2d 527 (1967). The United States Supreme Court has held that juveniles are entitled to basic constitutional protections such as the right to counsel, the right to receive notice of the charges alleged, the privilege against self-incrimination, the application of the proof-beyond-a-reasonable-doubt standard, and the protection against double jeopardy. *Schall v. Martin*, 467 U.S. 253, 263, 104 S.Ct. 2403, 81 L.Ed.2d 207 (1984). It has also held that the Eighth Amendment prohibits the imposition of the death penalty, the imposition of life without the possibility of parole for nonhomicide offenses, and the imposition of mandatory life-without-parole sentences on those who committed the crimes as juveniles. *Roper v. Simmons*, 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005); *Graham v. Florida*, 560 U.S. 48, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010); *Miller v. Alabama*, \_\_\_ U.S. \_\_\_, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012).

{¶ 19} But even though juveniles have been afforded many constitutional safeguards, there is still one important right that is not required in juvenile proceedings under the federal constitution—the right to trial by jury. *McKeiver v. Pennsylvania*, 403 U.S. 528, 545, 91 S.Ct. 1976, 29 L.Ed.2d 647 (1971). We have reached this same conclusion with regard to our state constitution. *In re Agler*, 19 Ohio St.2d 70, 77-78, 249 N.E.2d 808 (1969). Because the very purpose of the state juvenile code is “to avoid treatment of youngsters as criminals and insulate them from the reputation and answerability of criminals,” we declared that there was no need to afford the right in juvenile proceedings. *Id.* at 80.

{¶ 20} Hand argues that this lack of a right to a jury trial for juveniles is the reason why using his adjudication against him is a due-process violation. He contends that the use of a juvenile adjudication in a later adult criminal proceeding to require a mandatory sentence “undermines the careful balance of due-process rights required in the juvenile justice system” and denies a key protection that underlies *Apprendi*—the right to a jury trial. Although the state acknowledges that the juvenile and adult systems are different, the state focuses on recidivism and contends that the legislature should be allowed to factor a prior juvenile adjudication into an adult sentence. However, there is a significant difference between allowing a trial judge to consider an adjudication during adult sentencing and requiring a mandatory prison term to be imposed because of it.

*Apprendi and Juvenile Adjudications*

{¶ 21} In *Apprendi*, the United States Supreme Court determined that “[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.” 530 U.S. at 490, 120 S.Ct. 2348, 147 L.Ed.2d 435. The court held that the Fourteenth Amendment demanded no less of state statutes. *Id.*

{¶ 22} The United States Supreme Court expanded *Apprendi*’s holding and held that facts increasing a mandatory minimum sentence must also be submitted to a jury and found beyond a reasonable doubt. *Alleyne v. United States*, \_\_\_ U.S. \_\_\_, 133 S.Ct. 2151, 2162-2163, 186 L.Ed.2d 314 (2013).



{¶ 23} Two Ohio appellate courts have addressed whether R.C. 2901.08(A)'s treatment of juvenile adjudications as adult convictions violates due process and *Apprendi*. The Eighth District determined that there was no violation because there was no indication that the defendant was not afforded the appropriate due process in his juvenile proceeding and thus the juvenile adjudication was sufficiently reliable to satisfy the *Apprendi* exception for prior convictions. *State v. Parker*, 8th Dist. Cuyahoga No. 97841, 2012-Ohio-4741, ¶ 24.

{¶ 24} The Second District in this case and in *State v. Carver*, 2d Dist. Montgomery No. 25804, 2014-Ohio-3635, reached a similar result. In *Carver*, it stated that because there is no constitutional right to a jury trial for juvenile offenders, there is no denial of due process on that basis. *Id.* at ¶ 13.

{¶ 25} Federal circuit courts have also considered whether nonjury juvenile adjudications can be characterized as prior convictions. *See Welch v. United States*, 604 F.3d 408 (7th Cir.2010); *United States v. Wright*, 594 F.3d 259 (4th Cir.2010); *United States v. Crowell*, 493 F.3d 744 (6th Cir.2007); *United States v. Burge*, 407 F.3d 1183 (11th Cir.2005); *United States v. Jones*, 332 F.3d 688 (3d Cir.2003); *United States v. Smalley*, 294 F.3d 1030 (8th Cir.2002); *United States v. Tighe*, 266 F.3d 1187 (9th Cir.2001). These cases involve the Armed Career Criminal Act, 18 U.S.C. 924(e), which increases the sentence for certain defendants convicted of being a felon in possession of a firearm in violation of 18 U.S.C. 922(g). A conviction for 18 U.S.C. 922(g) is generally punishable by a maximum prison sentence of ten years. 18 U.S.C. 924(a)(2).

However, if the convicted felon is found to have three previous convictions for a violent felony, a minimum term of 15 years is required. 18 U.S.C. 924(e)(1). The federal act expressly defines the term “conviction” to include “a finding that a person has committed an act of juvenile delinquency involving a violent felony.” 18 U.S.C. 924(e)(2)(C).

{¶ 26} The majority of the federal circuit courts that have considered the issue have held that the lack of a right to a jury trial in juvenile proceedings does not prevent a court from using an adjudication to enhance a sentence under 18 U.S.C. 924(e). *See Welch*, 604 F.3d at 426; *Wright*, 594 F.3d at 264; *Crowell*, 493 F.3d at 750; *Burge*, 407 F.3d at 1190; *Jones*, 332 F.3d at 696; *Smalley*, 294 F.3d at 1032. These courts reasoned that *Apprendi* specifically excluded prior convictions from its general rule that sentence enhancements could not be premised on facts not determined by a jury, because procedural safeguards—the right to a jury trial and the right to have guilt proved beyond a reasonable doubt—buttress the prior convictions. *See Welch*, 604 F.3d at 427; *Wright*, 594 F.3d at 264; *Crowell*, 493 F.3d at 750; *Burge*, 407 F.3d at 1190; *Jones*, 332 F.3d at 696; *Smalley*, 294 F.3d at 1032. But these courts held that juvenile adjudications have sufficient procedural safeguards to render them reliable enough to satisfy *Apprendi*’s exception even though the juvenile did not have the right to a trial by jury. *See Welch*, 604 F.3d at 428-429; *see also Smalley*, 294 F.3d at 1032-1033; *Crowell*, 493 F.3d at 750; *Jones*, 332 F.3d at 696.

{¶ 27} The Ninth Circuit, however, held that nonjury juvenile adjudications may not be considered prior convictions that satisfy the *Apprendi* exception.

*Tighe*, 266 F.3d at 1191-1195. In *Tighe*, the Ninth Circuit quoted the following language from *Apprendi*:

“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.”

*Id.* at 1194, quoting *Apprendi*, 530 U.S. at 496, 120 S.Ct. 2348, 147 L.Ed.2d 435.

{¶ 28} The Ninth Circuit interpreted this language to require that “the ‘prior conviction’ exception to *Apprendi*’s general rule must be limited to prior convictions that were themselves obtained through proceedings that included the right to a jury trial and proof beyond a reasonable doubt.” *Id.* Accordingly, the court held that the defendant’s sentence could not stand, because he had not been afforded the right to trial by jury in one of the prior adjudications relied upon to enhance his sentence. *Id.* at 1194-1195.

{¶ 29} The dissenter in *Welch* agreed with *Tighe*’s holding and stressed the differences between the juvenile and adult systems:

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

\* \* \*

\* \* \* And because the philosophy on which the juvenile court system was founded emphasizes protecting the “best interests of the child” and rehabilitating rather than punishing the child, the culture of the juvenile courts discourages zealous adversarial advocacy even though in its current form the juvenile justice system is much more punitive than its founders envisaged. Lawyers also appear to be reluctant to appeal juvenile cases and to seek postconviction relief; heavy caseloads, a prevalent view that appeals undermine the rehabilitation process, and an absence of awareness among juveniles of their appeal rights are the likely reasons for this reluctance.

*Welch*, 604 F.3d at 431-432 (Posner, J., dissenting).

{¶ 30} State supreme courts also are divided on this issue. *Compare State v. Harris*, 339 Or. 157, 175, 118 P.3d 236 (2005) (the Sixth Amendment requires a juvenile adjudication that is offered as an enhancement factor to increase a criminal sentence to either be proved to a trier of fact or be admitted by a defendant) and *State v. Brown*, 879 So.2d 1276, 1289 (La.2004) (holding that a juvenile “adjudication should not be counted as a ‘prior conviction’ for *Apprendi* purposes”), with *Ryle v. State*, 842 N.E.2d 320, 323 (Ind.2005) (holding that juvenile adjudications are prior convictions for purposes of the *Apprendi* exception and indicating that “[t]he main concern [in *Apprendi*] was whether the prior conviction’s procedural safeguards ensured a reliable result, not that there had to be a right to a jury trial”) and *State v. Hitt*, 273 Kan. 224, 42

P.3d 732 (2002), paragraph one of syllabus (“Juvenile adjudications are included within the historical cloak of recidivism and enjoy ample procedural safeguards; therefore, the *Apprendi* exception for prior convictions encompasses juvenile adjudications”).

{¶ 31} We do not agree with the view adopted by the majority of courts in other jurisdictions and find the reasoning in *Tighe* to be more persuasive. Under *Apprendi*, a fact cannot be used to increase the penalty for a crime beyond the prescribed statutory maximum unless it is submitted to a jury and proved beyond a reasonable doubt or is admitted to by the defendant. *Id.*, 530 U.S. at 490, 120 S.Ct. 2348, 147 L.Ed.2d 435. The one exception to that rule is that a prior conviction can be used to increase the penalty without being submitted to the jury. *Id.* But prior convictions are treated differently only because “unlike virtually any other consideration used to enlarge the possible penalty for an offense, \* \* \* a prior conviction must itself have been established through procedures satisfying the fair notice, reasonable doubt, and jury trial guarantees.” *Jones v. United States*, 526 U.S. 227, 249, 119 S.Ct. 1215, 143 L.Ed.2d 311 (1999). Thus, at the heart of *Apprendi*’s narrow exception is the concept that the prior conviction was the result of 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.

{¶ 32} The significant expansion of *Apprendi*’s prior-conviction exception to include juvenile adjudications is at odds with the United States Supreme Court’s unwavering commitment to a narrow definition of a prior conviction. The proper inquiry

under *Apprendi* is not simply whether juvenile adjudications are deemed to be reliable, but whether the juveniles were afforded the right to a jury. *See id.* at 498-499 (Scalia, J., concurring).

{¶ 33} The right to a jury trial “is no mere procedural formality, but a fundamental reservation of power in our constitutional structure.” *Blakely v. Washington*, 542 U.S. 296, 305-306, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004). “[T]he Sixth and Fourteenth Amendments guarantee a jury standing between a defendant and the power of the State, and they guarantee a jury’s finding of any disputed fact essential to increase the ceiling of a potential sentence.” *Shepard v. United States*, 544 U.S. 13, 25, 125 S.Ct. 1254, 161 L.Ed.2d 205 (2005) (plurality opinion). That is, the jury-trial right is not primarily focused on the reliability of the jury’s conclusions drawn from the facts, but rather on preventing the state from drawing conclusions from the facts without using a jury.

{¶ 34} Given the United States Supreme Court’s emphatic pronouncements on the importance of the right to a jury trial, it is logical to conclude that the court meant to limit the prior-conviction exception to prior proceedings that satisfied the jury-trial guarantee. Because a juvenile adjudication is not established through a procedure that provides the right to a jury trial, it cannot be used to increase a sentence beyond a statutory maximum or mandatory minimum.

{¶ 35} In his amicus curiae brief, the Ohio Attorney General argues that if treating a juvenile adjudication as a conviction under R.C. 2901.08(A) violates due process, the remedy is to present the fact of the prior juvenile adjudication to the jury, not to declare

R.C. 2901.08(A) unconstitutional. The determination that a jury trial is not constitutionally necessary in juvenile-court proceedings is predicated on the juvenile system's purpose to "‘combine flexible decision-making with individualized intervention to treat and rehabilitate offenders rather than to punish offenses.’" *In re Anderson*, 92 Ohio St.3d at 65, 748 N.E.2d 67, quoting Rossum, *Holding Juveniles Accountable: Reforming America's "Juvenile Injustice System,"* 22 Pepperdine L.Rev. 907, 912 (1995). In order to continue holding that a jury trial is not required for juveniles, we must maintain the civil nature of juvenile adjudications. It is contradictory and fundamentally unfair to allow juvenile adjudications that result from these less formal proceedings to be characterized as criminal convictions that may later enhance adult punishment.

{¶ 36} We already have limited the use of prior convictions in other scenarios. An uncounseled prior conviction may not be used to enhance the penalty of a violation of R.C. 4511.19 without evidence of a valid waiver of counsel. *State v. Brooke*, 113 Ohio St.3d 199, 2007-Ohio-1533, 863 N.E.2d 1024. The right to a jury trial is fundamental to due process just as the right to counsel is fundamental. But in juvenile proceedings, there is no right to a jury because the focus is on rehabilitation rather than punishment. To convert an adjudication into a conviction when the adjudication process did not provide the right to have a jury test the elements of that offense offends due process and *Apprendi* and thus the state cannot treat a prior juvenile adjudication as a prior conviction to enhance the penalty for a subsequent conviction.

{¶ 37} For the foregoing reasons, we hold that R.C. 2901.08(A) violates the Due Process Clauses of Article I, Section 16 of the Ohio Constitution and the Fourteenth Amendment to the United States Constitution because it is fundamentally unfair to treat a juvenile adjudication as a previous conviction that enhances either the degree of or the sentence for a subsequent offense committed as an adult.

### **Conclusion**

{¶ 38} Treating a juvenile adjudication as an adult conviction to enhance a sentence for a later crime is inconsistent with Ohio's system for juveniles, which is predicated on the fact that children are not as culpable for their acts as adults and should be rehabilitated rather than punished. It is widely recognized that juveniles are more vulnerable to outside pressures, including the pressure to admit to an offense. Under *Apprendi*, using a prior conviction to enhance a sentence does not violate the constitutional right to due process, because the prior process involved the right to a jury trial. Juveniles, however, are not afforded the right to a jury trial. Quite simply, a juvenile adjudication is not a conviction of a crime and should not be treated as one.

{¶ 39} For the foregoing reasons, the judgment of the Montgomery County Court of Appeals is reversed, and the cause is remanded to the trial court for resentencing.

Judgment reversed  
and cause remanded.



O'CONNOR, C.J., and PFEIFER and O'NEILL, JJ.,  
concur.

O'DONNELL, J., dissents, with an opinion joined by  
KENNEDY and FRENCH, JJ.

**O'DONNELL, J., dissenting.**

{¶ 40} Respectfully, I dissent.

{¶ 41} A statute authorizing the use of a prior juvenile delinquency adjudication to enhance an adult sentence from a nonmandatory to a mandatory term does not violate due process or run afoul of *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). The prior juvenile adjudication of Adrian Hand as delinquent for having committed an offense that if committed by an adult would have been aggravated robbery is res judicata as to procedure and substance, and therefore the trial court properly relied on it to impose a mandatory prison term pursuant to R.C. 2929.13(F) for his adult aggravated burglary, aggravated robbery, and felonious assault convictions.

{¶ 42} The General Assembly has denoted in R.C. 2929.13(F)(6):

Notwithstanding divisions (A) to (E) of this section, the court shall impose a prison term or terms under sections 2929.02 to 2929.06, section 2929.14, section 2929.142, or section 2971.03 of the Revised Code and \* \* \* shall not reduce the term or terms pursuant to section 2929.20, section 2967.19, section 2967.193, or any other provision of Chapter 2967. or Chapter 5120. of the Revised Code for any of the following offenses:

\* \* \*

(6) Any offense that is a first or second degree felony and that is not set forth in division (F)(1), (2), (3), or (4) of this section, if the offender previously was convicted of or pleaded guilty to aggravated murder, murder, any first or second degree felony, or an offense under an existing or former law of this state, another state, or the United States that is or was substantially equivalent to one of those offenses.

{¶ 43} Because juvenile offenders are not convicted of offenses by juvenile courts but rather are adjudicated as delinquent, some confusion exists as to whether a juvenile adjudication should be used to enhance an adult criminal sentence imposed by a sentencing judge. That confusion however, is addressed by the legislature in R.C. 2901.08(A), which provides:

If a person is alleged to have committed an offense and if the person previously has been adjudicated a delinquent child or juvenile traffic offender for a violation of a law or ordinance, \* \* \* *the adjudication as a delinquent child or as a juvenile traffic offender is a conviction* for a violation of the law or ordinance *for purposes of determining the offense* with which the person should be charged *and*, if the person is convicted of or pleads guilty to an offense, *the sentence to be imposed* upon the person relative to the conviction or guilty plea.

(Emphasis added.)

{¶ 44} The plain language of this statute is unambiguous in my view and resolves any question

that a prior juvenile delinquency adjudication is a prior conviction for purposes of imposing a mandatory prison term under R.C. 2929.13(F)(6).

{¶ 45} In *Apprendi*, the United States Supreme Court held that “*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.” 530 U.S. at 490, 120 S.Ct. 2348, 147 L.Ed.2d 435. (Emphasis added.)

{¶ 46} A majority of federal and state court decisions agree and have held that a juvenile delinquency adjudication can be used to enhance a sentence under 18 U.S.C. 924(e), the Armed Career Criminal Act (“ACCA”), even though there is no right to a jury trial in juvenile proceedings. *See United States v. Jones*, 332 F.3d 688, 696 (3d Cir.2003) (“A prior nonjury juvenile adjudication that was afforded all constitutionally-required procedural safeguards can properly be characterized as a prior conviction for *Apprendi* purposes”); *United States v. Wright*, 594 F.3d 259, 264 (4th Cir.2010) (“As the ACCA expressly provides for qualifying juvenile adjudications to be used as predicate offenses and the Constitution in no way forbids it, the district court was correct not to discount the fact that Wright burgled firearms on three separate occasions during his delinquent youth. The fact that juries are not constitutionally required in juvenile adjudications does nothing to impeach this fact”); *United States v. Crowell*, 493 F.3d 744, 750 (6th Cir.2007) (“We now explicitly hold that the use of procedurally sound juvenile adjudications as ACCA predicates does not violate due process”); *Welsh v.*

*United States*, 604 F.3d 408, 429 (7th Cir.2010) (“We agree with other circuits that the protections juvenile defendants receive—notice, counsel, confrontation and proof beyond a reasonable doubt—ensure that the proceedings are reliable. Therefore, because juvenile adjudications are reliable, they are not subject to the *Apprendi* rule”); *United States v. Smalley*, 294 F.3d 1030, 1033 (8th Cir.2002) (“We therefore conclude that juvenile adjudications can rightly be characterized as ‘prior convictions’ for *Apprendi* purposes”); *United States v. Burge*, 407 F.3d 1183, 1191 (11th Cir.2005), quoting *Jones*, 332 F.3d at 696 (“Accordingly, ‘[a] prior nonjury juvenile adjudication that was afforded all constitutionally-required procedural safeguards can properly be characterized as a prior conviction for *Apprendi* purposes’ ”).

{¶ 47} In *Crowell*, the Sixth Circuit held that “the use of procedurally sound juvenile adjudications as ACCA predicates does not violate due process.” 493 F.3d at 750. The court noted that Congress has the power “to treat prior convictions as sentencing factors subject to a lesser standard of proof because the defendant received all process that was due when convicted—for adults that includes the right to a jury trial; for juveniles it does not.” *Id.*, quoting *Jones*, 332 F.3d at 695. Thus, the court concluded that “[j]uvenile adjudications, where the defendant has the right to notice, the right to counsel, the privilege against self-incrimination, the right to confront and cross-examine witnesses, and the right to a finding of guilt beyond a reasonable doubt, provide sufficient procedural safeguards to satisfy the reliability requirement that is at the heart of *Apprendi*.” *Id.*

{¶ 48} And the majority in today's decision is at odds with decisions on this issue from state supreme courts in Kansas, Indiana, Minnesota, Washington, and California. *State v. Hitt*, 273 Kan. 224, 236, 42 P.3d 732 (2002) ("Juvenile adjudications are included within the historical cloak of recidivism and enjoy ample procedural safeguards; therefore, the *Apprendi* exception for prior convictions encompasses juvenile adjudications. Juvenile adjudications need not be charged in an indictment or proven to a jury beyond a reasonable doubt before they can be used in calculating a defendant's criminal history score under the Kansas Sentencing Guidelines Act"); *Ryle v. State*, 842 N.E.2d 320, 321-322 (Ind.2005) ("The federal circuits are divided over whether juvenile adjudications are an exception to the *Apprendi* requirement that all facts used to enhance a sentence over the statutory maximum must be found by a jury beyond a reasonable doubt. *Apprendi*, 530 U.S. at 490, 120 S.Ct. 2348 [147 L.Ed.2d 435]. The Third, Eighth, and Eleventh Circuits have held that they are. \* \* \* Our analysis of *Apprendi* leads us to conclude that the Third, Eighth, and Eleventh Circuits are right"); *State v. McFee*, 721 N.W.2d 607, 619 (Minn.2006) ("We hold that, in calculating a defendant's criminal history score, a defendant does not have a Sixth Amendment right to a jury determination of the fact of a prior juvenile adjudication"); *State v. Weber*, 159 Wash.2d 252, 149 P.3d 646, ¶ 21 (2006) ("we hold that juvenile adjudications are convictions for the purposes of *Apprendi*'s prior conviction exception. Therefore, we affirm the court of appeals' determination that Weber's due process and jury trial rights are not violated by including Weber's juvenile adjudication in his offender score"); *People v. Nguyen*, 46 Cal.4th 1007, 1019, 209

P.3d 946 (2009) (“we agree with the majority view that the Fifth, Sixth, and Fourteenth Amendments, as construed in *Apprendi*, do not preclude the sentence-enhancing use, against an adult felon, of a prior valid, fair, and reliable adjudication that the defendant, while a minor, previously engaged in felony misconduct, where the juvenile proceeding included all the constitutional protections applicable to such matters, even though these protections do not include the right to jury trial”).

{¶ 49} No right to a jury trial exists in juvenile proceedings under the United States or Ohio Constitutions. *McKeiver v. Pennsylvania*, 403 U.S. 528, 545, 91 S.Ct. 1976, 29 L.Ed.2d 647 (1971); *In re Agler*, 19 Ohio St.2d 70, 249 N.E.2d 808 (1969), paragraph two of the syllabus. However, as this court stated in *State v. Walls*, 96 Ohio St.3d 437, 2002-Ohio-5059, 775, N.E.2d 829, ¶ 26,

numerous constitutional safeguards normally reserved for criminal prosecutions are equally applicable to juvenile delinquency proceedings. [*In re Anderson*, 92 Ohio St.3d 63] 66, 748 N.E.2d 67 [2001], citing *In re Gault*, 387 U.S. 1, 31-57, 87 S.Ct. 1428, 18 L.Ed.2d 527 [1967] (holding that various Fifth and Sixth Amendment protections apply to juvenile proceedings), and *In re Winship* (1970), 397 U.S. 358, 365-368, 90 S.Ct. 1068, 25 L.Ed.2d 368 (holding that the state must prove juvenile delinquency beyond a reasonable doubt); see, also, *Breed v. Jones*, 421 U.S. 519, 95 S.Ct. 1779, 44 L.Ed.2d 346 [1975] (holding that a delinquency proceeding places a juvenile in

jeopardy for purposes of the Double Jeopardy Clause); *In re Melvin J.* (2000), 81 Cal.App.4th 742, 759-760, 96 Cal.Rptr.2d 917 (relying on *Gault*, *Winship*, and *Breed* to hold that ex post facto principles apply to juvenile proceedings).

{¶ 50} Accordingly, imposing a mandatory sentence under R.C. 2929.13(F) based on a prior nonjury juvenile adjudication does not violate due process or run afoul of *Apprendi*, and therefore, the trial court did not violate Hand's right to due process by imposing a mandatory term based on his prior delinquency adjudication for an offense that would have been aggravated robbery if he had been convicted of it as an adult.

{¶ 51} Hand acknowledges that Ohio law and case authority from the Sixth Circuit Court of Appeals do not support his position that using a juvenile adjudication as a prior conviction for purposes of enhancing an adult sentence from a nonmandatory to a mandatory term violates due process and *Apprendi*, and urges that he is arguing for a change in existing law. That change, however, involves a policy consideration involving Ohio law and is not appropriate for judicial decree, but rather should emanate, if at all, from the policy making branch of government, the General Assembly in the State of Ohio.

{¶ 52} Accordingly, I respectfully dissent from the decision of the majority in this case, and I would affirm the judgment of the court of appeals.

KENNEDY and FRENCH, JJ., concur in the foregoing opinion.

Mathias H. Heck Jr., Montgomery County Prosecuting Attorney, and Andrew T. French, Assistant Prosecuting Attorney, for appellee.

Timothy Young, Ohio Public Defender, and Stephen A. Goldmeier, Assistant Public Defender, for appellant.

Michael DeWine, Attorney General, Eric E. Murphy, State Solicitor, and Peter T. Reed, Deputy Solicitor, urging affirmance for amicus curiae, Ohio Attorney General.



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**APPENDIX B**

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**[Cite as *State v. Hand*, 2014-Ohio-3838.]**

**IN THE COURT OF APPEALS OF OHIO  
SECOND APPELLATE DISTRICT  
MONTGOMERY COUNTY**

**Appellate Case No. 25840  
Trial Court Case No. 2012-CR-650/2  
(Criminal Appeal from Common Pleas Court)**

**[Filed September 5, 2014]**

STATE OF OHIO	)
Plaintiff-Appellee	)
	)
v.	)
	)
ADRIAN L. HAND, JR.	)
Defendant-Appellant	)
	)

**O P I N I O N**

Rendered on the 5th day of September, 2014.

MATHIAS H. HECK, JR., by ANDREW T. FRENCH,  
Atty. Reg. #0069384, Montgomery County Prosecutor's  
Office, Appellate Division, Montgomery County Courts  
Building, P.O. Box 972, 301 West Third Street, Dayton,  
Ohio 45402

Attorney for Plaintiff-Appellee

ROBERT ALAN BRENNER, Atty. Reg. #0067714, 120  
West Second Street, Suite 706, Dayton, Ohio 45402  
Attorney for Defendant-Appellant

HALL, J.

{¶ 1} Adrian L. Hand appeals from his conviction and sentence on charges of aggravated burglary, aggravated robbery, felonious assault, and a firearm specification.<sup>1</sup>

{¶ 2} In his sole assignment of error, Hand contends the trial court's use of a prior juvenile delinquency adjudication to enhance his sentence from a non-mandatory to a mandatory prison term violated his due process rights and *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000).

{¶ 3} The record reflects that before his current offenses, Hand had a delinquency adjudication for aggravated robbery, a first-degree felony if committed by an adult. In the proceedings below, the trial court imposed an aggregate six-year prison sentence for Hand's current offenses. The sentence consisted of (1) concurrent three-year terms for aggravated burglary, aggravated robbery, and felonious assault and (2) a consecutive three-year term for the firearm specification. The parties agreed that the sentence for the firearm specification involved mandatory prison time. They disputed, however, whether the trial court was required to impose mandatory prison time for the

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<sup>1</sup> Hand also was found guilty of kidnapping, a second count of felonious assault, and additional firearm specifications. The trial court merged these offenses into the others at sentencing as allied offenses of similar import.

substantive offenses. The trial court relied on R.C. 2929.13(F)(6) to find that those three years involved mandatory prison time as well.

{¶ 4} In relevant part, R.C. 2929.13(F)(6) requires a mandatory prison term where a defendant sentenced for the offenses at issue here has a prior conviction for any first or second-degree felony. The trial court concluded that Hand's delinquency adjudication qualified as a prior conviction for a first-degree felony. In so doing, it looked to R.C. 2901.08(A). As pertinent here, that statute provides:

If a person is alleged to have committed an offense and if the person previously has been adjudicated a delinquent child \* \* \* for a violation of a law or ordinance, \* \* \* the adjudication as a delinquent child \* \* \* is a conviction for a violation of the law or ordinance for purposes of determining the offense with which the person should be charged and, if the person is convicted of or pleads guilty to an offense, the sentence to be imposed upon the person relative to the conviction or guilty plea.

R.C. 2901.08(A).

{¶ 5} On appeal, Hand argues that treating his delinquency adjudication as a prior conviction violates his due process rights because he was not afforded a jury trial in juvenile court and was not advised of the collateral consequences of accepting responsibility there. Relying on *United States v. Tighe*, 266 F.3d 1187 (9th Cir. 2001), he also argues that treating his juvenile adjudication as a prior conviction violates *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348,

147 L.Ed.2d 435 (2000). In his appellate brief, Hand acknowledges that the weight of authority is against him. He stresses that he is raising the issue “in order to argue for a change in existing law and to preserve the issue for himself in the future.” (Appellant’s brief at 4).

{¶ 6} Upon review, we are unpersuaded by Hand’s arguments. This court explicitly rejected the same arguments in *State v. Craver*, 2d Dist. Montgomery No. 25804, 2014-Ohio-3635. Relying on *State v. Parker*, 8th Dist. Cuyahoga No. 97841, 2012-Ohio-4741, and cases cited therein, we rejected a claim that treating a delinquency adjudication as a prior conviction violates due process because the defendant was not afforded a jury trial in juvenile court and was not advised of the collateral consequences of accepting responsibility. *Craver* at ¶ 7-16. We also held that a prior delinquency adjudication falls within *Apprendi*’s prior-conviction exception despite the fact that such an adjudication does not involve a jury trial and does not require an explanation of all possible collateral consequences. *Id.* at ¶ 9-14. Finally, we noted our review of a juvenile-court transcript in *Craver* and found substantial compliance with Juv.R. 29(D).

{¶ 7} Based on the authority of *Craver* and the cases cited therein, we hold that treating Hand’s delinquency adjudication as a prior conviction for purposes of imposing a mandatory prison sentence under R.C. 2929.13(F)(6) did not violate his due process

rights or *Apprendi*.<sup>2</sup> Accordingly, Hand's assignment of error is overruled.

{¶ 8} The trial court's judgment is affirmed.

WELBAUM, J., concurs.

DONOVAN, J., dissenting:

{¶ 9} I disagree. The majority cites to *Craver* in finding no Due Process violation by use of a prior juvenile adjudication to enhance a sentence from a non-mandatory to a mandatory prison term. *Craver* was decided on an *Anders* brief, hence the argument was never fully developed by appointment of new counsel to file a merit brief. In my view, it was patently wrong to characterize this Due Process argument as wholly frivolous.

{¶ 10} There is a split of authority regarding whether juvenile adjudications may be utilized as sentence enhancements in criminal cases in light of the United States Supreme Court's ruling in *Apprendi* and its progeny. Compare *Tighe* (holding the use of juvenile adjudications without right to jury trial violates due process of law under *Apprendi*), and *State v. Brown*, 879 So.2d 1276, 1290 (La. 2004) (same), with *United States v. Burge*, 407 F.3d 1183, 1191 (11th Cir. 2005); *United States v. Jones*, 332 F.3d 688, 696 (3d Cir. 2003); and *United States v. Smalley*, 294 F.3d 1030, 1033 (8th Cir. 2002).

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<sup>2</sup> Unlike *Craver*, we have not reviewed a transcript of Hand's juvenile court proceeding because no such transcript is part of the record on appeal.

{¶ 11} Each of the above cited cases were decided before *Allenye v. United States*, \_\_ U.S. \_\_, 133 S.Ct. 2151, 186 L.Ed. 314 (2013), wherein Justice Thomas reiterated statements he made in *Apprendi*, observing that the logic of *Apprendi* applies with equal weight to facts triggering a mandatory minimum sentence. There are a significant number of law review articles which question on due process grounds whether juvenile court adjudications should be considered the equivalent of criminal convictions for purposes of sentence enhancement statutes. Generally, the critics note: (1) the different purposes of a juvenile adjudication and the juvenile justice system as a whole, (2) the prevalence of pleas in the juvenile system, (3) the lack of a jury trial in juvenile proceedings, (4) the difficulty juveniles face to meaningfully participate in a process they do not fully understand and do not control, and (5) the lack of zealous advocacy in juvenile proceedings. See, e.g., Courtney P. Fain, Note, *What's in a Name? The Worrisome Interchange of Juvenile "Adjudications" with Criminal "Convictions,"* 49 B.C. L. Rev. 495 (2008); Alissa Malzmann, Note, *Juvenile Strikes: Unconstitutional Under Apprendi and Blakely and Incompatible with the Rehabilitative Ideal*, 15 S. Cal. Rev. L. & Women's Stud. 171 (2005); Brian P. Thill, Comment, *Prior "Convictions" Under Apprendi: Why Juvenile Adjudications May Not be Used to Increase an Offender's Sentence Exposure if They Have Not First Been Proven to a Jury Beyond a Reasonable Doubt*, 87 Marq. L. Rev. 573 (2004); Barry C. Feld, *The Constitutional Tension Between Apprendi and McKeiver: Sentence Enhancements Based on Delinquency Convictions and the Quality of Justice in Juvenile Courts*, 38 Wake Forest L. Rev. 1111 (2003).

{¶ 12} It is inconsistent to consider juvenile adjudications civil for one purpose, i.e., no right to jury trial, but then criminal for the purpose of classifying them as “prior convictions” which can be counted as predicate offenses for the purpose of a mandatory prison term upon a first adult conviction. There is a significant difference between allowing a trial judge to consider a juvenile adjudication as a factor in exercising its discretion at sentencing and using that adjudication to impose a mandatory prison term.<sup>3</sup>

{¶ 13} A historical perspective is warranted before rejecting the Due Process argument. The first juvenile court system was established in Illinois, in 1899, with the aim to rehabilitate those young offenders deemed less culpable than their adult counterparts. Andrew Tunnard, *Not-So-Sweet Sixteen: When Minor Convictions Have Major Consequences Under Career Offender Guidelines*, 66 Vand. L. Rev. 1309, 1312 (2013); Laureen D’Ambra, *A Legal Response to Juvenile Crime: Why Waiver of Juvenile Offenders is Not a Panacea*, 2 Roger Williams U.L.Rev. 277, 280 (1997).

{¶ 14} Until the early nineteenth century, American criminal courts punished juveniles and adults in much the same way, and it was not until the Progressive era that the idea of juvenile courts gained traction. Barry

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<sup>3</sup> Absent a jury trial guarantee, counting juvenile adjudications as convictions falling within the “conviction exception” of *Apprendi* and its progeny violates the constitutionally guaranteed due process rights of Hand. *See generally*, Rebecca Gannon, Note, *Apprendi after Miller and Graham, How the Supreme Court’s Recent Jurisprudence on Juveniles Prohibits the Use of Juvenile Adjudications as Mandatory “Sentencing Enhancements”*, 79 Brooklyn Law Review 347 (2013).

C. Feld, *Cases and Materials on Juvenile Justice Administration*, 2 (3d Ed. 2009). Changes in the ideological assumptions about crime and the social landscape supported the movement, that rehabilitation for juvenile offenders was needed. *Id.* at 3. Additionally, new thoughts about social development designated adolescence as a distinct stage before adulthood, leading to the increasingly accepted view that children were less culpable and needed preparation for life. *Id.* at 4.

{¶ 15} The United States Supreme Court recognized this in the 1960s: “From the inception of the juvenile court system, wide differences have been tolerated - indeed insisted upon - between the procedural rights accorded to adults and those of juveniles. In practically all jurisdictions, there are rights granted to adults which are withheld from juveniles.” *In re Gault*, 387 U.S. 1, 14, 87 S.Ct. 1428, 18 L.Ed. 2d 527 (1967).

{¶ 16} From the beginning juvenile proceedings were not considered adversarial; the state acted as *parens patriae* for the juveniles. The state would attempt, “not so much to punish as to reform, not to degrade but to uplift, not to crush but to develop.” Julian W. Mack, *The Juvenile Court*, 23 Harv.L.Rev. 104, 107 (1909). The courts deemed a juvenile offender as a “delinquent,” not a “criminal,” preserving the possibility of rehabilitation and signifying a lower degree of culpability. *In re Gault* at 23. The US Supreme Court considers adult criminal cases and juvenile hearings as “fundamentally different.” *Schall v. Martin*, 467 U.S. 253, 263, 104 S.Ct. 2403, 81 L.Ed.2d 207 (1984).



{¶ 17} Ohio has followed this reasoning in the construction of its juvenile justice system. In Ohio, juvenile proceedings do not result in criminal convictions; juvenile court proceedings are civil actions. *In re Anderson*, 92 Ohio St.3d 63, 748 N.E.2d 67 (2001), syllabus. Juveniles are “adjudicated delinquent” rather than “found guilty.” *State v. Hanning*, 89 Ohio St.3d 86, 89, 728 N.E.2d 1059 (2000); *State v. Adkins*, 129 Ohio St. 3d 287, 2011-Ohio-3141, 951 N.E.2d 766, ¶ 10. We must recognize the concept of lessened culpability which attaches to the admission of responsibility in juvenile court.

{¶ 18} The Ohio Supreme Court in *Anderson* set forth the underlying criminal characteristics that are prevalent in juvenile proceedings:

Although the juvenile court operates in a separate system, the United States Supreme Court has carefully imposed basic due process requirements on it. We recognize that there are criminal aspects to juvenile court proceedings. For instance, in [*Gault*] the court specifically held the privilege against self-incrimination applicable to juvenile proceedings. *Id.* at 49-54, \* \* \* . In addition, notice of the charges, the assistance of counsel, and the rights of confrontation and cross-examination were also afforded to the juvenile. *Id.* at 31-57, \* \* \* . In *In re Winship* (1970), 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368, the court further advanced due process rights when it found that the state must prove its case against a juvenile beyond a reasonable doubt. However, in *McKeiver v. Pennsylvania* (1971), 403 U.S. 528, 91 S.Ct.

1976, 29 L.Ed.2d 647, and *Schall v. Martin* (1984), 467 U.S. 253, 104 S.Ct. 2403, 81 L.Ed.2d 207, the court declined further expansions when it denied juveniles the right to jury trials (*McKeiver*) and upheld the constitutionality of pretrial preventive detention for accused juvenile delinquents (*Schall*).

*Id.* at 65-66.

{¶ 19} The Court in *Anderson* reasoned further regarding the main goal of the juvenile justice system:

In *In re Caldwell* (1996), 76 Ohio St.3d 156, 157, 666 N.E.2d 1367, 1368, we summarized the purpose of R.C. 2151.01: “to provide for the care, protection, and mental and physical development of children, to protect the public from the wrongful acts committed by juvenile delinquents, and to rehabilitate errant children and bring them back to productive citizenship, or, as the statute states, to supervise, care for and rehabilitate those children. Punishment is not the goal of the juvenile system, except as necessary to direct the child toward the goal of rehabilitation.”[] See, also, Juv.R. 1(B)(3) and (4).

Thus, from their inception, juvenile courts existed as civil, not criminal, courts. The basic therapeutic mission of these courts continues to this day. \* \* \*.

*Id.* at 66.

{¶ 20} An adjudication is further distinguishable from a criminal conviction because juveniles are much

more likely to admit responsibility. As noted in a 2010 law review article:

[J]uveniles may plead guilty when they otherwise would not have out of a fear that their judge--who is often remarkably familiar with the minor and particularly knowledgeable of the facts surrounding the conduct in question--will find them guilty regardless and impose a harsher sanction in response to their unwillingness to plead initially.

Joseph I. Goldstein-Breyer, *Calling Strikes Before He Stepped to the Plate: Why Juvenile Adjudications Should Not Be Used to Enhance Subsequent Adult Sentences*, 15 Berkeley J. Crim. L. 65, 79 (2010).

{¶ 21} In juvenile courts it has been widely accepted that when a judge offers a juvenile the choice between admitting to an offense, and going home that day, or waiting another week in detention, evidence shows the juvenile will choose to go home as quickly as possible. *Id.*; See Brief of Pac. Juvenile Defender Ctr., et al. as Amici Curiae on Behalf of Appellant Nguyen, 34, *People v. Nguyen*, 46 Cal. 4th 1007 (No. S154847) (2009).

{¶ 22} Furthermore, authorities have cited additional differences such as the functions of lawyers in juvenile proceeding. It has been stated that lawyers who represent juveniles act more as guardians than advocates which would be found in adult criminal proceedings. See, Janet E. Ainsworth, *Youth Justice in a Unified Court: Response to Critics of Juvenile Court Abolition*, 36 B.C. L. Rev. 927, 940-41 (1995); Ellen Marrus, *Best Interests Equals Zealous Advocacy: A Not*

*So Radical View of Holistic Representation for Children Accused of Crime*, 62 Md. L. Rev. 288, 327-28 (2003) (arguing that attorneys may have a paternalistic approach in juvenile cases and view the juvenile system as more similar to a benevolent social welfare agency). It seems that some attorneys can be dissuaded from advocating aggressively on behalf of the minor in juvenile court.<sup>4</sup> Goldstein-Breyer, at 80. Juvenile proceedings can also be less reliable as a result of the different rules of evidence and criminal procedure, as well as a lack of a clear record or transcript. *Id.*

{¶ 23} Although juvenile offenders are afforded some of the same due process rights as their adult counterparts, the purposes of a criminal conviction and juvenile adjudication are inherently different. The purpose of juvenile adjudications is care and rehabilitation, which hopefully will not lead the juvenile delinquent to recidivate as an adult.

{¶ 24} I recognize that the majority of jurisdictions in the U.S. allow prior juvenile adjudications to be used as sentencing considerations. *See*, Ellen Marrus, “*That Isn’t Fair, Judge*”: *The Costs of Using Prior Juvenile Delinquency Adjudications in Criminal Court Sentencing*, 40 Hous. L. Rev. 1323, 1344 (2004). However, the adjudications in such cases are not used to enhance the defendant’s sentence (or as a predicate to mandatory prison), but they can be used by the judge to determine the actual sentence within the boundaries set by the legislature. Nevertheless, the court still

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<sup>4</sup> *See*, Steven A. Drizin & Greg Luloff, *Are Juvenile Courts A Breeding Ground for Wrongful Convictions?*, 34 N. Ky. L. Rev. 257, 305 (2007).

retains jurisdiction to consider the adult offender's youthfulness at the time of the juvenile adjudication and to exercise its judicial discretion to consider other options such as community control and community based correctional facilities.

{¶ 25} In Ohio, the judge uses many factors in sentencing. R.C. 2929.12. Among these, R.C. 2929.12(D)(2) provides, "[t]he offender previously was adjudicated a delinquent child pursuant to Chapter 2151. of the Revised Code prior to January 1, 2002, or pursuant to Chapter 2152. of the Revised Code, or the offender has a history of criminal convictions." This section should be read in pari materia with R.C. 2901.08, to conclude that a juvenile adjudication should only be considered a sentencing factor in a situation such as Hand's, unlike the case where the prior adjudication does determine the level of the offense, for example a domestic violence or OMVI offense. A single juvenile adjudication should not be used to morph an adult conviction into a mandatory prison term with no consideration of community control, judicial release, or other transitional control options.

{¶ 26} The trial court herein relied in part upon *State v. Adkins*, 129 Ohio St.3d 287, 2011-Ohio-3141, 951 N.E.2d 766, wherein the Ohio Supreme Court held that a juvenile adjudication could serve as one of the five prior similar offenses necessary to enhance a charge of operating a motor vehicle while under the influence of alcohol, because R.C. 2901.08 expressly includes juvenile adjudications among the offenses that may be used for penalty enhancement. The court specifically noted that "R.C. 2901.08 did not change [the] juvenile adjudication; it merely added another

type of legal violation as an aggravating offense under R.C. 4511.19(G)(1)(d).” *Id.* at ¶ 17. However, the *Adkins* case did not consider the Due Process implication of the lack of a right to a jury trial in juvenile court. Further, in *Adkins*, the defendant was put on notice of the aggravating circumstance of a prior juvenile adjudication, as it was set forth in the indictment. Here, Hand’s prior adjudication did not determine the offense charged as R.C. 2901.08(A) contemplates, and the prior adjudication was not set forth in the indictment providing notice of the mandatory prison term. Furthermore, no jury determination was available to Hand for the aggravating circumstance that resulted in a mandatory prison term.<sup>5</sup> Significantly, *Adkins* was decided before the U.S. Supreme Court decided *Alleyne*, which expanded the reasoning of *Apprendi* to mandatory minimum terms.

{¶ 27} In my view, equating *Hand’s* juvenile adjudication with an adult conviction ignores the fact that Ohio has developed a system for juveniles that assumes that children are not as culpable for their acts as adults. Compared to adults, juveniles evince a lack of maturity and an underdeveloped sense of responsibility; they are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure. “A juvenile is not absolved of responsibility for his actions, but his transgression ‘is

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<sup>5</sup> Furthermore, *Adkins’* focus was on the retroactivity and Ex Post Facto implications of R.C. 2901.08(A). There was no discussion of the unavailability of jury trials in juvenile court nor the impact of *Apprendi* and its progeny on the constitutionality of the legislative enhancement provisions, particularly those which are not set forth in the indictment, providing notice consistent with Due Process.

not as morally reprehensible as that of an adult.’ *Thompson* [*v. Oklahoma*, 487 U.S. 815] at 835, 108 S.Ct. 2687, [101 L.Ed.2d 702 (1988)] (plurality opinion).” *Graham v. Florida*, 560 U.S. 48, 68, 130 S.Ct. 2011, 2026, 176 L.Ed.2d 825 (2010).

{¶ 28} From a moral perspective, in my view, it is misguided to equate the failings of a minor with those of an adult. Although Hand was sentenced as an adult, the majority view prohibits the trial judge from considering his “youthfulness” at the time of his predicate offense. These facts, coupled with the failure to set forth the adjudication in the indictment and the lack of jury trial in juvenile court, in my view, constitute a Due Process violation under the United States and Ohio Constitutions. Clearly, one reason *Apprendi* exempts prior convictions from its rule is the opportunity for an initial jury determination of guilt and notice through the wording of the indictment of the predicate offense. *McKeiver* did not address nor contemplate these issues at all since it was decided long before *Apprendi* and *Allen*.

{¶ 29} I would reverse and remand for re-sentencing.

Copies mailed to:

Mathias H. Heck  
Andrew T. French  
Robert Alan Brenner  
Hon. Dennis J. Langer

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**APPENDIX C**

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**IN THE COMMON PLEAS COURT  
OF MONTGOMERY COUNTY, OHIO**

**Case No. 12 CR 650  
(Judge Dennis J. Langer)**

**[Filed July 16, 2013]**

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STATE OF OHIO,	)
Plaintiff,	)
	)
v.	)
	)
ADRIAN HAND,	)
Defendant.	)

---

**DECISION AND ENTRY RULING A JUVENILE  
DELINQUENCY AJUDICATION FOR A FIRST  
OR SECOND DEGREE FELONY IS A PRIOR  
“CONVICTION” UNDER R.C. 2929.13 (F) (6)**

**DEFENDANT’S REQUEST TO CONTINUE  
SENTENCING HEARING DENIED**

On June 12, 2013, the Defendant, Adrian Hand (hereinafter “Hand”), pled no contest to and was found guilty of all five indicted charges (hereinafter “the underlying felonies”):

- Aggravated Burglary, Aggravated Robbery and Kidnapping - first degree felonies



- two counts of Felonious Assault - second degree felonies

He also pled no contest to and was found guilty of the three-year firearm specifications attached to each of these offenses. Given that the offenses occurred as part of the same transaction, all five firearm specifications merge into a single firearm specification.

Pursuant to the plea agreement, Hand will be sentenced to three mandatory years for the merges firearm specification to run consecutively with a three-year prison term for the underlying felonies.

The issue before this Court is whether the three-year prison term for the underlying felonies should be designated as a mandatory prison sentence by reason of Hand's previous juvenile delinquency adjudication for aggravated robbery, a first degree felony.

R.C. 2929.13 (F) (6) mandates the imposition of mandatory prison term for "Any offense that is a first or second degree felony . . . if the offender previously was convicted of . . . any first or second degree felony . . ." Id. The question is whether the term "previously was convicted of . . . any first or second degree felony" includes a prior juvenile adjudication for such offense?

R.C. 2901.08(A) provides, in relevant part: "If a person is alleged to have committed an offense and if the person previously has been adjudicated a delinquent child . . . for a violation of a law . . . the adjudication as a delinquent child . . . is a conviction for a violation of the law . . . for purposes of determining the offense with which the person should be charged and, if the person is convicted of or pleads guilty to an

offense, the sentence to be imposed upon the person relative to the conviction or guilty plea.” Id.

In applying R.C. 2901.08(A), the Ohio Supreme Court has held that a juvenile delinquency adjudication for OVI may be used to enhance the penalty of an adult convicted of OVI - pursuant to R.C. 4511.19(G)(1)(d) which renders an OVI a fourth-degree felony if the offense previously convicted of or pleaded guilty to five or more OVI offenses within the previous 20 years. *State v. Adkins* (2011) 129 Ohio St. 3d 287.

*State v. Parker* (October 11, 2012), Cuyahoga App. No. 97841 - a case cited by the State - is factually directly on point. In *Parker*, the Eighth Appellate District held R.C. 2901.08(A) enables a juvenile delinquency adjudication for felonious assault to be used as a prior “conviction” specification under R.C. 2929.13(F)(6) in an adult prosecution for aggravated robbery. Furthermore, the Eighth Appellate District Court ruled that imposing a penalty enhancement under R.C. 2901.08 based on a juvenile delinquency adjudication does not violate the defendant’s constitutional rights under the Fifth, Sixth, and Fourteenth Amendments. Id. at P25.

Based upon R.C. 2901.08(A), *State v. Adkins*, supra, and *State v. Parker*, supra, this Court finds the Defendant Hand’s previous delinquency adjudication for the first degree felony of aggravated robbery constitutes a previous “conviction” under R.C. 2929.13 (F) (6). Therefore, the three-year prison term for Hand’s underlying felonies must be designated as a mandatory prison sentence. Furthermore, this Court finds this use of Hand’s delinquency adjudication does

not violate his constitutional rights under the Fifth, Sixth, and Fourteenth Amendments.

Finally, this Court denies Hand's request to continue his sentencing hearing "so that he may challenge his prior juvenile adjudication in the Montgomery County Juvenile Court." Defendant's *Sentencing Memorandum*. Notwithstanding this Court's decision, Hand is free to attempt obtain a court order vacating or voiding his prior juvenile delinquency adjudication. In the event he succeeds in obtaining such an order, this Court would entertain a post conviction petition to amend its sentencing entry to designate the underlying three-year prison term to be a nonmandatory term.

SO ORDERED:

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DENNIS J. LANGER, JUDGE

Copies of the above have been emailed to counsel:

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App. 48

General Divison  
Montgomery County Common Pleas Court  
41 N. Perry Street, Dayton, Ohio 45422

Type: Decision

Case Number: 2012 CR 00650 /2

Case Title: STATE OF OHIO vs ADRIAN  
LAMONT HAND

So Ordered

/s/