

# Calling Strikes Before He Stepped to the Plate: Why Juvenile Adjudications Should Not Be Used to Enhance Subsequent Adult Sentences

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## INTRODUCTION

In 1967, the United States Supreme Court held that minors in juvenile court have the right to notice of the charges upon which they stand accused, the right to cross-examination, the privilege against self-incrimination, and the right to counsel.<sup>1</sup> However, four years later, in *McKeiver v. Pennsylvania*, the Court determined that juveniles were not entitled to a jury trial due to what it considered fundamental differences between the purposes and characteristics of the juvenile and criminal justice system.<sup>2</sup> According to the *McKeiver* Court, these differences included the juvenile court's superior diagnostic and rehabilitative services, the lower level of culpability indicated through a juvenile adjudication than a criminal conviction, and the intimate, informal, and protective approach of the juvenile system that sought to rehabilitate rather than punish.<sup>3</sup> Therefore, the Court concluded, the right to a jury trial would lead to the "traditional delay, the formality, and the clamor of the adversary system."<sup>4</sup>

In light of the rationale for different treatment of juvenile adjudications, the California Supreme Court's decision in *People v. Nguyen*, which held that non-jury juvenile adjudications may be used to enhance subsequent sentences beyond the statutory maximum,<sup>5</sup> is inconsistent with the long-standing purposes of the juvenile system. Use of prior juvenile adjudications to enhance later adult sentences is contrary to the deliberately drawn boundaries between the juvenile and adult systems. Thus, the California Supreme Court's decision raises serious issues relating to the underlying differences between the juvenile

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1. *In re Gault*, 387 U.S. 1, 55-57 (1967).
  2. *McKeiver v. Pennsylvania*, 403 U.S. 528, 550 (1971) (plurality).
  3. *Id.* at 539-40, 544 n.5.
  4. *Id.* at 550.
  5. *People v. Nguyen (Nguyen III)* 46 Cal. 4th 1007, 1028 (2009).

and criminal justice systems. Moreover, it calls the fundamental fairness of these adjudications into question. This note recognizes that providing minors with fewer procedural safeguards in the name of rehabilitation, informality, and *parens patriae* may be justified. However, using those adjudications to punish juveniles more severely as *adults* is contradictory to the distinct purposes of the juvenile system.

Although *People v. Nguyen* may not have offended any binding precedent, the United States Supreme Court should grant certiorari<sup>6</sup> and prohibit the use of juvenile adjudications to enhance subsequent adult sentences in light of the Sixth Amendment concerns it engenders. These outcomes are inconsistent with the underlying principles of the juvenile justice system. If the Court declines to determine whether juvenile adjudications may be used to enhance subsequent adult sentences, it should reconsider *McKeiver*.<sup>7</sup> Ultimately, this note proposes that the better of these two options is to determine that it is unconstitutional to use non-jury juvenile adjudications as sentence enhancements.

This Note proceeds in six parts. Part II provides a brief history of the juvenile justice system. Part III describes the juvenile system's recent annexation by the adult criminal justice system, as illustrated by California's Three Strikes law. Part IV outlines the case law courts have relied on to determine the procedural safeguards afforded to criminal defendants and minors in the juvenile court system. Part V examines the factual background, procedural history, and both the majority and dissents' reasoning in *People v. Nguyen*.<sup>8</sup> Part VI proposes that the Supreme Court should grant certiorari in *Nguyen* and examine whether juryless juvenile adjudications may be used in subsequent proceedings to enhance adult sentences. Finally, in Part VII, this Note argues that the use of prior non-jury juvenile adjudications to enhance criminal sentences beyond the statutory maximum jeopardizes and damages the distinct boundaries of the juvenile and adult court systems, having unfair and unconstitutional effects.

## I. THE ORIGINS OF THE JUVENILE JUSTICE SYSTEM

In 1899, Illinois reformers developed the first juvenile justice system in order to discipline youth without the harshness of the criminal justice system.<sup>9</sup> In this new system, which quickly spread throughout the nation, "[t]he child was to be 'treated' and 'rehabilitated' and the procedures, from apprehension through institutionalization, were to be 'clinical' rather than punitive."<sup>10</sup>

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6. Defendant and appellant Nguyen filed a petition for certiorari before the United States Supreme Court. *Nguyen v. California*, 2009 WL 3870833 (Nov. 17, 2009) (No. 09-604).

7. *McKeiver*, 403 U.S. at 545.

8. See *Nguyen III*, 46 Cal. 4th 1007 (reviewing *People v. Nguyen (Nguyen II)* 62 Cal. Rptr. 3d 255 (Ct. App. 2007)).

9. See *In re Gault*, 387 U.S. 1, 14 (1967).

10. *Id.* at 15-16. See also Mary Berkheiser, *The Fiction of Juvenile Right to Counsel*:

Juvenile proceedings were not adversarial like those of the adult system but instead involved the state acting as *parens patriae* on behalf of the juvenile.<sup>11</sup> As a result of the unique characteristics and objectives of the juvenile system, “proceedings involving juveniles were described as ‘civil’ not ‘criminal’ and therefore not subject to the requirements which restrict the state when it seeks to deprive a person of his liberty.”<sup>12</sup>

California’s juvenile justice system arose out of this model.<sup>13</sup> Over time, however, it has developed beyond a concern for the welfare of the minor and playing the role of *parens patriae*. For example, the legislature has added the purposes of protecting the public from the effects of criminal activity and redressing injuries to victims.<sup>14</sup>

With this history of the juvenile justice system in mind, the United States Supreme Court, in *In re Gault*, considered what procedural safeguards were necessary in order to promote the system’s purpose and afford juveniles their constitutionally required due process.<sup>15</sup> The Court explained that although rehabilitation remained the primary goal of the juvenile system, which in part distinguished it from the adult criminal justice system, “unbridled discretion, however benevolently motivated, is frequently a poor substitute for principle and procedure.”<sup>16</sup> Consequently, the Court held certain procedural safeguards—the right to counsel, notice of charges, a fair and impartial hearing, the opportunity to confront and cross-examine witnesses, and protection against self-incrimination—were vital to the juvenile system.<sup>17</sup>

Next, *In re Winship*, another Supreme Court case, extended the procedural safeguards guaranteed to juveniles, holding that “preponderance of the evidence” was an insufficient standard of proof for juvenile adjudications.<sup>18</sup> Like adult criminal proceedings, the Court determined that the standard of

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*Waiver in Juvenile Courts*, 54 FLA. L. REV. 577, 585-86 (2002) (explaining that the juvenile court system, which was designed as a substitute for the discipline traditionally implemented by parents, demands informality and individualized treatment and focuses on rehabilitation rather than punishment).

11. *Gault*, 387 U.S. at 16.

12. *Id.* at 17 (citation omitted).

13. See *Nicholl v. Koster*, 157 Cal. 416, 419 (1910) (explaining the rationale for the juvenile court system was “to provide for the care and custody of children who have shown, or from lack of care are likely to develop, criminal tendencies, in order to have them trained to good habits and correct principles”); see also *In re Daedler*, 194 Cal. 320, 329 (1924) (the juvenile court system was created to “protect and train” minors and to “benefit, not only the child, but the community also, by surrounding the child with better and more elevating influences and training it in all that counts for good citizenship and usefulness as a member of society”).

14. See *In re Javier A.*, 159 Cal. App. 3d 913, 958-59 (1984); see also CAL. WELF. & INST. CODE § 202 (West 2009).

15. *Gault*, 387 U.S. 1.

16. *Id.* at 18.

17. *Id.* at 55.

18. *In re Winship*, 397 U.S. 358, 364 (1970).

proof necessary to sustain a conviction was “beyond a reasonable doubt.”<sup>19</sup> Just as it had done three years earlier in *Gault*, the Court refused to find that the required procedural safeguards in juvenile proceedings would impair or obstruct the juvenile system’s holistic, non-adversarial, and personal approach.<sup>20</sup>

The following year, in *McKeiver v. Pennsylvania*, the Supreme Court held that it was not necessary to grant minors the right to a jury trial in juvenile proceedings in order to comply with due process.<sup>21</sup> Sixteen-year-old Joseph McKeiver was charged as a juvenile with robbery, larceny, and receiving stolen goods.<sup>22</sup> At his juvenile adjudication hearing, McKeiver’s counsel requested a jury trial, which the trial judge denied.<sup>23</sup> McKeiver appealed this determination, and the issue eventually reached the Supreme Court. In a plurality opinion, the Supreme Court found that juveniles were not constitutionally entitled to a jury trial under the Sixth Amendment.<sup>24</sup> The Court noted, among other things, that a jury trial “might well destroy the traditional character of juvenile proceedings.”<sup>25</sup> Furthermore, according to the Court, a juvenile proceeding was not a criminal prosecution under the Sixth Amendment.<sup>26</sup> In addition to emphasizing the importance of the juvenile system’s rehabilitative ideal, the Court reaffirmed the system’s emphasis on “fairness,” “concern,” and “sympathy.”<sup>27</sup> Relying on *Gault* and *Winship*, the United States Supreme Court rejected the notion that juveniles have a constitutional right to a jury determination of guilt.

## II. CALIFORNIA’S USE OF JUVENILE ADJUDICATIONS IN THREE STRIKES SENTENCING

California has what is generally considered the country’s most punitive habitual offender statute.<sup>28</sup> Under California’s Three Strikes law, a defendant with one prior serious or violent felony conviction receives a mandatory sentence that is twice the minimum for the current felony charged, regardless of whether the current offense is a serious or violent felony.<sup>29</sup> When an offender

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19. *Id.*

20. *Id.* at 366.

21. *McKeiver*, 403 U.S. at 550.

22. *Id.* at 534.

23. *Id.* at 535.

24. *Id.* at 535-36.

25. *Id.* at 540.

26. *Id.* at 541.

27. *Id.* at 550.

28. See generally FRANKLIN E. ZIMRING ET AL., PUNISHMENT AND DEMOCRACY: THREE STRIKES AND YOU’RE OUT IN CALIFORNIA, 3 (Oxford University Press 2001); BRUCE WESTERN, PUNISHMENT AND INEQUALITY IN AMERICA, 64-65 (Russell Sage Foundation 2006); BRIAN P. JANISKEE & KEN MASUGI, DEMOCRACY IN CALIFORNIA: POLITICS AND GOVERNMENT IN THE GOLDEN STATE, 104 (Rowman & Littlefield Publishers, Inc. 2d ed. 2008).

29. CAL. PENAL CODE §§ 667(d)(3)(C), 1170.12(b)(3)(C) (West 2006).

has two or more prior serious or violent felonies and is convicted of any third felony, that offender receives a third strike, which triggers a mandatory sentence measured as either three times the normal sentence for the offense currently charged or twenty-five years to life.<sup>30</sup> Whereas a non-strike offender must serve approximately fifty-five percent of the sentence before becoming eligible for parole, an offender sentenced under Three Strikes law must serve at least eighty percent for parole eligibility.<sup>31</sup>

Under the Three Strikes law, juvenile adjudications may qualify as a felony for sentence enhancement purposes.<sup>32</sup> Before a juvenile adjudication can qualify as a strike, four requirements must be met: First, the juvenile must have committed the prior offense at the age of sixteen or older;<sup>33</sup> second, the prior offense must be either a serious or violent felony;<sup>34</sup> third, the juvenile must have been previously found “fit and proper” for the juvenile court;<sup>35</sup> and, finally, the juvenile must have been previously adjudged a ward of the court.<sup>36</sup>

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30. § 667(e)(2)(A); *see also* CAL. PENAL CODE § 1170 (West 2006).

31. §§ 667(c)(5), 1170.12(a)(5).

32. Prior to the enactment of the Three Strikes law, California courts could only use a juvenile’s past *criminal* convictions as a sentence enhancement. *See* *People v. Blankenship*, 167 Cal. App. 3d 840, 853 (1985) (holding that a defendant’s sentence could be increased based on his prior criminal conviction at age fifteen). Further, a prior juvenile adjudication could be used to determine the sentence only *within* the term. *See* *People v. Berry*, 117 Cal. App. 3d 184, 192-93 (1981) (holding that consideration of a prior juvenile adjudication as an aggravating factor did not violate due process).

33. §§ 667(d)(3)(A), 1170.12(b)(3)(A).

34. CAL. WELF. & INST. CODE § 707(b) (West 2006) (enumerating the forty-two different crimes classified as serious felonies under California Penal Code section 1192.7, including murder or voluntary manslaughter, mayhem, rape, sodomy by force, violence, duress, menace, threat of great bodily harm, or fear of immediate and unlawful bodily injury on the victim or another person, arson, first degree burglary, and kidnapping, among others); CAL. PENAL CODE § 667.5 (West 2006) (enumerating twenty-three violent felonies, including oral copulation, attempted murder, or carjacking); *see also* §§ 667(d)(3)(B), 1170.12 (b)(3)(B).

35. CAL. PENAL CODE §§ 667(d)(3)(C), 1170.12 (b)(3)(C). Certain crimes, such as murder, rape, spousal rape, forcible sex, and several other offenses, are automatically removed to criminal court. CAL. PENAL CODE § 602(b) (West 2006). “Fit and proper” is determined through a fitness hearing, which is implied if the prosecution does not file a transfer motion— thus allowing the minor to remain in juvenile court—or express as a result of the prosecutor’s motion for waiver to adult court upon the state’s belief that the minor cannot be rehabilitated through the juvenile system. CAL. WELF. & INST. CODE § 707(a)(1). In ruling on this transfer motion, the juvenile court judge considers several factors to determine the juvenile’s “fitness,” including the degree of criminal sophistication demonstrated by the minor, whether the minor can be rehabilitated through the juvenile court system, the minor’s history of delinquency, the success of previous attempts by the juvenile court to rehabilitate the minor, and the circumstances and gravity of the currently alleged offense. *Id.* If the alleged crime is enumerated in subsection (b) of section 707 of the Welfare and Institutions Code, the juvenile is presumed unfit for the juvenile court and jurisdiction is transferred to criminal court unless the court finds evidence of extenuating or mitigating circumstances. CAL. WELF. & INST. CODE § 707(a)(2)(B).

36. §§ 667(d)(3)(D), 1170.12 (b)(3)(D).

## III. APPRENDI AND ITS PROGENY

Before examining whether juryless juvenile adjudications may be used to enhance subsequent sentences, it is necessary to review a line of United States Supreme Court cases demonstrating the connection between the right to a jury trial and sentencing enhancements. Ultimately, these cases have come to stand for the principle that any fact *besides* a prior conviction that increases a prison term beyond the statutory maximum must be charged in the indictment, submitted to the jury, and proven beyond a reasonable doubt.<sup>37</sup>

In *Almendarez-Torres v. United States*,<sup>38</sup> the first of this line of cases, the United States Supreme Court found that courts could treat a prior conviction as a “sentencing factor”—rather than as an element of the crime—as a basis upon which they could impose an increased sentence.<sup>39</sup> In that case, an indictment charged the defendant with illegal reentry by a deported alien.<sup>40</sup> Although the relevant statute increased the maximum punishment if the previous deportation was the result of a conviction of an aggravated felony, the indictment did not allege this circumstance.<sup>41</sup> At his plea hearing, Almendarez-Torres admitted that his prior deportation arose from an aggravated felony, and, as a result, the court imposed the increased sentence.<sup>42</sup> On appeal, Almendarez-Torres contended that the Constitution required his prior convictions be treated as an element of the current criminal offense, charged in the indictment, and proved to a jury beyond a reasonable doubt.<sup>43</sup> Both the Ninth Circuit Court of Appeals and the Supreme Court disagreed, refusing to find that recidivism, which the Supreme Court described as “a traditional, if not the most traditional” basis upon which courts had imposed increased sentences, must be treated as an element.<sup>44</sup> Therefore, a prior conviction need not be stated in the indictment as an element nor proved to the jury beyond a reasonable doubt in order to increase a statutory maximum sentence.<sup>45</sup>

In *Jones v. United States*,<sup>46</sup> the Supreme Court clarified *Almendarez-Torres*, explaining that certain facts, such as recidivism, need not be stated in the indictment or found by a jury in order to expand the penalty range.<sup>47</sup> According to the Court, *Almendarez-Torres* “rested in substantial part on the tradition of regarding recidivism as a sentencing fact,” which may be “distinguishable for constitutional purposes from other facts that might extend

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37. See, e.g., *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

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

39. *Id.* at 243-47.

40. *Id.* at 227.

41. *Id.* at 263-64.

42. *Id.* at 227.

43. *Id.* at 239.

44. *Id.* at 243.

45. *Id.* at 247.

46. 526 U.S. 227 (1999).

47. *Id.* at 248, 249 n.10.

the range of possible sentencing.”<sup>48</sup> Recidivism is unique from any other factor, the Court explained, because “a prior conviction must itself have been established through procedures satisfying fair notice, reasonable doubt and *jury trial guarantees*.”<sup>49</sup>

In *Apprendi v. New Jersey*,<sup>50</sup> the United States Supreme Court held that any fact *other than* a prior conviction that increases the maximum penalty for a crime must be charged in the indictment, submitted to the jury, and proven beyond a reasonable doubt.<sup>51</sup> The Court reasoned that prior convictions are unlike other sentencing facts in that they are exempt from the same requirements as other facts used to enhance a penalty beyond the statutory maximum. However, the Court noted, *Almendarez-Torres* was “at best an exceptional departure from the historic practice” of submitting sentence-enhancing facts to the jury.<sup>52</sup> Furthermore, the Court continued, *Almendarez-Torres* was arguably incorrectly decided, and “a logical application of [the Court’s] reasoning today should apply if the recidivist issue were contested.”<sup>53</sup> However, the Court refused to overturn *Almendarez-Torres* because *Apprendi* did not contest the decision’s validity, and instead distinguished *Almendarez-Torres* by explaining that,

Both the certainty that procedural safeguards attached to any ‘fact’ of prior conviction, and the reality that *Almendarez-Torres* did not challenge the accuracy of that ‘fact’ in this case, mitigated the due process and Sixth Amendment concerns otherwise implicated in allowing a judge to determine a ‘fact’ increasing punishment beyond the maximum of the statutory range.<sup>54</sup>

The Court emphasized that criminal defendants enjoyed procedural safeguards, such as the right to a jury trial and proof beyond a reasonable doubt, thus ensuring the accuracy and reliability of the prior record.<sup>55</sup>

In its most recent examination of *Apprendi*, the Court held in *Oregon v. Ice* that the Sixth Amendment permits states to assign judges—rather than juries—the task of finding facts necessary to impose consecutive—rather than concurrent—sentences for multiple offenses.<sup>56</sup> The defendant, who was convicted of two counts of burglary and four counts of sexual abuse, appealed his sentence, arguing, among other things, that he had a Sixth Amendment right to have a jury find the facts permitting the imposition of a consecutive

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48. *Id.* at 249.

49. *Id.* (emphasis added).

50. 530 U.S. 466 (2000).

51. *Apprendi v. New Jersey*, 530 U.S. 466, 476 (2000) (quoting *Jones*, 526 U.S. at 243 n.6).

52. *Id.* at 487.

53. *Id.* at 489-90.

54. *Id.* at 488.

55. *Id.* at 496.

56. *Oregon v. Ice*, 129 S. Ct. 711, 715 (2009).

sentence.<sup>57</sup> The Court declined to extend *Apprendi*, reasoning that in light of the historical practice and states' authority over the administration of their criminal justice systems, it was within the states' right to assign this duty to judges.<sup>58</sup>

#### IV. PEOPLE V. NGUYEN

##### *a. The Juvenile Adjudication*<sup>59</sup>

In December 2004, the State of California filed a petition accusing then-16 year-old Vince Vinthuong Nguyen of aggravated assault with a knife and a crowbar and inflicting great bodily injury on the victim.<sup>60</sup> The petition alleged that Nguyen was not a "fit and proper subject to be dealt with under the juvenile court law," and that he should be tried as an adult.<sup>61</sup> Before a fitness determination was made, Nguyen admitted only to assault with a deadly weapon or instrument by means of force likely to produce great bodily injury,<sup>62</sup> but he did not admit to actual infliction of great bodily injury.<sup>63</sup>

##### *b. Trial Court's Verdict*

In March 2005, pursuant to a negotiated disposition, Nguyen pled no contest as an adult to one felony (firearm possession by an ex-felon) and to one misdemeanor (possession of a billy).<sup>64</sup> Nguyen, who had a 1999 juvenile adjudication for assault, waived his statutory right to a jury trial on the issue of whether he had "suffered" a prior strike.<sup>65</sup> Though he admitted to his prior juvenile adjudication, Nguyen objected that because he had no right to a jury in the juvenile proceeding, the use of the juvenile adjudication as a strike in the current case violated his Sixth Amendment rights.<sup>66</sup> The trial court rejected this argument and sentenced Nguyen to the lower term of 16 months for the firearm conviction.<sup>67</sup> Pursuant to California's Three Strikes law, his sentence was doubled to 32 months because of the prior juvenile adjudication.

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57. *Id.* at 716.

58. *Id.* at 718.

59. According to the California Court of Appeal, "the documents submitted to the court were not made a part of the record on appeal, and were subsequently lost." *People v. Nguyen (Nguyen II)* 62 Cal. Rptr. 3d 255, 257 n.1 (Ct. App. 2007).

60. CAL. PENAL CODE § 245(a)(1) (West 2006).

61. *Nguyen II*, 62 Cal. Rptr. 3d at 257 (citing the juvenile record).

62. § 245(a)(1).

63. *Nguyen II*, 62 Cal. Rptr. 3d at 257.

64. *People v. Nguyen*, No. CC476520 (Cal. Super. Ct. 2005) (trial court opinion unavailable).

65. The documents submitted to the court were not made a part of the record on appeal and were subsequently lost. *Nguyen II*, 62 Cal. Rptr. 3d at 257 n.1.

66. *Id.*

67. *Id.*

*c. California Sixth Appellate District Court of Appeal*

Nguyen appealed his sentence on the basis of an alleged Sixth Amendment violation. The California Court of Appeal held in its first opinion<sup>68</sup> that because of the lack of a jury-trial right in the juvenile proceeding, the Sixth Amendment forbids the use of a *contested* juvenile adjudication as a prior conviction to enhance the sentence of a subsequent adult offense.<sup>69</sup> However, because Nguyen admitted that he committed the criminal conduct at issue in the juvenile case, the current sentence was unaffected by the earlier deprivation of the right to a jury trial and he was therefore not entitled to relief.<sup>70</sup> According to the court,

With one caveat, the only constitutional solution to this problem, as we see it, is to hold that juvenile adjudications do not come within *Apprendi*'s exception for prior convictions because, unlike prior convictions, juvenile adjudications are not entered in a proceeding in which the defendant had the right to a jury trial. The one caveat is that a juvenile adjudication can be used, without offending the constitution, if it is based on the defendant's admission.<sup>71</sup>

The court arrived at this conclusion by focusing on language in *Apprendi* which suggested that Almdarez-Torres's admission of the *accuracy* of the prior conviction allegation affected the constitutionality of exempting prior convictions. The court also focused on a determination in the United States Supreme Court case *Blakely v. Washington* that because the facts supporting the exceptional sentence in that case were "neither admitted by [the] defendant nor found by a jury," the sentence could not stand.<sup>72</sup> Finally, according to the court on rehearing, "[o]ur prior holding also reflected a concern, rooted in respect for *stare decisis*, that a contrary holding would be interpreted as implicitly conflicting with the holdings in *McKeiver*, and *In re Daedler* [the California corollary to *McKeiver*], that juveniles have no constitutional right to a jury trial."<sup>73</sup>

The California Court of Appeal granted rehearing to reconsider the issue of whether, in light of *Apprendi* and *Blakely*, the use of juvenile adjudications for sentencing enhancement eroded the role of the jury and violated the Sixth and Fourteenth Amendments.<sup>74</sup> In this rehearing, the appellate court reversed the trial court, holding that because minors tried for criminal offenses as

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68. The court later reconsidered whether it was a violation of the Sixth Amendment to use non-jury juvenile adjudications in light of *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Blakely v. Washington*, 542 U.S. 296 (2004). See *Nguyen II*, 62 Cal. Rptr. 3d at 257.

69. *People v. Nguyen (Nguyen I)*, 54 Cal. Rptr. 3d 535, 557 (Ct. App. 2007), *rev'd*, 46 Cal. 4th 1007.

70. *Id.*

71. *Id.* at 556-57.

72. *Id.* (citing *Blakely*, 542 U.S. at 303).

73. *Nguyen II*, 62 Cal. Rptr. 3d at 279 (citation omitted).

74. *Id.* at 256.

juveniles are not entitled to jury trials, the use of *any* juvenile adjudication to enhance subsequent adult sentences is prohibited by the Sixth Amendment. In an opinion authored by Justice McAdams and joined by Justice Rushing, the court held “the use of a juvenile adjudication to enhance the defendant’s sentence beyond the ordinary, statutorily-mandated maximum sentence, pursuant to the Three Strikes law violates the defendant’s *Apprendi* rights, whether he was adjudicated a juvenile offender after a contested hearing or pursuant to an admission.”<sup>75</sup>

*d. California Supreme Court*

The State appealed the decision.<sup>76</sup> The California Supreme Court reversed, holding that “the absence of a constitutional or statutory right to a jury trial under the juvenile law does not . . . 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.”<sup>77</sup> First, the Court explained that Nguyen’s claim did not come under the literal rule of *Apprendi*: that rule only requires that a jury in the *current* proceeding determine the existence of an alleged prior adjudication.<sup>78</sup> Second, prior juvenile adjudications satisfy all the reasons why the *Apprendi* Court concluded that prior convictions *may* increase the maximum punishment for a subsequent adult offense without demanding jury findings in the later case. Like prior adult convictions, prior juvenile adjudications do not involve facts about the present offense that were withheld from a jury; instead, they concern the defendant’s recidivism or status as a repeat offender, which is a “highly rational basis” for enhancing an adult sentence.<sup>79</sup> Finally, the Court held that if the prior recidivist conduct was reliably adjudicated in proceedings that included all the constitutional protections required for *that* proceeding—which, in juvenile adjudications would not include the right to a jury—then the use of reliably obtained juvenile adjudication to enhance a later adult criminal sentence does not offend an adult defendant’s constitutional right to a jury trial.<sup>80</sup>

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75. *Id.* at 284.

76. *People v. Nguyen (Nguyen III)* 46 Cal. 4th 1007, 1029 (2009).

77. *Id.* at 1028.

78. *Id.* at 1015.

79. *Id.* at 1023.

80. *Id.* at 1030 (Kennard, J., dissenting) (stating that “basing the additional punishment on alleged facts whose truth was never determined by a jury” is “contrary to the holding of *Apprendi* . . . that under the Sixth Amendment . . . a criminal defendant has a right to have a jury determine ‘any fact’ that increases the penalty for a charged offense”) (internal citation omitted).

VI. THE UNITED STATES SUPREME COURT SHOULD GRANT CERTIORARI IN  
*NGUYEN*<sup>81</sup>

In the wake of *Apprendi* and its progeny, numerous petitioners have applied for certiorari to the United States Supreme Court on the issue of whether juryless juvenile adjudications may be used to impose sentencing enhancements.<sup>82</sup> In permitting the use of juvenile adjudications for sentence enhancements, the majority in *Nguyen* relied in part on the fact that “[t]he high court has never held that the Constitution places a direct restriction on the use of prior juvenile adjudications for this purpose.”<sup>83</sup> Although the United States Supreme Court has not specifically prohibited the use of juvenile adjudications for this purpose, the California Supreme Court could have found the use of these adjudications unconstitutional. Regardless, the court’s statement highlights the problem: the United States Supreme Court has written nothing on the issue. On the other hand, the Sixth and Fourteenth Amendments may be instructive: “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury . . . .”;<sup>84</sup> and, “No State shall . . . deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”<sup>85</sup> Furthermore, in order to satisfy the prior conviction exception, sentence-enhancing facts must be based on “a prior judgment of conviction entered in a proceeding in which the defendant had the right to a jury trial.”<sup>86</sup> Juvenile adjudications lack this constitutional right.

The United States Supreme Court should grant certiorari in *Nguyen* and hold that juryless juvenile adjudications may not be used to enhance subsequent criminal sentences. The California Supreme Court incorrectly decided the case for the following reasons: (a) the court’s improper use of recidivism in the context of juvenile adjudications; (b) its incorrect use of the term “conviction” as defined by *Apprendi*; (c) its improper application of *McKeiver*; (d) its overemphasis on reliability when addressing Sixth Amendment concerns; (e) its failure to adequately distinguish relevant Supreme Court case law; (f) its improper application of *Orgeon v. Ice*; and (g) its misleading assessment of the

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81. As noted above, supra note 6, defendant and appellant Nguyen filed a petition for certiorari before the United States Supreme Court. *Nguyen v. California*, 2009 WL 3870833 (Nov. 17, 2009) (No. 09-604).

82. See, e.g., *United States v. Burge*, 407 F.3d 1183 (11th Cir. 2005), *cert. denied*, 546 U.S. 981 (2005); *United States v. Jones*, 332 F.3d 688 (3rd Cir. 2003), *cert. denied*, 540 U.S. 1150 (2004); *United States v. Smalley*, 294 F.3d 1030 (8th Cir. 2002), *cert. denied*, 537 U.S. 1114 (2003); *People v. Lee*, 111 Cal. App. 4th 1310, 1315 (2003), *cert. denied*, 542 U.S. 906 (2004); *People v. Superior Court*, 113 Cal. App. 4th 817 (2003), *cert. denied sub nom. Andrades v. California*, 543 U.S. 884 (2004); *Ryle v. State*, 819 N.E.2d 119 (Ind. App. 2004), *superseded by* 842 N.E.2d 320 (Ind. 2005), *cert. denied*, 549 U.S. 836 (2006).

83. *Nguyen III*, 46 Cal. 4th at 958.

84. U.S. CONST. amend. VI.

85. U.S. CONST. amend. XIV.

86. *Apprendi v. New Jersey*, 530 U.S. 466, 496 (2000).

national trend. Until the Court correctly resolves the issue in *Nguyen*, criminal defendants in some states will have significantly fewer procedural safeguards than defendants in other states.

*a. Nguyen was incorrectly decided because the court improperly used “recidivism” in the context of juvenile adjudications.*

The *Nguyen* majority supports its opinion in part by relying on *Almendarez-Torres* and later interpretations of that case. The Court emphasizes the right to enhance punishment based on the defendant’s recidivism. To support this view, the majority relies on the Supreme Court’s later interpretation of *Almendarez-Torres* in *Jones*, where the Court explained that *Almendarez-Torres* had relied “in substantial part on the tradition of regarding recidivism as a sentencing fact, not as an element to be set out in the indictment.”<sup>87</sup> According to the California Supreme Court, the fact that *Jones* continually highlighted the importance of recidivism “leaves no question that the [*Almendarez-Torres*] Court regarded that fact as potentially distinguishable for constitutional purposes from other facts that might extend the range of possible sentencing.”<sup>88</sup>

However, the California court’s reliance on *Almendarez-Torres* to justify the use of recidivism as a sentencing factor is problematic because *Almendarez-Torres* is of questionable validity today as a pre-*Apprendi* decision. As Justice Stevens acknowledged in *Apprendi*, while *Almendarez-Torres* was arguably incorrectly decided, it should be treated “as a narrow exception to the general rule” that “[o]ther than the fact of 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.”<sup>89</sup>

The California Supreme Court’s reliance on *Almendarez-Torres* to justify the use of recidivism as a sentencing factor is problematic because *Almendarez-Torres* and its later interpretations are distinguishable from *Nguyen*. Unlike in *Almendarez-Torres*, where the defendant “admitted the three earlier convictions for aggravated felonies—all of which had been entered pursuant to proceedings with *substantial procedural safeguards of their own*” that resulted in his enhanced sentence,<sup>90</sup> *Nguyen*’s juvenile proceeding lacked significant safeguards—namely, the right to trial by jury—which distinguishes the cases considerably. Like *Almendarez-Torres*, the prior convictions in *Blakely* and *Apprendi* were obtained in a criminal court where the defendant was an adult and was entitled to a jury to challenge the facts underlying their convictions.<sup>91</sup>

87. *Nguyen III*, 46 Cal. 4th at 1007 (quoting *Jones v. United States*, 526 U.S. 227, 248-49 (1999)).

88. *Id.*

89. 530 U.S. at 490.

90. *Id.* at 488 (emphasis of “admitted” in original) (all other emphasis added).

91. *Apprendi*, 530 U.S. at 469-470; *Blakely v. Washington*, 542 U.S. 296, 299 (2004).

As the *Apprendi* Court emphasized, this is a significant distinction:

[T]here 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 guilty beyond a reasonable doubt, and allowing the judge to find the required fact under a lesser standard of proof.<sup>92</sup>

Thus, as the Sixth Appellate District noted in *Nguyen*, although the procedural safeguards afforded a juvenile may be enough to secure the reliability of an adjudication, it is unlikely that “those rights are ‘sufficient to ensure the reliability that *Apprendi* requires’ in a criminal case.”<sup>93</sup> As Justice Kennard notes in her *Nguyen* dissent, *Apprendi* stands for the proposition that the conduct that led to the prior adjudication must be determined in a proceeding in which the defendant was entitled to a jury; further, “to permit the mere existence of a prior non-jury juvenile court adjudication to increase the penalty for a later crime beyond the statutory maximum is contrary to the rationale underlying *Apprendi*.”<sup>94</sup>

*Nguyen*’s inappropriate use of “recidivism” in the juvenile context is further indicated by *Jones v. United States*,<sup>95</sup> where the Supreme Court discussed the long-standing tradition and centrality of the right to a jury. The Court cited Blackstone for the principal that trial by jury is “the grand bulwark” of liberty.<sup>96</sup> However convenient other methods of trial—such as by justices of the peace, commissioners of the revenue, or courts of conscience—“delays, and little inconveniences in the forms of justice, are the price that all free nations must pay for their liberty in more substantial matters.”<sup>97</sup> Furthermore, the Court noted that it was willing to accept recidivism as a sentencing factor rather than an element to be set out in the indictment and proved to a jury because of its unique nature. According to the Court, a prior conviction—unlike any other factor used to enhance a sentence, “must itself have been established through procedures satisfying the fair notice, reasonable doubt, and *jury trial guarantees*.”<sup>98</sup>

In support of its use of “recidivism” in this context, the *Nguyen* court notes that neither *Jones*, *Apprendi*, nor *Almendarez-Torres* implicitly or explicitly state that the prior criminal adjudication constituting recidivism must

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92. *Apprendi*, 530 U.S. at 496; see also *id.* at 498 (Scalia, J., concurring) (explaining that “the criminal will never get *more* punishment than he bargained for when he did the crime, and his guilt of the crime (and hence the length of the sentence to which he is exposed) will be determined *beyond a reasonable doubt by the unanimous vote of 12 of his fellow citizens*”) (emphasis in original).

93. *People v. Nguyen (Nguyen I)*, 54 Cal. Rptr. 3d. 535, 556 (Cal. Ct. App. 2007) (quoting *People v. Lee*, 111 Cal. App. 4th 1310, 1315 (2003)) (citations omitted).

94. *People v. Nguyen (Nguyen III)*, 46 Cal. 4th 1007, 1031 (2009).

95. 526 U.S. 227 (1999).

96. *Id.* at 246 (citing 4 WILLIAM BLACKSTONE, COMMENTARIES \*278).

97. *Id.*

98. *Id.* at 249 (emphasis added).

be obtained in a proceeding that included the right to a jury trial.<sup>99</sup> The majority reasons that while those cases cited certain procedural safeguards that ensure the reliability of prior adult convictions, they did not require that *all* of these rights, “or any one of them in particular, is essential to the availability of a prior criminal adjudication to furnish such proof.”<sup>100</sup> Although those cases did not specifically state that the right to a jury trial was *the* necessary safeguard, they cited it as one of several necessary rights, which may support the proposition that at least the right to a jury trial—if not the *entire* group of safeguards—is required to use the prior adjudication.<sup>101</sup> Furthermore, since neither *Jones*, *Apprendi*, nor *Almendarez-Torres* made any mention of the use of juvenile adjudications toward later sentence enhancements, it is unwise to infer about the suitability of juvenile adjudications at all—especially an assumption which so drastically limits the rights of individuals.

*b. Nguyen incorrectly used the term “conviction” as defined by Apprendi.*

Furthermore, the reasoning in *Nguyen* is flawed because it incorrectly assumes that a juvenile adjudication qualifies as a “fact of prior *conviction*,” as required by *Apprendi*.<sup>102</sup> This is an incorrect assumption because in California, the term “conviction” does not apply in juvenile cases.<sup>103</sup> California law explicitly uses the term “adjudication” to describe juvenile proceedings<sup>104</sup> and the term “civil delinquency” to describe outcomes finding fault in minors. As Justice Kennard notes, “[t]his is not a matter of semantics. A conviction is obtained in a trial court proceeding at which the adult defendant has the right to a jury trial. By contrast, . . . [a] juvenile has no right to a jury trial.”<sup>105</sup>

The distinction between a “juvenile adjudication” and “criminal conviction” is based not only on the age of the offender but also on the nature of the proceeding, which, among other things, varies in the procedural safeguards it provides. For example, juvenile court judges see the same minors repeatedly and read their probation files when deciding whether to remand them before trial.<sup>106</sup> Given their familiarity with the children and the unique

99. *Nguyen III*, 46 Cal. 4th at 1023-24.

100. *Id.*

101. See *Almendarez-Torres v. United States*, 523 U.S. 224, 227 (1998) (defendant’s previous conviction of aggravated felonies found in a criminal proceeding in which he was granted the right to a jury trial); see also *Apprendi v. New Jersey*, 530 U.S. 466, 476 (2000) (any fact that increases the penalty for a crime beyond the prescribed statutory maximum, other than the fact of prior conviction, must be submitted to a jury and proved beyond a reasonable doubt); *Jones v. United States*, 526 U.S. 227, 249 (1999) (in order to be used for a subsequent sentence enhancement, “a prior conviction must itself have been established through procedures satisfying the fair notice, reasonable doubt, and *jury trial* guarantees”) (emphasis added).

102. *Apprendi*, 530 U.S. at 476.

103. See CAL. WELF. & INST. CODE § 203 (West 2006).

104. *Id.*

105. *Nguyen III*, 46 Cal. 4th at 1033 (Kennard, J., dissenting).

106. Ellen Marrus, “*That Isn’t Fair, Judge*”: *The Costs of Using Prior Juvenile Delinquency*

nature of the juvenile system generally, juvenile judges may be more likely to find a juvenile to be delinquent for the sake of the juvenile, who as a result of this disposition can receive the *services*—which are not thought of in terms of punishment—afforded juvenile offenders.<sup>107</sup> Judges in juvenile court see the same children repeatedly and read their probation files when deciding whether to remand them before trial.<sup>108</sup> Furthermore, the judge who presides over the juvenile’s trial is likely the same judge who presided over any pretrial suppression hearings, and in so doing is exposed as the fact-finder to evidence otherwise inadmissible.<sup>109</sup> Although these judges should theoretically disregard evidence that is inadmissible, it is reasonable to suspect that the judge’s determination regarding culpability may be influenced by the juvenile’s prior history, as well as, for example, her statements to probation officials regarding the conduct in question. Furthermore, the extraordinary number of cases that juvenile judges hear may compromise their ability to adequately examine each case, thereby hindering their ability to act as a superior fact-finder.<sup>110</sup> Elected juvenile judges may also feel pressured to punish juvenile offenders by voters’ law and order attitudes.<sup>111</sup>

An “adjudication” in the juvenile justice system is further distinct from a criminal “conviction” because defendants in the former are much more likely to plead guilty. For example, juveniles 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.<sup>112</sup> It is widely accepted that where the judge offers a juvenile the choice between admitting to a “strike” offense and getting to go home that day, or waiting another week in detention for the possibility of a non-strike offense, the juvenile will choose to go home as quickly as possible.<sup>113</sup>

Furthermore, the juvenile system’s absence of any preliminary hearing for the testing of evidence, which is fundamental to an adult criminal proceeding, presents a serious concern about reliability of an “adjudication” as opposed to a criminal “conviction.” Although a juvenile may request a hearing to demand evidence upon which juvenile detention is based, such a hearing is only

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*Adjudications in Criminal Court Sentencing*, 40 HOUS. L. REV. 1323, 1350-51 (2004).

107. *Id.*

108. *See id.*

109. *See* Steven A. Drizin & Greg Luloff, *Are Juvenile Courts A Breeding Ground for Wrongful Convictions?*, 34 N. KY. L. REV. 257, 305 (2007).

110. Marrus, *supra* note 106.

111. *Id.* at 1351.

111. *Id.*

112. *Id.*

113. *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).

intended to determine whether evidence exists that would justify the minor's continued detention.<sup>114</sup> It does not allow for the presentation of affirmative evidence that may exculpate the minor.<sup>115</sup>

As a result of the non-adversarial, informal, and familial nature of proceedings, lawyers representing minors in juvenile court operate more as guardians than as the fervent advocates essential to adult criminal proceedings.<sup>116</sup> During both preliminary stages and throughout the adjudicatory proceeding itself, the defense counsel may be dissuaded from advocating aggressively on behalf of the minor. For example, issues such as the possibility of a false confession, the reliability of an eyewitness or other evidence, or even an excuse or justification for the conduct, may be seen by the judge as a waste of time both for that particular minor and the court more generally.<sup>117</sup> This is particularly relevant in light of the juvenile system's aforementioned backlog, the judge's extraordinary familiarity with the juvenile and the case (including technically inadmissible evidence), and because an "adjudication" is understood as an opportunity to *help* rather than punish the juvenile. As a result, defense counsel may refrain from pursuing an investigation, appointing an expert, or even raising an issue that would likely be appropriate in an adult criminal proceeding.<sup>118</sup> This is especially troubling in juvenile proceedings, where there is a greater risk for false confessions.<sup>119</sup>

Juvenile proceedings may also be less reliable as a result of the different rules of evidence and criminal procedure, as well as the occasional lack of a clear record or transcript of the proceedings in order to determine whether the appropriate due process was afforded.<sup>120</sup> For example, unlike in an adult criminal proceeding, accomplice testimony need not be corroborated in a juvenile hearing.<sup>121</sup> Furthermore, interlocking confession evidence, which is strictly excluded in jury proceedings, is admissible in juvenile hearings.<sup>122</sup> In light of these significant impairments to reliability of a juvenile adjudication, it

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114. These are known as "Dennis H. hearings." See *In re Dennis H.*, 19 Cal. App. 3d 350 (1971).

115. *Id.*

116. 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).

117. See generally Drizin & Luloff, *supra* note 109; NAT'L JUVENILE DEFENDER CTR., STATE ASSESSMENTS, <http://www.njdc.info/assessments.php> (last visited Dec. 14, 2009).

118. See NAT'L JUVENILE DEFENDER CTR., *supra* note 117.

119. See Drizin & Luloff, *supra* note 109 ("Juveniles also tend to be more compliant and suggestible during police interrogations, two traits which are risk factors for false confessions.")

120. See, e.g., Ainsworth, *supra* note 116; see also Marrus, *supra* note 116.

121. See Brief of Amicus Curiae Cal. Pub. Defenders Ass'n In Support of Appellant Nguyen, 31, *People v. Nguyen*, 46 Cal. 4th 1007 (No. S154847) (2009).

122. See *id.*

seems doubtful that the juvenile judgment was as “reliably obtained,” as the *Nguyen* majority asserts.<sup>123</sup> Since the juvenile never had the opportunity to contest the prior allegations before a jury, the “historical circuitbreaker in the State’s machinery of justice” as contemplated by the Sixth Amendment, does not play its essential role.<sup>124</sup>

Partially as a result of guaranteeing fewer procedural safeguards than adult defendants, juvenile adjudications are less reliable indicators of actual criminal conduct, even where the juvenile admitted to the offense because of the aforementioned factors that may compel a juvenile to plead guilty.<sup>125</sup> Thus, the reliability of an adjudication where the juvenile never had the opportunity to contest the prior allegations before a jury is undermined. “Admitted” priors, therefore, may be only marginally more reliable than “found” priors, if at all. In light of these issues, it is questionable whether the juvenile judgment is as “reliably obtained” as the majority asserts.<sup>126</sup> Perhaps this explains the majority’s ultimate conclusion that the remarkably low standard in “the absence of jury trials from juvenile proceedings does not *significantly undermine* the fairness or accuracy of juvenile factfinding.”<sup>127</sup>

The term “adjudication”—in light of the process upon which it is based—does not fall within *Apprendi*’s explicit “prior conviction” language.<sup>128</sup> In light of this, it appears inappropriate to place any juvenile within the category of “habitual offender” for Three Strikes sentencing purposes.

*c. Nguyen improperly applied McKeiver.*

To support its finding that juvenile adjudications do not require a right to a jury trial, the *Nguyen* majority relies in part on *McKeiver v. Pennsylvania*, which held that the lack of a right to a jury trial in juvenile proceedings does not violate due process.<sup>129</sup> However, as discussed below, the reasons the *Nguyen* court cites from *McKeiver* indicate that juvenile adjudications should

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123. For a detailed examination of how the inadequacy of counsel in juvenile court enhances the risk of wrongful convictions, see Drizin and Luloff, *supra* note 109 (describing inadequacies, such as “poor investigation, infrequent use of motions, high caseloads, over-reliance on pleas, a juvenile court culture of wanting to ‘help’ juveniles, and a general lack of training among attorneys on youth and adolescents”).

124. *Blakely v. Washington*, 542 U.S. 296, 306 (2004).

125. See *Fare v. Michael C.*, 442 U.S. 707, 732-33 (1979) (Powell, J. dissenting) (disagreeing with the majority’s holding that a juvenile’s request to see his probation officer during custodial interrogation was not a per se invocation of his Miranda rights because “the greatest care must be taken to assure that an alleged confession of a juvenile was voluntary,” and the defendant was “immature, emotional, and uneducated, and therefore was likely to be vulnerable to the skillful, two-on-one, repetitive style of interrogation”).

126. See *United States v. Tighe*, 266 F.3d 1187, 1193-94 (9th Cir. 2001) (the informal juvenile adjudication lacks the “certainty . . . attached to the ‘fact’ of prior conviction” that allowed the Supreme Court to exempt such a fact from its jury requirement in *Apprendi*).

127. *People v. Nguyen (Nguyen III)*, 46 Cal. 4th 1007, 1025 (2009) (emphasis added).

128. *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

129. *Nguyen III*, 46 Cal. 4th at 1018-20.

not be used to enhance adult sentences. As the majority in *Nguyen* notes, at least five of the justices in *McKeiver* emphasized an overriding concern with considering juvenile adjudications “criminal proceedings” in light of the juvenile system’s “greater emphasis on informality, rehabilitation, and *parens patriae* protection of the minor, as opposed to more formal, adversary, and punitive nature of the adult criminal system.”<sup>130</sup> These differences, according to Justice White, eliminated the need for the “jury’s role as a community buffer against government oppression, judicial bias, and politicized justice.”<sup>131</sup>

The *Nguyen* court’s reliance on *McKeiver* is misplaced because the court failed to recognize that the underlying reasoning in *McKeiver* does not support using juvenile adjudications for criminal sentencing enhancements. *Nguyen* recognizes that the *McKeiver* Court was sensitive to the idea that introducing juries into juvenile proceedings would “interfere too greatly with the effort to deal with youthful offenders by procedures less formal and adversarial, and more protective and rehabilitative . . . than those applicable to adult defendants.”<sup>132</sup> However, *McKeiver* did not consider how the use of juvenile adjudications in later criminal proceedings would directly raise these concerns and offend the principals the Court sought to protect. A juvenile who is aware that his previous informal proceeding may carry long-term consequences will be forced to approach the juvenile proceeding in a much more formal and adversarial way. Among other things, this may lead to far less contrition.

*d. Nguyen over-emphasized “reliability” in addressing the Sixth Amendment concerns.*

In addition to their possible unreliability, the use of non-jury adjudications offends an additional principle upon which the Sixth Amendment is based: the fundamental role of the jury to stand between the accused and the state. However, according to *Nguyen*,

[I]t makes little sense to conclude, under *Apprendi*, that a judgment of juvenile criminality which the Constitution deemed fair and reliable enough, when rendered, to justify confinement of the minor in a correctional institution is nonetheless constitutionally inadequate for later use to establish the same individual’s recidivism as the basis for an enhanced adult sentence.<sup>133</sup>

The court did not find it persuasive that there are asymmetries between standards sufficient for restriction of juveniles’ liberties and the standards sufficient for adult sentence enhancements.<sup>134</sup> The court’s reasoning, which is based on the premise that juvenile adjudications are reliable enough to not

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130. *Id.* at 1020-21 (citation omitted).

131. *Id.* (citation omitted).

132. *Id.* at 1023 (citation omitted).

133. *Id.* at 1021-22.

134. *Id.* at 1012.

violate due process, is flawed. The juvenile may have received all the due process constitutionally required under *McKeiver* for his *juvenile* adjudication, but not for his *criminal* conviction.

The court overlooks that the Sixth Amendment is not merely an assurance of reliability by reasoning that juvenile adjudications are sufficiently reliable. Rather, as the Supreme Court explained in *Duncan v. State of Louisiana*,<sup>135</sup> the Sixth Amendment right to a jury trial is not based solely on the reliability of the fact-finder but also “reflect[s] a fundamental decision about the exercise of official power—a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges.”<sup>136</sup> Likewise, in *Ring v. Arizona*,<sup>137</sup> the Supreme Court noted that the right to a jury trial “does not turn on the relative rationality, fairness, or efficiency of potential factfinders.”<sup>138</sup> As the Supreme Court noted in *Blakely*, the right to trial is no mere procedural formality, but is an essential restriction and division of power as intended by the Framers of the Constitution.<sup>139</sup> The Sixth Amendment’s core purpose is to entrust every deprivation of freedom to the consent of the governed. Surely withholding this protection from youth, at a cost to adults, is on par with the deprivations of liberty most offensive to the Framers.

*e. The majority failed to adequately distinguish Towne.*

Because of the potentially incongruous precedent it sets, the *Nguyen* majority is forced to distinguish the key facts in its case from those in another recent California Supreme Court decision, *People v. Towne*.<sup>140</sup> *Towne* dealt with a probation revocation proceeding, and the California Supreme Court held, among other things, that under *Apprendi* a sentencing court may not find as a basis for an increased maximum sentence a “poor performance” finding by the current sentencing court acting without a jury, because probation revocation proceedings “do not entail the same procedural safeguards as a criminal

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135. 391 U.S. 145, 149 (1968).

136. *Id.* at 156. See *Blakely v. Washington*, 542 U.S. 296, 305-06 (2004) (“the right to a jury trial . . . is no mere procedural formality, but a fundamental reservation of power in our constitutional power . . . Without that restriction, the jury would not exercise the control that the Framers intended); *Ring v. Arizona*, 536 U.S. 584, 607 (2002) (“[t]he Sixth Amendment jury trial right . . . does not turn on the relative rationality, fairness, or efficiency of potential factfinders.”); *State v. Harris*, 118 P.3d 236, 243 (Or. 2005) (“[T]he jury’s importance in establishing the general validity of convictions under the Sixth Amendment is founded upon more than the relatively narrow function of the jury as a reliable factfinder. From the Framers’ perspective, the jury was also meant to serve as the people’s check on judicial power at the trial court level.”).

137. See *Ring*, 536 U.S. 584.

138. *Id.* at 607.

139. *Blakely*, 542 U.S. at 306. See also *Harris*, 118 P.3d at 243 (“[T]he jury’s importance in establishing the general validity of convictions under the Sixth Amendment is founded upon more than the relatively narrow function of the jury as a reliable factfinder. From the Framers’ perspective, the jury was also meant to serve as the people’s check on judicial power at the trial court level.”).

140. *People v. Towne*, 44 Cal. 4th 63 (2008).

trial.”<sup>141</sup> Although probation revocation proceedings require procedural safeguards such as notice and an opportunity to be heard, the court found this to be an insufficient basis on which to enhance a sentence because those proceedings lack the requirements of the right to a trial by jury and proof beyond a reasonable doubt.<sup>142</sup> Accordingly, the majority surmised, “we doubt that the United States Supreme Court would conclude that a defendant’s prior unsatisfactory performance on probation or parole is included within the exception the court has recognized for ‘the fact of a prior conviction’ unless that circumstance is established by defendant’s history of prior convictions.”<sup>143</sup>

To distinguish *Nguyen* from *Towne*, the California court explained, “like *Almendarez-Torres*, *Jones*, and *Apprendi*, *Towne* was not specifically concerned with the use of prior *juvenile adjudications* as evidence of recidivism to increase the maximum punishment for a later crime.”<sup>144</sup> Next, the court reasoned, like *Almendarez-Torres*, *Jones*, and *Apprendi*, *Towne* did not hold that in order to use a prior adjudication to demonstrate recidivism for sentence enhancement purposes, that prior adjudication must have included the right to a jury trial.<sup>145</sup> *Towne* concerned probation and parole proceedings, which lacked both the right to a jury trial *and* the requirement of proof beyond a reasonable doubt. According to the majority, because juvenile adjudications include *one* of these procedural safeguards, it “substantially bolster[s] their fairness and reliability as evidence of recidivism.”<sup>146</sup>

The *Nguyen* court’s reasoning raises several issues. First, the court was now willing to emphasize that other cases did not concern *juvenile* adjudications, whereas it made no such mention of this meaningful distinction when it relied on other cases. Regardless, while *Almendarez-Torres*, *Jones*, *Apprendi*, and *Towne* may not have concerned the use of prior juvenile adjudications, they all involved the use of nonjury facts to enhance sentences;<sup>147</sup> an issue that was central to *Nguyen*. Moreover, while these cases did not specifically prohibit the use of prior juvenile adjudications in

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141. *Id.* at 83.

142. *Id.* (emphasis added).

143. *Id.*

144. *People v. Nguyen (Nguyen III)*, 46 Cal. 4th 1007, 1027 n.13 (2009).

145. *Id.*

146. *Id.*

147. *See Apprendi v. New Jersey*, 530 U.S. 466, 496 (2000) (holding that a state’s hate crime statute, which authorized sentence enhancement beyond the maximum based on a nonjury finding, violated due process); *Jones*, 526 U.S. at 248-49 (finding that a provision that enhanced the penalty imposed when the offense resulted in serious bodily injury or death added elements of offense, not just sentencing considerations, which therefore were required to be proven to a jury beyond a reasonable doubt); *Almendarez-Torres v. United States*, 523 U.S. 224, 226-27 (1998) (finding that because a defendant’s prior felony conviction is a sentencing factor rather than an element of an current offense, it need not be proven to a jury); *Towne*, 44 Cal. 4th at 83-89 (holding that aggravating circumstances—such as defendant’s prior prison term, the fact that he was on probation or parole at the time the crime was committed, or his unsatisfactory performance on probation or parole—may be determined by a judge and need not be proven by a jury).

subsequent sentence enhancements, compelling language in *Towne* indicates use of nonjury juvenile adjudication offends the principles underlying those decisions. According to the *Towne* court, “[e]ven if the trial court’s finding of unsatisfactory performance is based upon a prior *revocation* of probation or parole, the proceedings that result in such revocation do not entail the same procedural safeguards as a criminal trial.”<sup>148</sup> Although parolees are entitled to notice and the opportunity to be heard and present evidence before a neutral body, they do not enjoy either the requirement of proof beyond a reasonable doubt or the right to a jury trial.<sup>149</sup>

Finally, distinguishing *Towne* from the present case based on the inclusion of an additional procedural safeguard—namely, the requirement of proof beyond a reasonable doubt—raises several issues. First, *Nguyen*’s reasoning implicitly assumes that had *Towne* included either the right to a jury trial *or* the requirement of proof beyond a reasonable doubt, it would have been decided differently. *Nguyen* noted that juvenile adjudications include the requirement of proof beyond a reasonable doubt, and that by “substantially bolstering their fairness and reliability as evidence of recidivism,”<sup>150</sup> this standard of proof renders the adjudication sufficient to comply with the Sixth Amendment. Although recidivism may be a traditional basis for sentence enhancements when based on past *adult* conduct, it has never been recognized as valid by the Supreme Court. Further, for the reasons discussed above, recidivism is a much less reliable factor when referring to juvenile adjudications.

Additionally, considering the extraordinary deficiency of procedural safeguards in *Towne*, “substantially bolster” is an inadequate standard. The problem is not necessarily that the court drew an arbitrary line but, rather, that this line errs on the side of failing to provide all the procedural safeguards enjoyed by adult defendants without qualifying juvenile offenses. This approach is especially troubling when a defendant’s personal liberty is at stake. In this regard, the United States Supreme Court’s reasoning in *Crawford v. Washington*<sup>151</sup> is informative: “[w]here testimonial statements are involved, we do not think the Framers meant to leave the Sixth Amendment’s protection to the vagaries of the rules of evidence, much less to amorphous notions of “reliability.”<sup>152</sup>

Furthermore, *Crawford* asserted, “[d]ispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty. This is not what the Sixth Amendment prescribes.”<sup>153</sup> Thus, where a prior conviction is used to enhance a subsequent

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148. *Towne*, 44 Cal. 4th at 83.

149. *Id.*

150. *Nguyen III*, 46 Cal. 4th at 1027 n.13.

151. 541 U.S. 36, 68-69 (2004).

152. *Id.* at 61.

153. *Id.* at 61-62.

criminal sentence, the only reliability sufficient to satisfy due process is the one that the Sixth Amendment actually prescribes: the right to a jury trial. In light of the aforementioned distinct characteristics of the juvenile court system, this assurance of reliability seems particularly necessary when juvenile adjudications are at issue.

*f. Nguyen improperly applied Oregon v. Ice*

The value of the jury's role was reaffirmed in *Oregon v. Ice*, which, as noted above, was the Court's most recent examination of the *Apprendi* rule. Justice Ginsburg, writing for the majority, stressed the rule's fundamental goal of preserving the "jury's historic role as a bulwark between the State and the accused . . . ." <sup>154</sup> Justice Ginsburg went on to explain that the Court must also remain sensitive to each state's right to administer its own criminal justice system. <sup>155</sup> The "twin considerations" <sup>156</sup> of historical precedent and respect for state sovereignty serve as guidance in determining the scope of the Sixth Amendment. The majority in *Nguyen* responds that "neither juvenile adjudications nor previously adjudicated recidivism as a sentencing factor is, as a matter of 'historical practice,' within the 'traditional domain' of juries." <sup>157</sup> Therefore, the state court held that California can employ its sovereign prerogative by enacting Three Strikes laws that use juvenile adjudications for the purpose of sentence enhancements in subsequent adult proceedings. <sup>158</sup> As a result, the majority concluded, "[t]he 'twin considerations' identified in *Ice* thus clearly weigh in favor of a conclusion that the *Apprendi* rule should not be construed to bar such use." <sup>159</sup>

Although the majority states that the "twin considerations" "clearly weigh in favor" of its determination, it is uncertain that both or either actually do. <sup>160</sup> First, the majority frames the question of "historical practice" as whether juries have been the factfinder of juvenile adjudications or previously adjudicated recidivism. The answer is clearly "no," but not because *historically* this has been the role of the judge. Rather, the answer is "no" because it is not a historical practice to use juvenile adjudications to enhance adult sentences. <sup>161</sup> The Framers of the Bill of Rights arguably never intended for this

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154. *Ice v. Oregon*, 129 S. Ct. 711, 717 (2009).

155. *Id.* at 713.

156. *Id.* at 713 (citing *Apprendi v. New Jersey*, 530 U.S. 466, 477 (2000)) (citations omitted).

157. *People v. Nguyen (Nguyen III)*, 46 Cal. 4th 1007, 1027-1028 (2009).

158. *Id.*

159. *Id.*

160. *Id.*

161. In California, juvenile adjudications were not used to enhance subsequent adult sentences until the passage of the Three Strikes law on November 8, 1994. See Tonya K. Cole, Note, *Counting Juvenile Adjudications as Strikes Under California's 'Three Strikes' Law: An Undermining of the Separateness of the Adult and Juvenile Systems*, 19 J. JUV. L. 335, 339-40 (1998).

determination to be within the domain of the jury because they never contemplated such use and, given the history of juvenile justice, never would have endorsed it.

Second, when considering the use of prior non-jury adjudications to enhance subsequent sentences, the question of “historical practice” should have been framed in terms of the particular *type* of case at issue: serious criminal cases. From this perspective, as the United States Supreme Court held in *Duncan v. State of Louisiana*, in light of the Framers’ intent, “[t]he deep commitment of the Nation to the right of jury trial in serious criminal cases as a defense against arbitrary law enforcement qualifies for protection under the Due Process Clause of the Fourteenth Amendment, and must therefore be respected by the States.”<sup>162</sup> Moreover, the right to a jury trial in criminal cases was the only guarantee common to the twelve state constitutions that predated the Constitutional Convention and every state that subsequently entered the Union incorporated such a right into its own constitution.<sup>163</sup>

Third, as the Court of Appeal in *Nguyen* noted, prior to 1854, juveniles— if tried at all— were tried as adults with the right to jury trial. At English Common Law, when the British Parliament enacted the Youthful Offenders Act in 1854, juveniles lost the right to a jury trial for minor crimes, “*but retained the right in felonies.*”<sup>164</sup> For these reasons, the first of the “twin considerations”—historical practice—does not weigh in favor of the use of juvenile adjudications.

In addition, while it is within the sovereign prerogative of each state to operate its own criminal justice system, this independence has important limits. The fact that Three Strikes provisions such as the use of juvenile adjudications were enacted by popular vote does not exempt them from constitutional requirements. As the Supreme Court noted in *Jones*, it is “no trivial question to ask whether recognizing an unlimited legislative power to authorize determinations setting ultimate sentencing limits without a jury would invite erosion for the jury’s function to a point against which a line must necessarily be drawn . . . .”<sup>165</sup> While the court may have found no violation of the Sixth Amendment, other courts disagree. Finally, the Supreme Court has yet to consider this issue, which arguably weakens the assertion that the twin considerations “clearly weigh in favor of a conclusion that the *Apprendi* rule should not be construed to bar such use.”<sup>166</sup>

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162. *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968).

163. Albert W. Alshuler & Andrew G. Deiss, *A Brief History of the Criminal Jury in the United States*, 61 U. CHI. L. REV. 867, 870 (1994).

164. *People v. Nguyen (Nguyen I)*, 54 Cal. Rptr. 3d 535, 537 (Cal. Ct. App. 2007) (emphasis added).

165. *Jones v. United States*, 526 U.S. 227, 243-44 (1999).

166. *People v. Nguyen (Nguyen III)*, 46 Cal. 4th 1007, 1028 (2009).

*g. The majority's assessment of the national trend is misleading.*

Finally, *Nguyen's* assertion that the majority of post-*Apprendi* federal and state decisions have reached the same conclusion—"that nonjury juvenile adjudications may be used to enhance later adult sentences"<sup>167</sup>—is misleading.<sup>168</sup> As Justice Kennard points out in her dissent, the development of the *Apprendi* rule was brought about by a "new trend in the legislative regulation of sentencing," namely sentencing laws that impose significant enhancements on the basis of prior facts, which enhanced the power of trial courts but weakened the role of juries.<sup>169</sup> California's Three Strikes law in general, and this particular provision, represents the movement towards harsher sentence enhancements that in turn inspired the *Apprendi* rule.

When the Supreme Court of California decided *Nguyen*, forty-one states had habitual offender statutes.<sup>170</sup> Of those states, California and Texas were the only states which permitted a juvenile adjudication to qualify as a strike.<sup>171</sup> Nineteen states explicitly prohibited the use of juvenile adjudications as a strike, five by statute<sup>172</sup> and fourteen through judicial determination.<sup>173</sup> In the remaining twenty states that were silent on the issue, each contained language in its criminal statutes indicating that prior juvenile adjudications may not be used towards adult criminal sentences.<sup>174</sup> Therefore, the national trend is

167. *Id.* at 1021.

168. Including *Nguyen*, California is one of eight state courts of last resort and federal appellate courts that have held that courts may increase a defendant's sentence based on non-jury juvenile adjudications. *See* *People v. Lee*

111 Cal. App. 4th 1310, 1316 (2003); *People v. Superior Court*, 113 Cal. App. 4th 817, 833 (2003); *People v. Bowden*, 102 Cal. App. 4th 387, 392-94 (2002); *State v. Hitt*, 42 P.3d 732 (Kan. 2002), *cert. denied*, 537 U.S. 1104 (2003); *State v. McFee*, 721 N.W.2d 607, 617 (Minn. 2006); *State v. Weber*, 112 P.3d 1287, 1294 (Wash. Ct. App. 2005), *cert. denied*, 551 U.S. 1137 (2007); *see also* *United States v. Crowell*, 493 F.3d 744, 750 (6th Cir. 2007), *cert. denied*, 552 U.S. 1105 (2008); *Burge*, *United States v. Burge*, 407 F.3d 1183 (11th Cir. 2005), *cert. denied*, 546 U.S. 981 (2005); *United States v. Jones*, 332 F.3d 688 (3rd Cir. 2003); *United States v. Smalley*, 294 F.3d 1030 (8th Cir. 2002), *cert. denied*, 537 U.S. 1114 (2003); *People v. Buchanan*, 143 Cal. App. 4th 139, 141 (2006); *People v. Palmer*, 142 Cal. App. 4th 724, 728-30 (2006); *People v. Smith*, 110 Cal. App. 4th 1072, 1079 (2003); *People v. Fowler*, 2 Cal. App. 4th 581, 585-86 (1999); *People v. Huber*, 139 P.3d 628, 632-33 (Colo. 2006); *People v. Mazzoni*, 165 P.3d 719, 723 (Colo. Ct. App. 2006); *Nichols v. State*, 910 So. 2d 863, 865 (Fla. Dist. Ct. App. 2005); *Ryle v. State*, 842 N.E.2d 320, 322-23 (Ind. 2005), *cert. denied*, 549 U.S. 836 (2006).

169. *Nguyen III*, 46 Cal. 4th at 1029-30 (quoting *Booker v. United States*, 543 U.S. 220, 236 (2005)).

170. *See* Brief of Amicus Curiae Criminal Defense Clinic, Mills Legal Clinic of Stanford Law Sch. on Behalf of Respondent, 3, *People v. Nguyen*, 46 Cal. 4th 1007 (No. S154847) (2009).

171. *Id.* at 3 (citing CAL. PENAL CODE § 667(d)(3); TEX. PENAL CODE ANN. § 12.42(f) (Vernon 2007)).

172. *Id.* at 3.

173. *Id.* at 3-4. This group includes Arizona, Arkansas, Alabama, Delaware, Georgia, Idaho, Kansas, Louisiana, New Mexico, Pennsylvania, South Carolina, Utah, Vermont, Virginia, and Washington. *Id.* at 4 n.5.

174. *Id.* at 5 n.7 (citing MONT. CODE ANN. § 41-5-106 (2007) ("No adjudication upon the status of any youth in the jurisdiction of the court shall . . . be deemed a criminal conviction"); OR. REV. STAT. ANN. § 419C.400(5) (2008) ("An adjudication by a juvenile court that a youth is

arguably shifting towards prohibiting the use of prior juvenile adjudications to enhance sentences.

Furthermore, this issue has reached the federal appellate courts only twice, and there has been a split among the circuits on the issue of whether a juvenile adjudication constitutes a “prior conviction” for the purpose of enhancing an adult’s sentence beyond the statutory maximum.<sup>175</sup> In *United States v. Tighe*,<sup>176</sup> the Ninth Circuit Court of Appeals held that the sentencing judge’s use of the defendant’s prior, nonjury juvenile adjudication in order to increase his sentence beyond the statutory maximum under a federal statute<sup>177</sup> violated his due process rights and his right to a jury trial under *Apprendi*.<sup>178</sup> According to the court, the prior conviction exception to *Apprendi* “must be limited to prior convictions that were themselves obtained through proceedings that included the right to a jury trial.”<sup>179</sup> The court noted that treating juvenile adjudications as “prior convictions” under *Apprendi* “ignores the significant constitutional differences between adult convictions and juvenile adjudications.”<sup>180</sup> Furthermore, the court explained, *Apprendi*’s continued acceptance of the prior conviction exception was “rooted in the concept that prior convictions have been, by their very nature, subject to the fundamental triumvirate of procedural protections intended to guarantee the reliability of criminal convictions: fair notice, reasonable doubt, and the right to a jury trial.”<sup>181</sup>

Alternatively, in *United States v. Smalley*,<sup>182</sup> the Eighth Circuit Court of Appeals found that under the same federal statute at issue in *Tighe*, defendant Smalley’s prior juvenile adjudication qualified as a “prior conviction” for sentence enhancement purposes.<sup>183</sup> According to *Smalley*, “it is incorrect to assume that it is not only sufficient but necessary that the ‘fundamental triumvirate of procedural protections,’ as the Ninth Circuit put it, underlie an

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within its jurisdiction is not a conviction of a crime or offense.”); *S.G.W. v. People*, 752 P.2d 86, 88 (Colo. 1998) (“[O]ur prior decisions have consistently emphasized that a delinquency proceeding is not a criminal prosecution.”); *State v. Angel C.*, 715 A.2d 652, 659 (Conn. 1998) (“There is no dispute that adjudication as a juvenile rather than prosecution as an adult carries significant benefits, chief among which are a determination of delinquency rather than criminality.”)).

175. See *United States v. Tighe*, 266 F.3d 1187, 1193 (9th Cir. 2001); see also *United States v. Smalley*, 294 F.3d 1030, 1031 (8th Cir. 2002).

176. *Tighe*, 266 F.3d at 1193.

177. The Armed Career Criminal Act, 18 U.S.C. § 924(E) (2006).

178. *Tighe*, 266 F.3d at 1194-95.

179. *Id.* at 1194.

180. *Id.* at 1192-93.

181. *Id.* at 1193. *Tighe* has been followed in *Boyd v. Newland*, 467 F.3d 1139, 1151-52 (9th Cir. 2006) (refusing to recognize non-jury juvenile adjudications as “convictions” falling within the *Apprendi* exception); and *United States v. Washington*, 462 F.3d 1124, 1141-42 (9th Cir. 2006) (holding that *Apprendi*’s prior conviction exception does not apply to juvenile adjudications obtained without a jury trial).

182. *United States v. Smalley*, 294 F.3d 1030, 1032-33 (8th Cir. 2002).

183. *Id.* at 1031.

adjudication before it can qualify for the *Apprendi* exemption.”<sup>184</sup> The procedural safeguards supplied by *Gault* and *Winship* were sufficient to ensure the reliability required by *Apprendi*, according to the Eighth Circuit.<sup>185</sup> Finally, the court relied on *McKeiver* in concluding 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.”<sup>186</sup>

#### VI. PRESERVE THE JUVENILE JUSTICE SYSTEM BY RESTORING THE DISTINCTION BETWEEN JUVENILE AND CRIMINAL COURTS

The California Supreme Court’s ruling in *Nguyen* compromises the integrity and character of the juvenile system. Despite the system’s many shortcomings, the juvenile justice system should not be eliminated. Research indicates that minors who are transferred from juvenile court to the adult system are more likely to re-offend than minors who remain within the juvenile system.<sup>187</sup> Nevertheless, if juvenile adjudications are used to enhance subsequent adult sentences beyond the statutory maximum, those proceedings should offer all the procedural safeguards constitutionally required in an adult proceeding. The drawback, however, would be the further destruction of the deliberately drawn distinction between the juvenile and the adult systems.

##### *a. The United States Supreme Court should reexamine McKeiver*

If the United States Supreme Court chooses to permit juvenile adjudications to be used in the same way as criminal convictions, then it must afford the same procedural safeguards as it does in other criminal proceedings. As the Court stated in *Breed v. Jones*,<sup>188</sup> when establishing constitutional policies and rights in juvenile proceedings, it is necessary that courts “eschew the ‘civil’ label-of-convenience which has been attached to juvenile proceedings and that the juvenile process . . . be candidly appraised.”<sup>189</sup>

As discussed above, the Supreme Court in *McKeiver* determined that juveniles do not have a constitutional right to a jury trial. When *McKeiver* was decided, however, there was a meaningful boundary between juvenile and adult

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184. *Id.* at 1032.

185. *Id.* at 1033.

186. *Id.* (quoting *McKeiver v. Pennsylvania*, 403 U.S. 528, 547 (1971) (plurality)).

187. See Donna M. Bishop, *Juvenile Offenders in the Adult Criminal Justice System*, 27 CRIME & JUST. 81, 130 (2000) (theorizing that the transferred youths are more likely to reoffend as a result of either a failure to deter or the superior treatment provided by the juvenile system) (citing Marcy R. Podkopacz & Barry C. Feld, *Criminology: The End of the Line: An Empirical Study of Judicial Waiver*, 86 J. CRIM. L. & CRIMINOLOGY 449, 449-92 (1996); Marcy R. Podkopacz & Barry C. Feld, *Judicial Waiver Policy and Practice: Persistence, Seriousness, and Race*, 14 LAW & INEQ. J. 73, 101-207 (1995)).

188. 421 U.S. 491, 510 (1975).

189. *Id.* at 529 (citation omitted) (quoting *In re Gault*, 387 U.S. 1, 21, 50 (1967)).

proceedings.<sup>190</sup> Had the juvenile system been implicated by the adult system as it is now through repeat offender laws, the Court might have ruled differently.

Moreover, the right to a jury trial has been denied in order to preserve the “civil” and rehabilitative nature upon which the juvenile justice system is founded. It is unclear, however, how the right to a jury would destroy the “civil” spirit of the juvenile proceeding. Our civil system often includes jury trials<sup>191</sup> without compromising their “civil” nature and transforming them into criminal proceedings. The *McKeiver* Court analyzed the right to a jury trial for juveniles within the context of whether it would support the unique advantages of the juvenile justice system.<sup>192</sup> According to the plurality, finding a constitutional right to a jury trial in juvenile proceedings would not meet that standard because “it would bring with it into that system the traditional delay, the formality, and the clamor of the adversary system[],”<sup>193</sup> all of which will arguably happen as a result of the use of juvenile adjudications to enhance subsequent sentences. While the right to a jury trial may create delay, formality, and “clamor” in certain instances, the main concern is supposed to be the interests of the juvenile, who could retain the right to waive a jury under the advisement of counsel in light of these concerns. As the Supreme Court stated in *Duncan*, “[e]ven when defendants [waive jury] trials, the right to a jury trial very likely serves its intended purpose of making judicial or prosecutorial unfairness less likely.”<sup>194</sup>

In the interest of accuracy, reliability, and due process more generally, the right to a jury trial—which is a substantive rather than procedural protection—would not necessarily interfere with the purported goals of the juvenile system. These objectives—rehabilitation, *parens patriae*, and informality—relate more to sentencing than to guilt. Thus, there is good reason to employ the same procedural mechanisms in the guilt phase of juvenile cases while still achieving the unique objectives through the disposition of cases, namely rehabilitative measures rather than the penalties usually administered to adult offenders.

Because both *Almendarez-Torres* and *Apprendi* concerned the use of prior *adult* convictions where the defendant had admitted his prior criminal acts, those cases leave open the possibility that the United States Supreme Court could take a different direction. One option is that *all* priors—both juvenile adjudications and adult convictions—may be used. In light of the distinction drawn between juvenile and adult proceedings, this would be an unfavorable

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190. *McKeiver*, 403 U.S. at 553.

191. See CAL. CIV. PROC. CODE §191 (West 2006) (“The Legislature recognizes that trial by jury is a cherished constitutional right . . .”). Furthermore, perhaps the addition of a jury—rather than encouraging adversarial and formal qualities—promotes a communal and restorative approach to juvenile justice by incorporating community members in the adjudicative process.

192. *McKeiver*, 403 U.S. at 543, 547.

193. *Id.* at 550.

194. *Duncan v. Louisiana*, 391 U.S. 145, 157-58 (1968).

interpretation. Another possibility is to limit the use of prior convictions to previous adult convictions. This option at least remains loyal to the boundary between the juvenile and adult systems. A third possibility is to limit the use of prior convictions where the defendant admitted the offense, which could include both adult and juvenile proceedings. Although this would affect the non-adversarial and informal nature of the juvenile system, it would help to ensure that those individuals caught within it enjoy the constitutionally required procedural safeguards. However, “admitted” juvenile adjudications may be unreliable, as discussed above. Finally, if the Court allows the use of prior convictions where the defendant admitted the offense—whether in an adult *or* juvenile proceeding—this should be discretionary and should remain within rather than *exceed* the range, which California’s Three Strikes law currently permits.

*b. The Court should restore the vital distinction between juvenile and criminal courts.*

On the other hand, according to the Court in *Schall v. Martin*, criminal cases and juvenile hearings are “fundamentally different.”<sup>195</sup> The California Supreme Court offered a similar expression of the distinction in *In re Joseph B.*, where it stated that “[an] order adjudging a minor to be a ward of the juvenile court shall not be deemed a conviction of a crime for any purpose, nor shall a proceeding in the juvenile court be deemed a criminal proceeding.”<sup>196</sup> Courts should not continue to deny constitutional rights to juveniles on the theory that juvenile and criminal courts are different when that juvenile adjudication has the same criminal consequences as would impact an adult. It is arguable that as sentencing practices increasingly result in longer sentences, procedural safeguards should evolve in order to afford greater protection.

If *McKeiver* was predicated on the notion that juvenile adjudications were non-criminal in nature,<sup>197</sup> one should consider whether that description still holds true in practice. For instance, the juvenile justice system incorporates various central components of the adult criminal justice system, such as a petition charging the juvenile in language similar to that in a criminal indictment, a presiding judge, a prosecutor and defense attorney, plea bargaining, a detention center which in many ways resembles an adult institution, and as affirmed by *Nguyen*, the incorporation of Three Strikes sentencing consequences.<sup>198</sup> As Justice Douglas pointed out in his dissent, in light of the Sixth and Fourteenth Amendments, a “juvenile is entitled to a trial ‘as a matter of right where the delinquency charged is an offense that, if the

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195. *Schall v. Martin*, 467 U.S. 253, 263 (1984).

196. *In re Joseph B.*, 34 Cal. 3d 952, 955 (1983).

197. *McKeiver*, 403 U.S. at 541 (“[T]he juvenile court proceeding has not yet been held to be a ‘criminal prosecution,’ within the meaning and reach of the Sixth Amendment . . .”).

198. See CAL. WELF. & INST. CODE §§ 202, 203, 607, 707(d)(1)-(d)(3), & 1769 (West 2006).

person were an adult, would be a crime triable by jury.”<sup>199</sup>

In its plurality opinion, the Court in *McKeiver* determined that the due process right to a jury trial did not extend to juvenile proceedings.<sup>200</sup> But according to Justice Blackmun, “the juvenile court proceeding has not yet been held to be a ‘criminal prosecution,’ within the meaning and reach of the Sixth Amendment.”<sup>201</sup> Similarly, Justice White noted that “there remain differences of substance between criminal and juvenile courts.”<sup>202</sup> The use of juvenile adjudications in subsequent criminal convictions, therefore, undermines the very premise upon which *McKeiver* was decided. If the Court was concerned with eliminating the distinction between juvenile and criminal courts by providing the same procedural safeguards in both, it probably would have feared eliminating the distinction by using juvenile adjudications for enhancing sentences in adult proceedings. The Court would have been reluctant to extend the possible penalties for the same reasons the Court refused to fully extend the procedural safeguards.

The juvenile system should be preserved because of its many advantages. In order to uphold the valuable principles and objectives of the juvenile justice system, it must remain a non-adversarial, rehabilitation-centered structure. Yet the possibility that an adjudication will come back to haunt the juvenile might reduce contrition,<sup>203</sup> create fewer guilty pleas, encourage more aggressive lawyering, and, consequently, deny help to at-risk youth. The “civil” nature of the juvenile justice system—which is by definition not “criminal”—is a sufficient reason not to use prior juvenile adjudications to enhance adult sentences.

A juvenile’s record should generally remain private and protected from subsequent adult criminal proceedings because it is understood that a minor deemed fit for the juvenile system is subject to its rules and consequences, which are distinct from the criminal justice system. Section 203 of the California Welfare and Institutions Code states, “[a]n order adjudging a minor to be a ward of the juvenile court shall not be deemed a conviction of a crime for any purpose, nor shall a proceeding in the juvenile court be deemed a criminal proceeding.”<sup>204</sup> Juvenile adjudications should not be used in later proceedings because of the fundamental difference between the adult and

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199. *McKeiver*, 403 U.S. at 561 (Douglas, J., dissenting) (Black, J. and Marshall, J. concurring in dissent) (quoting *DeBacker v. Brainard*, 396 U.S. 28, 35 (1969) (Douglas, J., dissenting)).

200. *McKeiver*, 403 U.S. at 550.

201. *Id.* at 541.

202. *Id.* at 553.

203. *See id.* at 563-64 (Douglas, J., dissenting) (“The child who feels that he has been dealt with fairly and not merely expediently or as speedily as possible will be a better prospect for rehabilitation.”).

204. CAL. WELF. & INST. CODE § 203.

juvenile systems.<sup>205</sup>

The purpose of California's Three Strikes law, which is to "ensure longer prison sentences and greater punishment for those who commit a felony and have been previously convicted of serious and/or violent felony offenses,"<sup>206</sup> is at odds with the purpose of the juvenile system, which expressly rejects retribution as a form of punishment.<sup>207</sup> As Justice White noted in *McKeiver*, although a guilty adult is found "blameworthy" for his conduct, a juvenile's "conduct is not deemed so blameworthy that punishment is required to deter him or others."<sup>208</sup> In fact, disciplinary action, where employed, is "neither retribution nor punishment."<sup>209</sup> Moreover, in light of the *Roper v. Simmons* determination that juveniles are "categorically less culpable than the average criminal,"<sup>210</sup> harsher punishments such as using juvenile adjudications as strikes could be found to violate the Eighth Amendment. Even though the sentence enhancement is triggered by the current offense, it is founded in part on notions of retribution, which reflects the offender's moral culpability. Because juveniles have reduced culpability, the use of a juvenile adjudication for retributive purposes is inappropriate.<sup>211</sup>

Three Strikes provisions are intended to serve as a deterrent, which further indicates that juvenile adjudications should not be a factor in subsequent sentence enhancements. As the *Roper* Court explained, the juvenile's immaturity and undeveloped sense of responsibility often lead to impulsive and immature decisions.<sup>212</sup> Moreover, a juvenile is "more vulnerable . . . to negative influences and outside pressures, including peer pressure."<sup>213</sup> Therefore, a juvenile's poor decision-making ability and extreme vulnerability to peer pressure make the deterrent objective of Three Strikes provisions inappropriate for minors. In the words of *Roper*, "the same characteristics that render juveniles less culpable than adults suggest as well that juveniles will be less susceptible to deterrence."<sup>214</sup>

205. See *id.* (stating the purpose of the juvenile court is to provide for treatment and rehabilitation, protection and safety of the minor and the public, and the preservation of the family).

206. CAL. PENAL CODE §§ 667(b), 1170.12 (b)(3)(A).

207. See Julianne P. Sheffer, Note, *Serious and Habitual Juvenile Offender Statutes: Reconciling Punishment and Rehabilitation Within the Juvenile Justice System*, 48 VAND. L. REV. 479, 488 (1995) (citing CAL. WELF. & INST. CODE § 202(e)).

208. *McKeiver*, 403 U.S. at 551-52.

209. *Id.*

210. *Roper v. Simmons*, 543 U.S. 551, 567 (2005) (citing *Atkins v. Virginia*, 536 U.S. 304, 316 (2002)) (internal quotations omitted).

211. See *id.* at 569.

212. *Id.* (quoting *Johnson v. Texas*, 509 U.S. 350, 367 (1993)) (internal quotations omitted).

213. *Roper*, 543 U.S. at 569. (citing *Eddings v. Oklahoma*, 455 U.S. 104, 115 (1982)).

214. *Roper*, 543 U.S. at 571. It seems worth exploring how juveniles' inability to make complex, consequential decisions may impact the decisions they make even at the adjudicatory stages. Also, the minor's lawyer may believe that it is in the minor's best interest to be adjudicated "guilty" so that the minor will receive the most treatment/attention possible.

The inherent differences between juveniles and adults and the distinct justice systems the state has created and retained in response to these distinctions indicate that Three Strikes laws are harmful when imposed upon the juvenile court system. As discussed above, the state has the opportunity to transfer certain minors to adult criminal court if certain requirements are met. Certain juvenile offenses mandate direct filing in adult court by the prosecutor, which is referred to as “legislative exclusion.”<sup>215</sup> Under “discretionary direct filing” in adult criminal court, the prosecutor may choose to file in adult criminal court if certain requirements are met.<sup>216</sup> The explicit legislative choice, which grants the judge and prosecutor discretion to try certain minors in adult court, indicates not only that certain juveniles may be tried in criminal court when the state determines the minor is no longer awarded the benefits of the juvenile system, but also that those minors who the state determines should remain within the juvenile system should *retain* the advantages of that system without later being injured by their deprivation of a jury trial. It is unfair for the court to determine that an offender whose conduct was not serious enough to be processed in criminal court has the same long-term consequences as someone deemed unfit for juvenile court and tried as an adult, where he is granted greater procedural protection. Until California erases its explicit distinction between the juvenile and adult systems and guarantees the same procedural safeguards to adults and minors alike, the Court should acknowledge these differences in order to avoid excessively punishing minors who were found unfit for the retributive and punitive adult system.

#### CONCLUSION

Regardless of whether *Nguyen* correctly applied Supreme Court precedent, the use of juryless juvenile adjudications offends the principles and reasoning upon which juvenile justice case law and *Apprendi* and its progeny are based. *Nguyen* highlights—and indeed exacerbates—the eroding division between two deliberately separated court systems. The Supreme Court should use this opportunity to account for this change and, in accordance, ensure that the individuals affected by it are afforded the procedural safeguards sufficient to satisfy due process.

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215. See CAL. WELF. & INST. CODE § 602(b) (West 2006).

216. See CAL. WELF. & INST. CODE § 707(a)-(d).

