No. 16-

IN THE

Supreme Court of the United States

DERRICK JONES,

Petitioner,

v.

THE PEOPLE OF THE STATE OF ILLINOIS,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF ILLINOIS

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000), this Court held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." This case concerns the application of *Apprendi* to non-jury juvenile adjudications. In this case, the Illinois Supreme Court held that petitioner's juvenile adjudication fell within *Apprendi*'s prior-conviction exception and hence could be used to enhance his sentence for a subsequent criminal conviction without being proved to a jury. That decision implicates important and recurring constitutional questions.

Currently pending before this Court is the petition for certiorari in *Ohio v. Hand* (No. 16-711). There, the Ohio Supreme Court held exactly the opposite: because the right to a jury trial did not attach to defendant's prior juvenile adjudication, that adjudication could not be used to enhance his sentence for a subsequent criminal conviction.

This case encompasses the question presented in No. 16-711 and also raises further issues. The questions presented are:

(1) Whether it violates the Sixth and Fourteenth Amendments to use a criminal defendant's prior juvenile adjudication, where that defendant had no right to a jury trial, to impose a longer sentence than would otherwise be permissible in a subsequent adult criminal proceeding.

(2) If it is constitutionally permissible to use a prior non-jury juvenile adjudication to enhance a

sentence, whether the fact of that adjudication must be proved to a jury, or may be found by a judge alone.

(3) Alternatively, whether this Court's decision in *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), which held that the fact of a prior conviction need not be submitted to a jury and proved beyond a reasonable doubt, should be overruled.

PARTIES TO THE PROCEEDING

The parties to the proceeding are listed in the caption of the Petition.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Derrick Jones respectfully petitions this Court for a writ of certiorari to review the judgment of the Illinois Supreme Court in this case.

OPINION BELOW

The opinion of the Illinois Supreme Court (Pet. App. 1a) is reported at 2016 IL 119391 and 2016 WL 6137236 and will be reported in the Northeast Reporter 3d. The opinion of the Appellate Court of Illinois, Third District is reported at 32 N.E.3d 198 (2015) (Pet. App. 37a).

JURISDICTION

The Illinois Supreme Court issued its decision on October 20, 2016. By Order of December 6, 2016 in No. 16-A554, Justice Kagan extended the time for filing a petition for writ of certiorari until February 17, 2017. This Court has jurisdiction under 28 U.S.C. § 1257(a).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

Relevant constitutional and statutory provisions are reprinted in the Appendix (Pet. App. 64a).

STATEMENT

Both this Petition and the Petition in *State v. Hand* (No. 16-711) present the question of whether non-jury juvenile adjudications fall within the prior-conviction exception of *Apprendi v. New Jersey*, 530 U.S. 466 (2000): "[o]ther than the fact of a prior conviction any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." 530 U.S. at 490. The Illinois and Ohio Supreme Courts recently reached opposite conclusions on that question.

In this case, the Illinois Supreme Court held that non-jury juvenile adjudications constitute prior convictions for the purposes of *Apprendi* and *Almendarez-Torres v. United States*, 523 U.S. 224 (1998). Petitioner's sentence was extended because of a prior non-jury juvenile adjudication, even though the adjudication's existence was not proved to a jury. Without that adjudication, Petitioner was subject to a 4-to-15 year sentence. But because of that adjudication, Petitioner received a 24-year sentence.

Illinois' holding stands in sharp contrast to the decision of the Ohio Supreme Court in *State v. Hand,* No. 2104-1814, 2016 WL 4486068 (Ohio Aug. 25, 2016). There, the Ohio Supreme Court held that the Sixth and Fourteenth Amendments prohibit using prior non-jury juvenile adjudications to enhance sentences in subsequent criminal proceedings above otherwise applicable statutory maximums. The State of Ohio has sought this Court's review.

These two cases show that the longstanding split on the questions presented is not only persisting, but

worsening. And these cases confirm that the issue is a recurring one.

This case reinforces the importance of the question presented in *Hand*—whether prior non-jury juvenile adjudications may ever be used to extend a sentence beyond the otherwise applicable statutory maximum. Moreover, this case provides the Court an alternative vehicle encompassing the question raised in *Hand* and raising two further questions:

First, whether a non-jury juvenile adjudication needs to be presented to the jury at the subsequent criminal trial, or whether it can be found by a judge alone (as occurred in this case).

Second, whether this Court should finally overrule *Almendarez-Torres v. United States*, which "arguabl[y] . . . was incorrectly decided." *Apprendi*, 530 U.S. at 489.[1]

Because this case places the full range of issues before the Court, it offers an ideal vehicle for resolving longstanding constitutional questions in the area of criminal sentencing.

1. Background.

Petitioner was convicted of aggravated robbery in Will County Circuit Court. Pet. App. 1a. Aggravated robbery is punishable by 4 to 15 years in prison. *Id.* at 6a. However, Illinois law authorized the judge to extend Petitioner's sentence to "*not less than 15 years* and not more than 30 years" on the basis of his prior juvenile adjudication. Pet. App. 64a

[1] The Ohio Supreme Court's decision in *Hand* does not cite or discuss *Almendarez-Torres*.

(emphasis added). Other than Petitioner's prior juvenile adjudication, there was no statutory basis for extending petitioner's sentence. *Id.* at 9a. No evidence regarding Petitioner's prior juvenile adjudication was presented to the jury. *Id.* at 5a. The judge ultimately sentenced Petitioner to an extended-term of 24 years imprisonment. *Id.* at 6a.

Thus, Petitioner's sentence was extended 9 years beyond the otherwise applicable statutory maximum on the sole basis of his prior non-jury juvenile adjudication, which was found by the judge and not by a jury.

Petitioner's motion to reconsider his sentence was denied. *Id.* at 6a, 46a. Petitioner appealed, arguing that both *Apprendi* and the Illinois statute codifying *Apprendi* required the State to prove the fact of his prior juvenile adjudication to a jury beyond a reasonable doubt. *Id.* at 47a.

The Illinois appellate court reviewed this issue *de novo* to determine whether there was plain error. *Id.* at 51a. The court viewed the statutory and *Apprendi* issues as coextensive and controlled by federal constitutional law. *Id.* at 50a–52a. The court recognized a split among state and federal courts regarding the constitutional treatment of prior non-jury juvenile adjudications. *Id.* at 60a–64a. After comprehensively addressing the history of this split, it joined the majority and held that prior non-jury juvenile adjudications may be used to enhance criminal sentences, even when they are not presented to the subsequent jury. *Id.* at 64a–66a.

2. The Decision Below.

A sharply divided Illinois Supreme Court affirmed. Petitioner argued that the trial court erred in "impos[ing] an extended term sentence . . . based on a prior delinquency adjudication, where the alleged fact of the prior adjudication [was] neither pled in the indictment nor proved beyond a reasonable doubt to the jury." Brief and Argument for Defendant-Appellant, *People v. Jones*, No. 119391, at 2 (Dec. 8, 2015). This question was argued on both federal constitutional and state statutory grounds. Brief of Plaintiff-Appellee, People of the State of Illinois, *People v. Jones*, No. 119391 (Feb. 11, 2016) Reply Brief for Defendant-Appellant, *People v. Jones*, No. 119391 (Feb. 25, 2016).

The majority decided the case solely on constitutional grounds, based on its interpretation of *Apprendi* and *Almendarez-Torres*. *See* Pet. App. 7a–11a. The court held that prior juvenile adjudications may be used to enhance adult sentences without violating the Sixth Amendment and need not be proved to the jury. The majority acknowledged and extensively discussed the conflict among circuit courts and state supreme courts on the issue. *Id.* at 11a–16a. The Illinois Supreme Court identified the split as tripartite:

(i) The Ninth Circuit and Louisiana have held that prior juvenile adjudications categorically may not be used to enhance adult felony convictions. *Id.* at 11a, 15-16a.

(ii) Oregon has taken "a middle ground position" that the use of prior juvenile adjudications as sentencing factors does not categorically violate the Sixth Amendment, but that when such an

adjudication is used, its existence must either be proved to the jury or be admitted by a defendant for sentencing purposes following an informed and knowing waiver. *Id.* at 15a.

(iii) The First, Third, Fourth, Sixth, Seventh, Eighth and Eleventh Circuits, as well as the highest courts of Kansas, Indiana, Minnesota, Washington, and California have all held that a juvenile adjudication constitutes a prior conviction for the purposes of *Apprendi* and may be used to enhance an adult criminal sentence regardless of whether it is proved to the jury or admitted by the defendant. *Id.* at 12a–15a.

The Illinois Supreme Court adopted the majority approach and held that Petitioner's juvenile adjudication could be used to enhance his sentence despite a finding of its existence by the judge alone.

REASONS FOR GRANTING THE WRIT

Apprendi's prior-conviction exception derives from this Court's decision in *Almendarez-Torres* that the fact of a defendant's prior conviction need not be proved to a jury before being used to enhance a sentence for a subsequent crime. This Court has yet to address how prior non-jury juvenile adjudications must be treated in the light of *Apprendi.*

The Illinois Supreme Court recognized that courts addressing this question have split along three lines. The fact that this case and *Hand* have arisen in quick succession and reached opposite conclusions emphasizes the significance and importance of the split. The split unjustly leads to disparate outcomes for criminal defendants

depending on the fortuity of location and whether their indictment is based on state or federal law.

Further, this question is quantitatively important: Nationally, about 500,000 juveniles are adjudicated delinquent each year. Sarah Hockenberry & Charles Puzzanchera, Nat'l Ctr. for Juvenile J., Juvenile Court Statistics 2013, at 6, 42 (2015) (stating that in approximately 55 percent of the 1,058,500 proceedings a year, the juvenile is adjudicated delinquent). In Illinois alone, somewhere between 20 and 60 percent of those juveniles will become recidivists.[2] Ill. Dep't of Juvenile J., 2015 Annual Report 4 (2015).

The question is also qualitatively important: the rule adopted by the Illinois Supreme Court's decision in this case undermines the fundamental constitutional importance of the jury trial and ignores important differences between the nature of the juvenile justice system and the adult criminal justice system.

The instant Petition is an especially good vehicle because it presents the questions of whether the Sixth and Fourteenth Amendments permit the use of prior juvenile adjudications as sentencing factors *at all*, and if so, whether the existence of prior adjudications must either be proved to the jury or be

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[2] National juvenile recidivist studies do not exist "since juvenile justice systems vary across states." Brittany Bostic, *Reducing Recidivism for Juvenile Criminal Offenders*, Michigan Youth Violence Prevention Center, (Mar. 11, 2014), http://yvpc.sph.umich.edu/exploring-rehabilitation-programs-juvenile-criminal-offenders/.

admitted by a defendant for sentencing purposes following an informed and knowing waiver.

This Petition also presents the question whether this Court should overrule *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), which this Court has recognized is in serious tension with subsequent decisions. Members of this Court have expressed interest in reconsidering *Almendarez-Torres*. The Court has since reconsidered and overruled other precedents that conflict with *Apprendi*; and the Court should do the same here.

The principal virtue of this Petition is that it provides this Court with the flexibility to address all facets of the prior juvenile-adjudication issue under *Apprendi*. The first two questions presented allow this Court to decide whether non-jury juvenile adjudications may be used to enhance subsequent criminal sentences, and if so, in what circumstances. In so doing, this Court would resolve an important issue for juvenile offenders. The third question allows this Court to decide that, contrary to the holding of *Almendarez-Torres*, prior convictions must be included in an indictment and proved to a jury. This case thus presents an ideal vehicle to clarify the role that prior convictions and juvenile adjudications play in sentencing.

I. This Court Should Grant Review To Establish The Proper Role Of Prior Non-Jury Juvenile Adjudications In Enhancing Subsequent Criminal Sentences.

As evidenced by this case and *Ohio v. Hand* (No. 16-711), the questions presented are recurring and deeply important questions of criminal justice. Lower courts have reached conflicting decisions

about if and how prior non-jury juvenile adjudications may be used to extend sentences for subsequent convictions beyond otherwise permitted statutory maximums. The Illinois Supreme Court explicitly recognized and thoroughly discussed the existence of this tripartite split of authority. Pet. App. 11a–16a.

These questions affect large numbers of criminal defendants and generate large differences in the duration of prison sentences for criminal defendants. For example, one scholar found that a prior juvenile adjudication allows a court to increase an adult defendant's sentence by over twenty years in twenty states. *See* Joseph B. Sanborn, Jr., *Striking Out on the First Pitch in Criminal Court*, 1 BARRY L. REV. 7, 21–22 tbl.3 (2000). In this case, Petitioner received a sentence of 24 years; without the finding of the prior juvenile adjudication by the judge, Petitioner's sentence would be no more than 15 years. Such a dramatic impact underscores the importance of the question presented and the need for this Court's review.

A. There Is a Deepening and Intractable Three-Way Split Among Federal and State Courts Over the Use of Prior Non-jury Juvenile Adjudications In Extended Sentencing.

The majority of courts—six circuits and six states—hold that prior non-jury juvenile adjudications are convictions for the purposes of *Apprendi*. These courts interpret *Apprendi* as being primarily concerned with reliability, as opposed to the right to a jury trial. Thus, as long as there were constitutionally sufficient safeguards in the juvenile proceedings, the outcome of those proceedings has

"more than sufficient [safeguards] to ensure the reliability that *Apprendi* requires." *United States v. Smalley*, 294 F.3d 1030, 1033 (8th Cir. 2002).

The court below adopted this majority position. However, its decision directly conflicts with precedent from the Ninth Circuit and three states. These courts reject the majority's reliability-based interpretation of *Apprendi*, instead interpreting *Apprendi* as being primarily concerned with the jury's role as a structural protection between the people and the state. This minority position is further divided. Although the Ninth Circuit, Ohio, and Louisiana hold that non-jury juvenile adjudications may never be used for enhancement purposes, Oregon holds that such adjudications may be used if their existence is proved to a jury beyond a reasonable doubt.

1. The Ninth Circuit and the Ohio, Oregon, and Louisiana Supreme Courts reject the majority position.

a. The Ninth Circuit. The Ninth Circuit was the first circuit court confronted with the issue of whether juvenile adjudications qualified as prior convictions under *Apprendi*. In *United States v. Tighe*, 266 F.3d 1187 (9th Cir. 2001), the defendant pleaded guilty to, *inter alia*, being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1), which carries a maximum sentence of 10 years in the absence of previous convictions for violent felonies, *see id.* § 924(a)(2). *Tighe*, 266 F.3d at 1190. The district court, however, increased defendant's sentence from the prescribed statutory maximum of 10 years to a minimum of 15 years, based, in part, on the defendant's prior juvenile

adjudication for robbery. *Id.* at 1191. The defendant appealed the sentence and the Ninth Circuit reversed.

The court first reviewed this Court's decisions in *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), and *Jones v. United States*, 526 U.S. 227 (1999). Those cases established, the court explained, that prior convictions are constitutionally distinct from other sentence-enhancing facts because, "'unlike virtually any other consideration used to enlarge the possible penalty for an offense,' . . . 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." *Tighe*, 266 F.3d at 1193 (quoting *Jones*, 526 U.S. at 249)). It then clarified that *Apprendi*'s continued acceptance of *Almendarez-Torres* and *Jones*'s prior-conviction exception was "premised on sentence-enhancing prior convictions being the product of proceedings that afford crucial procedural protections – particularly the right to a jury trial and proof beyond a reasonable doubt." *Id.* at 1194.

The Ninth Circuit therefore concluded that prior convictions should remain a "narrow exception" to *Apprendi* that does not include juvenile adjudications, proceedings to which the right to a jury trial does not attach. *Id.* (quoting *Apprendi*, 530 U.S. at 490). Because Tighe's juvenile adjudication had been used to enhance his sentence beyond the otherwise applicable statutory maximum, the Ninth Circuit vacated the sentence and remanded for resentencing. The Ninth Circuit has adhered to this rule in subsequent decisions. *See infra* at p. 21.

b. Ohio and Louisiana. While acknowledging the split of authority among the circuits and states, both Ohio and Louisiana hold—in line with *Tighe*— that non-jury juvenile adjudications may not be used to enhance subsequent adult sentences. *See State v. Hand*, No. 2104-1814, 2016 WL 4486068 (Ohio Aug. 25, 2016); *State v. Brown*, 879 So.2d 1276 (La. 2004).

In *Brown,* the Louisiana Supreme Court held that the use of a non-jury juvenile adjudication to increase a penalty beyond the statutory maximum violated the defendant's due process rights guaranteed by the Fourteenth Amendment. *Id.* at 1290. The court explicitly rejected the majority's reliability-based rationale and instead focused on the important structural differences between the juvenile and adult criminal systems. *Id.* It succinctly articulated the incompatibility of these systems:

> It would be incongruous and illogical to allow the non-criminal adjudication of a juvenile delinquent to serve as a criminal sentencing enhancer. To equate this adjudication with a conviction as a predicate offense . . . would subvert the civil trappings of the juvenile adjudication to an extent to make it fundamentally unfair and thus, violative of due process. . . . It seems contradictory and fundamentally unfair to provide youths with fewer procedural safeguards in the name of rehabilitation and then to use adjudications obtained for treatment purposes to punish them more severely as adults.

Id. at 1289.

In *Hand*, the most recent state to deepen the existing split, the Ohio Supreme Court also held that juvenile adjudications could not be used to enhance a defendant's sentence during subsequent criminal proceedings because doing so violated due process. *Hand*, 2016 WL 4486068, at *9. Focusing on the "Supreme Court's emphatic pronouncements on the right to a jury trial," the court reasoned that the "proper inquiry under *Apprendi* is not simply whether juvenile adjudications are deemed to be reliable, but whether the juveniles were afforded the right to a jury," a right which is "at the heart of *Apprendi*'s narrow exception." *Id.* at *8 (quoting *Apprendi*, 530 U.S. at 498–99 ((Scalia, J., concurring)). Converting an adjudication into a conviction when "the adjudication process did not provide the right to have a jury test the elements of [the underlying] offense offends due process and *Apprendi*." *Id.* at *9. Moreover, the court concluded: "Quite simply, a juvenile adjudication is not a conviction of a crime and should not be treated as one." *Id.*

c. Oregon. Like the Ninth Circuit and the Ohio Supreme Court, the Supreme Court of Oregon recognized that reliability "is not the *sine qua non* of the Sixth Amendment." *State v. Harris*, 118 P.3d 236, 245 (Or. 2005). Instead, the court posited, *Apprendi* was primarily concerned with the structural importance of the jury as "the people's check on judicial power" that "serves to divide authority between judge and jury." *Id.* at 242–43, 245. The court accordingly held that the "Sixth Amendment requires that when . . . an adjudication is offered as an enhancement factor to increase a criminal sentence, its existence must be proved to a

trier of fact or be admitted by a defendant for sentencing purposes following an informed and knowing waiver." *Id.* at 245–46.[3] Oregon's position thus represents what the court below described as the "middle ground position." Pet. App. 15a.

2. Six circuits and six state supreme courts hold that prior non-jury juvenile adjudications are prior-convictions under *Apprendi*.

a. The Majority Position. In *United States v. Smalley*, 294 F.3d 1030 (8th Cir. 2002), the Eighth Circuit found that prior convictions are excepted from *Apprendi*'s general rule because of the "'certainty that procedural safeguards,' such as trial by jury and proof beyond a reasonable doubt, undergird them." *Id.* at 1032 (quoting *Apprendi*, 530 U.S. at 488). Because juvenile adjudications are afforded all constitutionally required protections, *see McKeiver v. Pennsylvania*, 403 U.S. 528 (1971) (holding that juveniles in juvenile proceedings are not entitled to a jury trial by the Sixth or Fourteenth Amendments), juvenile adjudications are sufficiently reliable that their exemption from *Apprendi*'s rule does not offend due process. *See Smalley*, 294 F.3d at 1033.

b. Five Other Circuits Employ *Smalley*'s Reliability-Based Analysis. In the fourteen years since *Smalley*, five other circuits have embraced its reasoning and held that juvenile adjudications "are sufficiently reliable so as to not offend constitutional

[3] The Court declined to go further and hold that the Sixth Amendment is violated by the "use of prior juvenile adjudications as sentencing factors" alone. *Id.* at 246.

rights if used to qualify for the *Apprendi* exception." *United States v. Jones*, 332 F.3d 688, 696 (3d Cir. 2003). These courts reason that, "when a juvenile is adjudicated guilty beyond a reasonable doubt in a bench trial that affords all the due process protections that are required, the adjudication should be counted as a conviction for purposes of subsequent sentencing." *Id. See United States v. Wright*, 594 F.3d 259, 265 (4th Cir. 2010) (stating that *Apprendi* "hinges in part on whether non-jury adjudications 'are so reliable that due process of law is not offended' by their inclusion in the prior conviction exception" and holding that they are sufficiently reliable) (quoting *Smalley*, 294 F.3d at 1033)); *United States v. Crowell*, 493 F.3d 744, 750 (6th Cir. 2007) (same); *Welch v. United States*, 604 F.3d 408, 426 (7th Cir. 2010) (same); *United States v. Burge*, 407 F.3d 1183, 1190 (11th Cir. 2005) (same).

c. Six states similarly follow the majority position. The Illinois Supreme Court's holding aligned it with the majority of states to have addressed the issue. *See People v. Nguyen*, 209 P.3d 946, 954 (Cal. 2009) ("[W]e agree with the majority view that the Fifth, Sixth, and Fourteenth Amendments, as construed in *Apprendi*, do not preclude the sentence-enhancing use, against an adult felon, of a prior valid, fair, and reliable adjudication . . . where the juvenile proceeding included all the constitutional protections applicable to such matters, even though these protections do not include the right to jury trial."); *State v. McFee*, 721 N.W.2d 607, 616–618 (Minn. 2006) (adopting explicitly the rationale and conclusions reached in *Jones*, *Smalley*, and *Burge*); *State v. Weber*, 149 P.3d

646, 652 (Wash. 2006) (en banc); *Ryle v. State*, 842 N.E.2d 320, 323 (Ind. 2005) (stating that *Apprendi*'s "main concern was whether the prior conviction's procedural safeguards ensured a reliable result, not that there had to be a right to a jury trial"); *State v. Hitt*, 42 P.3d 732, 739 (Kan. 2002).[4]

3. The split is mature and entrenched; there is no need for further percolation.

The lower courts have repeatedly recognized the existing three-way split and exhibited no willingness to alter their positions. The Ninth Circuit has acknowledged the split in cases since *Tighe*, but has made clear that it is firmly committed to *Tighe*'s principles. *See*, *e.g.*, *United States v. Strickland*, 601 F.3d 963, 978 (9th Cir. 2010) (noting that *Almendarez-Torres* stands on "shaky constitutional ground" and citing *Tighe* approvingly); *Boyd v.*

[4] Many of these decisions included dissenting opinions, further highlighting that the split in authority results from fundamentally different interpretations of the rationale underlying *Apprendi* and the importance of the jury trial right. *See*, *e.g.*, *Welch*, 604 F.3d at 431–32 (Posner, J., dissenting) (explaining that *Apprendi* mandated that "a prior conviction used to increase the length of the sentence must be the outcome of a proceeding in which the defendant had a right to have a jury determine his guilt"); *Nguyen*, 209 P.3d at 963 (Kennard, J., dissenting) (stating that the majority opinion "misses the point" because "[t]he problem is that the facts underlying a juvenile court adjudication were determined by . . . the judge); *State v. McFee*, 721 N.W.2d at 622 (Meyer, J., dissenting) ("The proper inquiry under *Apprendi* is not whether McFee's juvenile adjudications were 'fairly' or 'reliably' determined [but] whether the fact of McFee's prior juvenile adjudication was ever determined by a jury."); *Weber*, 149 P.3d at 663–64 (Madsen, J., dissenting) ("There is no substitute for the right to trial by jury.").

Newland, 467 F.3d 1139, 1152 (9th Cir. 2006) (refusing to entertain suggestion that *Tighe* was incorrectly decided).

There is no need for further percolation. Over the past decade the split has only deepened and solidified. Courts on all sides believe that their reasoning is mandated by, or at least consistent with, *Apprendi.* The decisions lead to three different and incompatible treatments of prior non-jury juvenile adjudications. The contradictory approaches reflect a fundamental philosophical split on the scope of the due process right and the constitutional significance and structural importance of the jury trial right in the context of the criminal justice system. This is not a division that will be resolved without the intervention of this Court.

B. The Question Presented Is An Important Question of Federal Law.

The majority rule adopted by the Illinois Supreme Court raises serious constitutional issues for three reasons. First, the absence under Illinois law of the right to a jury trial in juvenile proceedings removes a critical constitutional safeguard.[5] Second, apart from the jury trial right, the special nature of juvenile proceedings precludes the use of prior juvenile adjudications. Third, the split creates tensions in outcomes between defendants and within our federal system. This Court should grant review

[5] It is not disputed that petitioner was denied the right to a jury trial in this case. Juveniles in Illinois are afforded the right to a jury trial only in limited circumstances. *See* 705 Ill. Comp. Stat. 405/5–101(3).

to vindicate the fundamental constitutional principles at stake.

1. The majority rule violates defendants' rights to a jury trial and due process of law guaranteed by the Sixth and Fourteenth Amendments.

Apprendi's logic is firmly rooted in the fundamental importance of the right to a jury trial as the embodiment of the protections enshrined in the Sixth and Fourteenth Amendments. Beyond a "mere procedural formality" aimed at guaranteeing the accuracy of judicial proceedings, the jury trial right was understood to be a "fundamental reservation of power in our constitutional structure." *Blakely v. Washington*, 542 U.S. 296, 306 (2004). As the structural "intermediary between the State and criminal defendants," *Alleyne v. United States*, 133 S. Ct. 2151, 2161 (2013), a jury therefore stands as "the great bulwark of [our] civil and political liberties." *Apprendi*, 530 U.S. at 477 (quoting 2 J. Story, Commentaries on the Constitution of the United States 540–41 (4th ed. 1873)). Without *Apprendi*'s requirement that a jury find all facts used to enhance a sentence beyond a term statutorily authorized, "the jury would not exercise the control that the Framers intended." *Id.*

In carving out the prior-conviction exception, the *Apprendi* Court accordingly recognized it as "at best an exceptional departure from the historic practice" of proving facts relied on to enhance a sentence before a jury. *Apprendi*, 530 U.S. at 487. At the same time, this Court has made clear that "a prior conviction must itself have been established through procedures satisfying the fair notice, reasonable

doubt, and *jury trial guarantees*." *Jones v. United States*, 526 U.S. 227 (1999) (emphasis added).

However, when a judge bases a sentencing enhancement on a juvenile adjudication—a proceeding without a jury trial guarantee—she facilitates an illicit transfer of power from jury to judge, resulting in an erosion of the jury right that is irreconcilable with the Sixth Amendment. This result cannot comport with *Apprendi*'s principles.

2. Fundamental Differences Between the Juvenile Court and Criminal Justice Systems Prohibit a Juvenile Adjudication from Qualifying as a "Prior Conviction."

Beyond the absence of a jury, three aspects of the juvenile court system demonstrate the significant constitutional concerns that arise from classifying an adjudication as a "prior conviction."

First, although a criminal court's responsibility is to establish a defendant's culpability, the role of the juvenile court is "not to ascertain whether the child [is] 'guilty' or 'innocent,'" but rather to determine whether the child needs the state's "care and solicitude." *In re Gault*, 387 U.S. 1, 15 (1967) (quoting Julian Mack, *The Juvenile Court*, 23 HARV. L. REV. 104, 119–20 (1909)). Illinois' juvenile justice system's explicit purpose is to "equip juvenile offenders with competencies to live responsibly and productively," including the "development of educational, vocational, social, emotional and basic life skills which enable a minor to mature into a productive member of society"—not to punish or achieve retribution. 705 Ill. Comp. Stat. 405/5–101; *see also Kent v. United States*, 383 U.S. 541, 555

(1966) ("The Juvenile Court[']s . . . objectives are . . . not to fix criminal responsibility, guilt and punishment."). Indeed, it is the State's function as *parens patriae* upon which the *McKeiver* Court relied to find a right to a jury trial inapplicable to juvenile adjudications. *See* 403 U.S. at 550–51. Where an adjudication was rendered subject to fewer procedural protections in the name of rehabilitation, it is fundamentally unfair to allow that adjudication later to transform into a criminal conviction at the prosecution's convenience. *Cf. Kent*, 383 U.S. at 556 (recognizing that "there may be grounds for concern that the child gets the worst of both worlds").

Second, the unique nature of the juvenile system spawns an environment in which judges are more likely to convict the juvenile than a jury would be a defendant in a criminal trial. Juvenile-court judges are exposed to inadmissible evidence;[6] they repeatedly hear the same stories from defendants, leading them to treat defendants' testimony with skepticism;[7] they become chummy with the police and apply a lower standard of scrutiny to the

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[6] *See* Joseph B. Sanborn, Jr., *Second-Class Justice, First-Class Punishment: The Use of Juvenile Records in Sentencing Adults*, 81 JUDICATURE 206, 212 (1998).

[7] *See* Barry C. Feld, *The Constitutional Tension Between* Apprendi *and* McKeiver*: Sentence Enhancements Based on Delinquency Convictions and the Quality of Justice in Juvenile Courts*, 38 WAKE FOREST L. REV. 1111, 1164 (2003); Martin Guggenheim & Randy Hertz, *Reflections on Judges, Juries, and Justice: Ensuring the Fairness of Juvenile Delinquency Trials*, 33 WAKE FOREST L. REV. 553, 574–75 (1998).

testimony of officers they trust;[8] and they make their decisions alone, meaning their decisions lack the benefits of group deliberation.[9]

As Judge Posner has commented, research confirms that the "noncriminal 'convictions [of the juvenile courts] may well lack the reliability of real convictions in criminal courts." *Welch*, 604 F.3d at 432 (Posner, J., dissenting). Indeed, the Louisiana Supreme Court adopted the minority position when faced with the fact that the defendant before it had, with "no evidence of being an accessory to anyone, [been] adjudicated as guilty [of attempted second degree murder] by a judge and sent to juvenile prison," while, paradoxically, his adult "accomplice" was tried before a jury and acquitted of all charges. *State v. Brown*, 853 So.2d 8, 13 (La. Ct. App. 2003), *aff'd* 879 So.2d 1276 (La. 2004).

Third, as this Court has recognized, "developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds." *Graham v. Florida*, 560 U.S. 48, 68 (2010). The same lack of maturity, vulnerability to outside pressure, and underdeveloped character that render children "constitutionally different from adults for the

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[8] *See* Guggenheim & Hertz, *Reflections*, *supra* note 9, at 575.

[9] This Court has recognized that "[j]uries fairly chosen from different walks of life bring into the jury box a variety of different experiences, feelings, intuitions and habits . . . [and] may reach completely different conclusions than would be reached by specialists in any single field." *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 18 (1955); *cf. Ballew v. Georgia*, 435 U.S. 223, 233–34 (1978).

purposes of sentencing," cast a cloud of doubt over the reliability and due process sufficiency of juvenile adjudications when wielded to enhance adult sentences. *Miller v. Alabama*, 132 S. Ct. 2455, 2464 (2012). For example, notwithstanding the fact that well over 90 percent of juveniles waive their protection against self-incrimination, they often neither understand the function nor the consequences of waiving *Miranda* rights, rendering a knowing and intelligent waiver near impossible to obtain. *See* Steven A. Drizin & Greg Luloff, *Are Juvenile Courts a Breeding Ground For Wrongful Convictions?*, 34 N. KY. L. REV. 257, 266, 268 (2007). The combination of juveniles' lack of cognitive capacity with their susceptibility to coercive pressure results in an omnipresent danger of false confessions nearly unparalleled in the justice system.[10]

Illinois' juvenile adjudication system is not exempt from these weaknesses. A study of the Illinois juvenile justice system, the "most comprehensive of

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[10] *See Gallegos v. Colorado*, 370 U.S. 49, 54 (1962) (recognizing that a fourteen year-old is "a person who is not equal to the police in knowledge and understanding of the consequences of the questions . . . and who is unable to know how to protest his own interests or how to get the benefits of his constitutional rights"); *Haley v. Ohio*, 332 U.S. 596, 599 (1948) (describing a fifteen year-old child as "an easy victim of the law"); Barry C. Feld, *Behind Closed Doors: What Really Happens When Cops Question Kids*, 23 CORNELL J.L. & PUB. POL'Y 395, 440 (2013) (finding that 58.6% of juveniles in the study confessed "within the first few minutes waiving Miranda"). Illinois recognizes that only 16.7% and 77% of children ages thirteen-and-under and fifteen-to-sixteen years old, respectively, are fit to stand trial. *See* Ill. Juvenile Competency Comm'n, Final Report and Recommendations of the Juvenile Competency Commission 27 (2001).

its kind ever undertaken in Illinois," confirms its flaws. *See* Cathryn Crawford, et al., Ill. Children & Family J. Ctr., Illinois: An Assessment of Access to Counsel and Quality of Representation in Delinquency Proceedings 1 (2007) ("Illinois Assessment").

First, the "overall quality of the representation of children in Illinois falls well short of national standards." Illinois Assessment, at 1. The study found six major shortcomings in Illinois' juvenile justice system: it suffers from "untimely appointment of counsel"; "inappropriate use of plea bargaining"; "confusion over role of counsel"; "lack of zealous advocacy"; "inadequate resources"; and "incomplete data & information." *Id.* at 2–5. While all of these findings show how unreliable juvenile adjudications are, of particular concern is how the rehabilitative statutory purposes of the juvenile justice system affect the behaviors of juveniles, their attorneys, and judges. Many attorneys conceptualize their responsibility as achieving a result that is in the "best interests" of their client, no matter what the client's actual "expressed interests" are; judges reinforce that understanding. *Id.* at 62–63. The combination of a focus on "best interests" with an underlying goal of rehabilitation creates a system of perverse incentives, even for well-meaning attorneys: "Under the 'best interest' model of representation, a lawyer may forgo challenging the State's evidence, even when the case is weak or there is a viable defense, if she believes that the only way she can access 'treatment or services' for her client is by having them adjudicated delinquent. This in turn leaves the court-involved child, who may be facing lifelong negative consequences, legally vulnerable."

Id. at 22. Illinois's system is not unique. *See, e.g.*, Elizabeth Gladden Kehoe & Kim Brooks Tandy, Nat'l Juvenile Def. Ctr., Indiana: An Assessment of Access to Counsel and Quality of Representation in Delinquency Proceedings 8–9 (2006); Laval S. Miller-Wilson & Patricia Puritz, Am. Bar Assoc. Juvenile J. Ctr., Pennsylvania: An Assessment of Access to Counsel and Quality of Representation in Delinquency Proceedings 2–11 (2003).

3. The split creates tensions in outcomes between defendants and in our federal system.

The conflicting approaches in the lower courts have produced substantially disparate treatment among criminal defendants, based solely on the accident of location. Indeed, the split between circuit and states courts within their geographic boundaries means that defendants will receive different procedure based solely on whether a defendant is indicted under federal or state law. *Compare Tighe*, 266 F.3d at 1194–95, *and Hand*, 2016 WL 4486068, at *8, *with Crowell*, 493 F.3d at 750, *and Nguyen*, 209 P.3d at 953–54. Such disparate results undermine a core precept of criminal proceedings—"justice must satisfy the appearance of justice." *Levine v. United States*, 362 U.S. 610, 616 (1960) (quoting *Offutt v. United States*, 348 U.S. 11, 14 (1954)).

The conflicting approaches also disrupt "the very essence of a healthy federalism" by creating a "needless conflict between state and federal courts." *Mapp v. Ohio*, 367 U.S. 643, 657–58 (1961) (quoting *Elkins v. United States*, 364 U.S. 206, 221 (1960)). Currently, in both the Ninth and Sixth Circuits "a

federal prosecutor may" present prior convictions in one way during sentencing, while a "State's attorney across the street may" use it in another, "although he supposedly is operating under the enforceable prohibitions of the same Amendment." *Id.* at 657.

C. This Case is an Ideal Vehicle for Resolving the First Two Questions Presented.

The deep-seated conflict in the lower courts, as well as the important and recurring nature of the questions presented, is underscored by the fact that numerous petitions for certiorari have been filed on the issue. Although this Court has previously denied certiorari, recent developments in Ohio and Illinois make this petition an ideal vehicle to reverse course.

Two state governments and the federal government have now sought this Court's review. *See* Petition for Writ of Certiorari, *Ohio v. Hand* (No. 16-711); Petition for Writ of Certiorari, *Louisiana v. Brown*, (No. 04-770); Brief for the United States, *Smalley v. United States* (No. 02-6693); Brief for the United States as Amicus Curiae, *Hitt v. Kansas* (No. 01-10864). The United States has represented that "review by this Court is warranted." *Id.* at 8. Although the Court denied certiorari in *Smalley*, that petition was filed in 2002, and the decision created the first split in authority on this issue. As discussed above, *see supra* at pp. 13–20, the split that first arose between the Ninth (*Tighe*) and Eighth Circuits (*Smalley*) has only crystallized in the interim fourteen years. It is now even more imperative that the Court resolve this issue.

Further, this case is not plagued by the vehicle problems that marred some of the earlier petitions.[11] The Illinois statutory scheme is simple and the lower court's decision cleanly raises the questions presented. Petitioner's prior non-jury juvenile adjudication was the sole statutory basis relied on by the judge for increasing Petitioner's sentencing range from 4 to 15 years to 15 to 30 years and the judge's ultimate imposition of a 24-year-sentence. The legitimacy of this nine-year increase in petitioner's sentence thus stands or falls on whether the use of petitioner's prior juvenile adjudication was constitutional.

II. This Court Should Grant Review To Decide Whether *Almendarez-Torres* Should Be Overruled.

This Petition also gives the Court the opportunity address an additional question: Whether, and to what extent, *Almendarez-Torres* should be overruled.

Although this Court has previously declined to revisit *Almendarez-Torres*, it may wish to do so in

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[11] *See*, *e.g.*, *Welch v. United States*, 604 F.3d 408 (7th Cir. 2010) (issue raised within claim of ineffective assistance of counsel), *cert. denied*, 564 U.S. 1018 (2011); *United States v. Matthews*, 498 F.3d 25, 35–36 (1st Cir. 2007) (treatment of the issue mere dicta because Massachusetts law grants juveniles the right to a jury trial and defendant waived said right), *cert. denied*, 552 U.S. 1238 (2008); *People v. Nguyen,* 209 P.3d 946, 948 (Cal. 2009) (defendant waived jury-trial right), *cert. denied*, 559 U.S. 1067 (2010); *State v. Hitt*, 42 P.3d 732, 740 (Kan. 2002) (question as to whether petitioner's prior juvenile adjudications were in fact used to enhance his sentence beyond the statutory maximum), *cert. denied*, 537 U.S. 1104 (2003).

this case for two reasons. First, granting review to reconsider *Almendarez-Torres* would provide this Court with all possible means of addressing every question presented by this petition. This Court could simply overrule *Almendarez-Torres,* a result that would also decide the subsidiary question of whether and to what extent non-jury juvenile adjudications count as prior convictions. Or it could rule more narrowly, overturning *Almendarez-Torres* only to the extent that it implicates non-jury juvenile adjudications—a result that would also resolve the *Apprendi* questions.[12]

Second, *Almendarez-Torres* warrants review because it has been substantially eroded by this Court's precedents, it significantly prejudices defendants, and it burdens lower courts.

A. Stare Decisis Counsels in Favor of Reviewing *Almendarez-Torres*.

Stare decisis counsels in favor of reviewing *Almendarez-Torres*. Stare decisis is not an "inexorable command," *Hohn v. United States*, 524 U.S. 236, 251 (1998) (internal quotation marks omitted). Nor does it "compel adherence to a decision whose 'underpinnings' have been 'eroded' by subsequent developments of constitutional law." *Alleyne*, 133 S. Ct. at 2164 (Sotomayor, Ginsburg, & Kagan, JJ., concurring) (quoting *United States v. Gaudin*, 515 U.S. 506, 521 (1995)).

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[12] Indeed, the Respondent in *Hand* argues that overturning *Almendarez-Torres* would be one way to handle the split over whether prior non-jury juvenile adjudications constitute convictions. *See* Brief in Opposition to Certiorari, *Ohio v. Hand* (No. 16-711), at 9.

Almendarez-Torres has been undermined by subsequent decisions of this Court. Indeed, several Justices, including Justice Thomas (a member of the *Almendarez-Torres* majority), have explicitly cast doubt on its continued vitality. *See*, *e.g.*, *Apprendi*, 530 U.S. at 520 (Thomas, J., concurring) (expressing regret over his vote in *Almendarez-Torres*).

Almendarez-Torres significantly prejudices defendants by weakening the traditional role of the jury as a democratic intermediary between the government and the accused. In addition, it has split the courts of appeals and state supreme courts by creating an unworkable rule inappropriately applied to prior non-jury adjudications.

1. This Court's Subsequent Decisions Have Undermined *Almendarez-Torres*.

In *Almendarez-Torres*, this Court considered whether prior convictions must be included in an indictment and proved to a jury. 523 U.S. at 227. The majority concluded that neither the statute at issue nor the Constitution imposed such a requirement. *Id.* at 239, 247. Each component of the majority's reasoning has been called into question by subsequent decisions.

First, *Almendarez-Torres* relied on a distinction between "elements" and "sentencing factors." *Id.* at 242. Because prior convictions were "sentencing factors" rather than elements, they did not need to be proved to a jury. *Id.* at 235.

However, although the distinction between "sentencing factors" and "elements" was valid under then-existing precedent, *see McMillan v. Pennsylvania*, 477 U.S. 79, 86 (1986), that

distinction no longer answers the question of "who decides," *Ring v. Arizona*, 536 U.S. 584, 604–05 (2002) ("*Apprendi* repeatedly instructs . . . that the characterization of a fact or circumstance as an 'element' or a 'sentencing factor' is not determinative of the question of 'who decides,' judge or jury.").

Second, the *Almendarez-Torres* majority emphasized its understanding that "the sentencing factor at issue here—recidivism—is a traditional . . . basis for a sentencing court's increasing an offender's sentence." 523 U.S. at 243. In dissent, Justice Scalia, joined by Justice Ginsburg and two other Justices, asserted that the majority's contention was wrong, and that "[a]t common law, the fact of prior convictions *had* to be charged in the same indictment charging the underlying crime, and submitted to the jury for determination along with that crime." *Id.* at 261 (Scalia, J. dissenting). Justice Scalia also raised the possibility—and later, again joined by Justice Ginsburg, fully adopted the position, *see Monge v. California*, 524 U.S. 721, 741–42 (1998) (Scalia, J., dissenting)—that the Constitution indeed required prior convictions to be proved to a jury. 523 U.S. at 251–60.

This Court's more recent cases, beginning with *Apprendi*, have adopted the rationale from Justice Scalia's *Almendarez-Torres* dissent. In particular, this Court indicated that the tradition relied on by the *Almendarez-Torres* majority was actually limited to judges "imposing a judgment *within the range* prescribed by statute," not a judgment "*exceeding* the maximum he would receive if punished according to the facts reflected in the jury verdict alone."

Apprendi, 530 U.S. at 481–82. Recent scholarship agrees.[13] But regardless of whether judge or jury can claim the support of tradition, this Court's jurisprudence since *Apprendi* has focused on the effect that fact-finding has on a defendant's punishment. *See Apprendi*, 530 U.S. at 494 ("[T]he relevant inquiry is one . . . of effect–does the required finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict?").

Third, the *Almendarez-Torres* majority rejected the petitioner's argument that "any significant increase in a statutory maximum sentence would trigger a constitutional 'elements' requirement." *Id.* at 247. Such a rule would "seem anomalous in light of existing case law that permits a judge, rather than a jury, to determine the existence of factors that can make a defendant eligible for the death penalty." *Id.* (quoting *Walton v. Arizona*, 497 U.S. 639, 647 (1990)).

However, this concern no longer supports the *Almendarez-Torres* prior conviction exception. Because *Walton*'s reasoning was irreconcilable with *Apprendi*, this Court overruled it in *Ring*, 536 U.S. at 609.

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[13] *See*, *e.g.*, Frank O. Bowman, III, *Debacle: How the Supreme Court Has Mangled American Sentencing Law and How It Might Yet Be Mended*, 77 U. CHI. L. REV. 367, 394–95 (2010) (differentiating between judicial discretion within statutory ranges and a judge's power to increase a sentence beyond the otherwise applicable maximum sentence).

2. This Court Has Questioned The Continuing Vitality of *Almendarez-Torres*.

This Court's undermining of *Almendarez-Torres* is not accidental. In *Apprendi*, the Court recognized that its new rationale conflicted with *Almendarez-Torres*, and stated that "it is arguable that *Almendarez-Torres* was incorrectly decided, and that a logical application" of its reasoning "should apply if the recidivist issue were contested" 530 U.S. at 489; *see also Dretke v. Haley*, 541 U.S. 386, 395–96 (2004) (considering whether *Almendarez-Torres* should be overruled).

Individual members of this Court have also called *Almendarez-Torres* into question. *See Rangel-Reyes v. United States*, 547 U.S. 1200, 1202 (2006) (Thomas, J., dissenting from denial of certiorari) (stating that "[i]t is time for this Court to do its part."); *Ring*, 536 U.S. at 619 (O'Connor, J., dissenting) ("*Apprendi*'s rule . . . directly contradicts . . . *Almendarez-Torres*."); *Jones*, 526 U.S. at 254 (Kennedy, J., dissenting) (stating that the majority's "sweeping Constitutional discussion" "contradicts" and "depart[s] from" *Almendarez-Torres*); *Monge*, 524 U.S. at 741 (Scalia, J., dissenting) ("[T]he Court's holding in *Almendarez-Torres* . . . was in my view a grave constitutional error affecting the most fundamental of rights . . . .").

Overruling *Almendarez-Torres* would be far from unprecedented. At least twice, this Court has overruled decisions that conflicted with *Apprendi*. *See Ring*, 536 U.S. at 608 ("[W]e hold that *Walton* and *Apprendi* are irreconcilable; our Sixth Amendment jurisprudence cannot be home to both.

Accordingly, we overrule *Walton*."); *Alleyne*, 133 S. Ct. at 2163 ("*Harris* was inconsistent with *Apprendi*. It is, accordingly, overruled.")

Even Justices who initially dissented in *Apprendi* have recognized the need to harmonize this area of law. *See Alleyne*, 133 S. Ct. at 2167 (Breyer, J., concurring in part and concurring in the judgment) ("While *Harris* has been the law for 11 years, *Apprendi* has been the law for even longer; and I think the time has come to end this anomaly in *Apprendi*'s application. Consequently, I vote to overrule *Harris*."); *Ring*, 536 U.S. at 613 (Kennedy, J., concurring) ("Though it is still my view that [*Apprendi*] was wrongly decided, *Apprendi* is now the law, and its holding must be implemented in a principled way.").

Scholars have also questioned the continued vitality of *Almendarez-Torres*. After reviewing this Court's decisions in *Jones*, *Apprendi*, *Ring*, *Blakely*, *United States v. Booker*, 543 U.S. 220 (2005), and *Cunningham v. California*, 549 U.S. 270 (2007), one scholar concluded that *Almendarez-Torres* had already been implicitly overruled, noting that its holding has been "completely eviscerated" by and "rendered irreconcilably inconsistent" with "several subsequent holdings."[14] Other scholars agree that *Almendarez-Torres* is inconsistent with this Court's subsequent precedent and argue that *Almendarez-Torres* should be revisited and overruled.[15]

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[14] Bradley Scott Shannon, *Overruled by Implication*, 33 SEATTLE U. L. REV. 151, 158–65, 165 (2009) (footnotes omitted).

[15] *See* Bowman, *supra* note 12, at 473–74 (arguing that *Almendarez-Torres* should be overruled "if Sixth Amendment

3. Prejudice to Defendants and Lower Courts' Confusion Counsel in Favor of Overturning *Almendarez-Torres*.

Besides its undermined foundation, *Almendarez-Torres* requires review because it significantly prejudices defendants and has split lower courts.

Almendarez-Torres destabilizes our constitutional structure by stripping the jury of its duty to find all facts necessary for criminal sentencing, a result that destroys "the historic role of the jury" as a democratic check "between the State and criminal defendants." *Alleyne v. United States*, 133 S. Ct. 2151, 2161 (2013). As a result, *Almendarez-Torres* prejudices a significant number of defendants and warrants review.

The instant case provides a particularly stark illustration. Here, Petitioner's adult sentence was substantially enhanced by a *non-jury* prior juvenile adjudication that was never proven before his adult jury, either. Petitioner was denied a jury during both his prior juvenile adjudication *and* when the fact of that prior adjudication was used to enhance his sentence in his subsequent adult proceeding. The constitutional violation was two-fold.

Removing prior conviction enhancements from the jury, especially when based on prior non-jury adjudications, ignores the historic role of the jury as democratic "intermediary between the State and

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jurisprudence is to be both intellectually coherent and genuinely respectful of . . . juries."); *see also* Erwin Chemerinsky, *Making Sense of* Apprendi *and Its Progeny*, 37 MCGEORGE L. REV. 531, 542–43 (2006) (arguing that "the error of *Almendarez-Torres* [is] clear").

criminal Defendants." *Alleyne*, 133 S. Ct. at 2161. *Almendarez-Torres* treats the Sixth Amendment as little more than a procedural formality instead of a cornerstone of our constitutional structure. *See Blakely*, 542 U.S. at 306.

In addition, the mix of contradictory holdings from this Court has also divided courts of appeals and state supreme courts. As shown in Part I-A, many lower courts have split over whether non-jury juvenile adjudications in subsequent sentencing proceedings count for the purposes of *Almendarez-Torres*. From 1994, when it was decided, until 2008, *Almendarez-Torres* has produced 5,200 appeals in the Federal courts alone. Brent E. Newton, Almendarez-Torres *and the* Anders *Ethical Dilemma*, 45 HOUSTON L. REV. 747, 784 n.192 (2008).

Then-Judge Sotomayor, facing a challenge to *Almendarez-Torres* in *United States v. Estrada*, 428 F.3d 387 (2d Cir. 2005), recognized that this Court's subsequent decisions have cast doubt on the vitality of *Almendarez-Torres*, but that lower courts are nevertheless "bound by the Supreme Court's rulings" until this Court revisits its decision. 428 F.3d at 390–91. Other courts, facing similar challenges, have also noted *Almendarez-Torres*'s crumbling foundation. *See Garrus v. Sec'y of Pa. Dep't of Corr.*, 694 F.3d 394, 416 (3d Cir. 2012) ("It is no secret that *Almendarez-Torres* is one of the most tenuous precedents of the Supreme Court."); *United States v. Deval*, 496 F.3d 64, 83 (1st Cir. 2007) (noting that this Court has cast doubt on *Almendarez-Torres*); *United States v. Martinez-Rodriguez*, 472 F.3d 1087, 1093 (9th Cir. 2006) (same); *United States v. Santa*, 155 F. App'x 475, 478 (11th Cir. 2005) (same);

United States v. Gatewood, 230 F.3d 186, 192 (6th Cir. 2000) (same).

These lower court decisions are not surprising. This Court has repeatedly undermined *Almendarez-Torres*. Nor is it surprising that lower courts have continued to uphold *Almendarez-Torres*. Despite a decision's "infirmities [and] increasingly wobbly, moth-eaten foundations," it is the [Supreme Court's] prerogative alone to over-rule one of its precedents." *State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997). This Court should grant review to overrule *Almendarez-Torres* and relieve lower courts of the burden it represents.

B. This Case Is a Good Vehicle to Address *Almendarez-Torres*.

This petition represents an ideal vehicle to overrule *Almendarez-Torres*. This case does not present justiciability or factual disputes. Petitioner's sentence could not have been enhanced without a jury but for *Almendarez-Torres.*

Moreover, the non-jury juvenile component of this proceeding makes it a good vehicle to address *Almendarez-Torres*. Petitioner was *twice-denied* the right to a jury trial—once in his juvenile proceeding (where no jury was empaneled) and again in his adult criminal trial (where his juvenile adjudication was not proved before a jury). As a result, this case crystallizes the Sixth Amendment defects created by *Almendarez-Torres*, presenting a clean vehicle to reconsider this Court's sentencing enhancement precedent. *See* Molly Gulland Gaston, *Never Efficient, but Always Free: How the Juvenile Adjudication Question Is the Latest Sign That* Almendarez-Torres v. United States *Should Be*

Overturned, 45 AM. CRIM. L. REV. 1167, 1179 (2008) (advocating that the circuit split arising over the issue of non-jury juvenile adjudications offers a good vehicle for overturning *Almendarez-Torres*).

Petitioner's prior non-jury adjudication is also what distinguishes this petition from others which have challenged the vitality of *Almendarez-Torres*. Unlike most prior petitions, this case offers this Court special reasons to overturn its precedent by elucidating the significant prejudice suffered by defendants subject to *Almendarez-Torres*. *See*, *e.g.*, *Rangel-Reyes*, 547 U.S. at 1201 (Stevens, J., commenting on denial of certiorari) (indicating that if *Almendarez-Torres* "create[s] . . . [a] significant risk of prejudice to the accused" it should be reviewed); *United States v. Miles*, 290 F.3d 1341 (11th Cir. 2002) (absence of a prior non-jury adjudication), *cert. denied*, 537 U.S. 1089 (2002); *United States v. Terry*, 240 F.3d 65 (1st Cir. 2001) (same), *cert. denied*, 532 U.S. 1023 (2001).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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January 31, 2017

APPENDIX

Appendix A

2016 IL 119391

Supreme Court of Illinois.

The PEOPLE of the State of Illinois, Appellee,

v.

Derrick JONES, Appellant.

No. 119391.

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Oct. 20, 2016.

OPINION

Justice FREEMAN delivered the judgment of the court, with opinion.

¶1 Defendant Derrick Jones was convicted of aggravated robbery in the circuit court of Will County and sentenced to an extended-term sentence of 24 years' imprisonment based on a prior juvenile adjudication of delinquency referenced in his presentence investigative report. Defendant appealed his sentence, contending that the use of his prior juvenile adjudication to enhance his sentence violated the rulings in *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), and *Shepard v. United States,* 544 U.S. 13, 125 S.Ct. 1254, 161 L.Ed.2d 205 (2005). The appellate court affirmed. 2015 IL App (3d) 130053, 392 Ill.Dec. 198, 32 N.E.3d 198. We allowed defendant's petition for leave to appeal pursuant to Illinois Supreme Court

Rules 315 and 612 (Ill. S.Ct. R. 315 (eff. July 1, 2013); R. 612 (eff. Feb. 6, 2013)). For the following reasons, we affirm the judgment of the appellate court.

¶2 I. BACKGROUND

¶3 Defendant was charged by indictment with aggravated robbery, a Class 1 felony (720 ILCS 5/18–5 (West 2010) (repealed by Pub. Act 97–1108 (eff. Jan. 1, 2013))), as a result of an incident that occurred on January 6, 2012. Before defendant's jury trial began, the court asked the parties whether the sentencing range for the aggravated battery charge would be 4 to 30 years. The State agreed, as did defendant's counsel. Defendant's counsel stated that the State had tendered to her a "certified court docket from the '04 JD case" indicating that defendant, as a juvenile, had been adjudicated delinquent on multiple counts of residential burglary and that adjudication would make defendant eligible for an extended-term sentence in the present case, with a range of 4 to 30 years.[1] However, defendant's counsel also indicated that she spoke with defendant and defendant denied having an adjudication for residential burglary. The court admonished defendant that he faced a sentencing range of 4 to 30 years, and the case proceeded to trial.

¶4 At trial, the evidence presented was limited to the aggravated robbery charge. No evidence regarding defendant's prior juvenile adjudication was introduced. The jury found defendant guilty of

[1] The docket sheet for the 2004 juvenile proceeding was not made a part of the record.

aggravated robbery, and the case proceeded to sentencing.

¶5 A presentencing investigative report (PSI) indicated that defendant, as a juvenile, had been adjudicated delinquent in 2005 of multiple offenses in case number 04 JD 00276, including three counts of residential burglary. The PSI provided:

> "On April 28, 2005, with the then minor, Derrick Jones, having been adjudicated delinquent in the original Petition alleging Assault, and the 1st, 2nd and 3rd Supplemental Petitions alleging: Burglary, Criminal Trespass to Land, Knowingly Damage to Property and Residential Burglary, three (3) Counts. Derrick Jones was sentenced to 5 years and 8 months Probation, until his 21st Birthday in the aforementioned offenses, with the first nine (9) months of Probation to be under the directive of Intensive Probation Supervision ***."

After considering various factors in aggravation and mitigation, the court sentenced defendant to an extended-term sentence of 24 years' imprisonment. Defendant's motion to reconsider his sentence was subsequently denied.

¶6 On direct review, defendant did not challenge his conviction for aggravated robbery but did challenge his extended-term sentence. Defendant first argued that his extended-term sentence

violated his sixth amendment right to a jury trial pursuant to the Supreme Court's ruling in *Apprendi,* because the fact of his juvenile adjudication was neither proven to a jury beyond a reasonable doubt nor alleged in the indictment. The appellate court rejected his contention, finding that a prior adjudication of delinquency was sufficiently analogous to a prior criminal conviction to fall under the prior-conviction exception in *Apprendi*. 2015 IL App (3d) 130053, ¶ 38, 392 Ill.Dec. 198, 32 N.E.3d 198. The court reasoned that because due process does not require the right to a jury trial in juvenile proceedings, the absence of a right to a jury trial does not undermine the reliability of a juvenile proceeding. *Id.* ¶ 37. It further stated that a juvenile adjudication "reached only where all constitutionally required procedural safeguards are in place, is a no less reliable basis for the enhancement of a sentence than is a standard adult criminal conviction." *Id.* ¶ 36. Defendant also argued in the alternative that the circuit court improperly relied upon the PSI in determining the fact of his prior juvenile adjudication in contravention of the Supreme Court's ruling in *Shepard*, contending that a PSI is "particularly unreliable" in determining the fact of a prior adjudication of delinquency, as opposed to a prior criminal conviction. The appellate court also rejected this contention, finding that information in a PSI may be used as the basis for sentence enhancement without running afoul of *Shepard* and that the PSI unequivocally indicated defendant had been adjudicated delinquent pursuant to a petition alleging three counts of residential burglary, a Class 1 felony. *Id.* ¶ 47. The appellate court affirmed the judgment of the circuit court of Will County. *Id.* ¶ 50.

¶7 We granted defendant's petition for leave to appeal (Ill. S.Ct. R. 315 (eff. July 1, 2013); R. 612 (eff. Feb. 6, 2013)) and affirm the judgment of the appellate court.

¶8 II. ANALYSIS

¶9 On appeal, defendant contends that a prior juvenile delinquency adjudication is not the equivalent of a prior conviction for purposes of extended-term sentencing under *Apprendi* and that such a fact must be alleged in the indictment and proven beyond a reasonable doubt. Alternatively, defendant contends that even if a prior adjudication of delinquency can qualify as a prior conviction for purposes of extended-term sentencing, the information contained in his PSI failed to conclusively establish that he had been adjudicated delinquent of residential burglary. Defendant acknowledges that he failed to preserve these issues for review but argues that an *Apprendi* violation may be reviewed as plain error where, as here, the violation was prejudicial to him.

¶10 It is well settled that the plain-error doctrine allows a reviewing court to consider unpreserved error when (1) a clear or obvious error occurred and the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant or (2) a clear or obvious error occurred and the error is so serious that it affected the fairness of the defendant's trial and the integrity of the judicial process, regardless of the closeness of the evidence. *In re Jonathon C.B.*, 2011 IL 107750, ¶ 70, 354 Ill.Dec. 484, 958 N.E.2d 227; *People v.*

Herron, 215 Ill.2d 167, 178–79, 294 Ill.Dec. 55, 830 N.E.2d 467 (2005). Our decision in Herron established two categories of plain error: prejudicial errors, which may have affected the outcome in a closely balanced case, and presumptively prejudicial errors, which must be remedied although they may not have affected the outcome. *People v. Nitz*, 219 Ill.2d 400, 415, 302 Ill.Dec. 418, 848 N.E.2d 982 (2006). In both instances, the burden of persuasion remains with the defendant. *Herron*, 215 Ill.2d at 187, 294 Ill.Dec. 55, 830 N.E.2d 467. We have held that potential *Apprendi* violations fall under the first category of prejudicial errors and have required defendants to prove that they were prejudiced by the error. *Nitz*, 219 Ill.2d at 415, 302 Ill.Dec. 418, 848 N.E.2d 982. In addressing a plain-error argument, we first consider whether error occurred. *In re Jonathon C.B.*, 2011 IL 107750, ¶ 70, 354 Ill.Dec. 484, 958 N.E.2d 227. Review of this issue presents a question of law, which we review de novo. *People v. Hopkins*, 201 Ill.2d 26, 36, 265 Ill.Dec. 869, 773 N.E.2d 633 (2002).

¶11 A. *Apprendi*'s Prior–Conviction Exception

¶12 We first consider defendant's argument based on *Apprendi*. As noted above, the offense of aggravated robbery is a Class 1 felony. 720 ILCS 5/18–5(b) (West 2010) (repealed by Pub. Act 97–1108 (eff. Jan. 1, 2013)). The standard sentencing range for a Class 1 felony is 4 to 15 years. 730 ILCS 5/5–4.5–30(a) (West 2010). The extended-term sentencing range for a Class 1 felony is 15 to 30 years. *Id.* Section 5–5–3.2 of the Unified Code of Corrections (Code of Corrections) sets forth various

factors that the court may consider as a reason to impose an extended-term sentence. 730 ILCS 5/5–5–3.2(b) (West 2010). Relevant here is the factor in subsection (b)(7) of section 5–5–3.2, which governs "[w]hen a defendant who was at least 17 years of age at the time of the commission of the offense is convicted of a felony and has been previously adjudicated a delinquent minor under the Juvenile Court Act of 1987 for an act that if committed by an adult would be a Class X or Class 1 felony when the conviction has occurred within 10 years after the previous adjudication, excluding time spent in custody." 730 ILCS 5/5–5–3.2(b)(7) (West 2010). The offense of residential burglary is a Class 1 felony. 720 ILCS 5/19–3(b) (West 2010). Based on the information in the PSI that defendant had been adjudicated delinquent of the offense of residential burglary, section 5–5–3.2(b)(7) of the Code of Corrections authorized the circuit court to impose an extended-term sentence. Therefore, we consider whether the manner in which the court imposed the sentence violated the rule set forth in *Apprendi*.

¶13 In *Apprendi*, the Supreme Court held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi*, 530 U.S. at 490, 120 S.Ct. 2348. The Court found unconstitutional a New Jersey hate-crime statute that permitted an increase in the defendant's maximum prison sentence based on the trial judge's finding by a preponderance of the evidence that the defendant had acted with purpose to intimidate the victim based on particular characteristics of the

victim. *Id.* at 491, 120 S.Ct. 2348. The court emphasized, "there is a vast difference between accepting the validity of a prior judgment of conviction entered in a proceeding in which the defendant had the right to a jury trial and the right to require the prosecutor to prove guilt beyond a reasonable doubt, and allowing the judge to find the required fact under a lesser standard of proof." *Id.* at 496, 120 S.Ct. 2348.

¶14 In February 2001, our legislature amended section 111–3(c–5) of the Code of Criminal Procedure of 1963 (Criminal Code) (Pub. Act 91–953 (eff. Feb. 23, 2001) (adding 725 ILCS 5/111–3(c–5))) in response to the decision in *Apprendi*. This amendment brought the Criminal Code into conformity with *Apprendi*, expressly incorporating the prior-conviction exception as well as the due process protections afforded to defendants when an extended-term sentence is sought. Section 111–3(c–5) of the Criminal Code provides in relevant part: "Notwithstanding any other provision of law, in all cases in which the imposition of the death penalty is not a possibility, if an alleged fact (other than the fact of a prior conviction) is not an element of an offense but is sought to be used to increase the range of penalties for the offense beyond the statutory maximum that could otherwise be imposed for the offense, the alleged fact must be included in the charging instrument or otherwise provided to the defendant through a written notification before trial, submitted to a trier of fact as an aggravating factor, and proved beyond a reasonable doubt." 725 ILCS 5/111–3(c–5) (West 2010).

¶15 The question here is whether defendant's juvenile adjudication, which qualified defendant for an extended-term sentence, falls within *Apprendi*'s prior-conviction exception and, in turn, the exception in section 111–3(c–5) of the Criminal Code. This question is an issue of first impression before this court.

¶16 To fully understand *Apprendi*'s holding, we must examine some of the cases that preceded it, namely *Almendarez–Torres v. United States*, 523 U.S. 224, 118 S.Ct. 1219, 140 L.Ed.2d 350 (1998), and *Jones v. United States*, 526 U.S. 227, 119 S.Ct. 1215, 143 L.Ed.2d 311 (1999). In *Almendarez–Torres*, the Court first recognized the prior-conviction exception. There, the defendant was charged pursuant to a federal statute with the offense of illegal reentry to the United States by a deported alien. The offense authorized a prison term of up to two years. A subsection of the statute authorized a prison term of up to 20 years if the defendant had been deported subsequent to a conviction for the commission of an aggravated felony. The question before the Court was whether the subsection of the statute defined a separate offense or simply authorized an enhanced penalty. *Almendarez–Torres*, 523 U.S. at 226, 118 S.Ct. 1219. If the prior aggravated felony conviction was a separate offense, the State was required to charge the conviction in the indictment (and prove it beyond a reasonable doubt to a jury). *Id.* If the prior conviction merely authorized an enhanced sentence, then the prior conviction was not an element of the offense and need not be charged. *Id.* The Court concluded that the subsection was a penalty

provision that authorized a court to increase the sentence for a recidivist but did not define a separate offense. *Id.* It reasoned that the relevant statutory subject matter at issue was recidivism, which was "as typical a sentencing factor as one might imagine." *Id.* at 230, 118 S.Ct. 1219.

¶17 In *Jones*, the Court considered whether a federal carjacking statute defined three distinct offenses or a single offense with a choice of three maximum penalties, two of them dependent on sentencing factors "exempt from the requirements of charge and jury verdict." *Jones*, 526 U.S. at 229, 119 S.Ct. 1215. The statute's first subsection authorized a maximum sentence of 15 years. The second and third subsections authorized maximum sentences of 25 years and life imprisonment, respectively, if the carjacking resulted in serious bodily injury or death. The Court noted that the second and third subsections provided for "steeply" higher penalties and also conditioned these penalties on further facts. It stated that "[i]t is at best questionable whether the specification of facts sufficient to increase a penalty range by two-thirds, let alone from 15 years to life, was meant to carry none of the process safeguards that elements of an offense bring with them for a defendant's benefit." *Id.* at 233, 119 S.Ct. 1215. It concluded that the statute defined three separate offenses with distinct elements, each of which must be charged by indictment, proven beyond a reasonable doubt, and submitted to a jury for its verdict. *Id.* at 252, 119 S.Ct. 1215. In distinguishing its holding from *Almendarez–Torres*, the Court reiterated that it viewed recidivism differently from other factors that enlarge the

possible penalty for an offense. The Court stated, "[o]ne basis for that possible constitutional distinctiveness is not hard to see: unlike virtually any other consideration used to enlarge the possible penalty for an offense, and certainly unlike the factor before us in this case, a prior conviction must itself have been established through procedures satisfying the fair notice, reasonable doubt, and jury trial guarantees." *Id.* at 249, 119 S.Ct. 1215.

¶18 Since *Apprendi* was decided, state and federal courts have not been uniform in concluding whether a juvenile adjudication is the equivalent of a prior conviction under *Apprendi* for sentencing purposes. The Ninth Circuit Court of Appeals was the first court to address the issue in *United States v. Tighe*, 266 F.3d 1187 (9th Cir.2001). In a split decision, the court determined that the prior-conviction exception must be limited to prior convictions that were themselves obtained through proceedings that included the right to a jury trial and proof beyond a reasonable doubt. *Id.* at 1194. It concluded that juvenile adjudications that do not include the right to a jury trial and the reasonable doubt burden of proof do not fall within the prior-conviction exception. *Id.* The court relied on the language in *Apprendi* that referred to accepting the validity of a prior judgment of conviction that was entered in a proceeding in which the defendant had the right to a jury trial and the right to require proof of guilt beyond a reasonable doubt. *Id.* It also relied on the language in *Jones* that prior convictions are distinct because they were established through procedures satisfying the fair notice, reasonable doubt, and jury trial guarantees. *Id.* at 1193. The

court characterized these constitutional procedural safeguards as the "fundamental triumvirate of procedural protections." *Id.*

¶19 The dissent in *Tighe* found that the court had reached an "unsupportable conclusion" by taking the language in *Jones* and making a "quantum leap." *Id.* at 1200 (Brunetti, J., dissenting). The dissent believed that the language in *Jones* only stood for the basic proposition that Congress had the constitutional power to treat prior convictions as sentencing factors subject to a lesser standard of proof because the defendant presumably received all the process that was due when he was convicted of the prior crime. *Id.* It explained that, for adults, such process would include the right to a jury trial. For juveniles, however, such process would not include that right. Therefore, the dissent concluded that when a juvenile adjudication is the result of a proceeding in which a juvenile has received all the process constitutionally due at the juvenile stage, there is no constitutional problem in using that adjudication to support a later sentencing enhancement. *Id.*

¶20 Since *Tighe*, numerous courts have had the opportunity to address this issue. As a result, there has been more agreement with the *Tighe* dissent. Agreeing with the *Tighe* dissent and adopting what would become the majority view, in *United States v. Smalley*, 294 F.3d 1030 (8th Cir.2002), the Eighth Circuit Court of Appeals concluded that juvenile adjudications could be characterized as "prior convictions" for *Apprendi* purposes. *Id.* at 1033. The court explained that *Apprendi* did not preclude such

a conclusion, specifically noting "[w]e think that while the [*Apprendi*] Court established what constitutes sufficient procedural safeguards (a right to jury trial and proof beyond a reasonable doubt), and what does not (judge-made findings under a lesser standard of proof), the Court did not take a position on possibilities that lie in between these two poles." *Id.* at 1032. Like the *Tighe* dissent, the court also determined that the language in *Jones* that referred to the " 'fundamental triumvirate of procedural protections' " was not intended to define the term " 'prior conviction' " for constitutional purposes as a conviction that " 'ha[s] been established through procedures satisfying fair notice, reasonable doubt, and jury trial guarantees.' " *Id.* at 1032 (quoting *Tighe*, 266 F.3d at 1193–94). The court reasoned that the issue "should not turn on the narrow parsing of words, but on an examination of whether juvenile adjudications, like adult convictions, are so reliable that due process of law is not offended by such an exemption." *Id.* at 1033. Noting that the procedural protections afforded to juveniles include the right to notice, the right to counsel, the right to confront and cross-examine witnesses, the privilege against self-incrimination, and proof of guilt beyond a reasonable doubt, it concluded that these safeguards were "more than sufficient to ensure the reliability that *Apprendi* requires." *Id.* Specifically addressing the lack of a right to a jury for juveniles, the court believed that the lack of such right did not undermine the reliability of adjudications in any significant way because the use of a jury in the juvenile context is not constitutionally required and, moreover, would not strengthen the fact-finding function. *Id.*

¶21 Joining the Eighth Circuit and embracing the majority view that a juvenile adjudication falls within the *Apprendi* prior-conviction exception are the Courts of Appeal for the First, Third, Fourth, Sixth, Seventh, and Eleventh Circuits. See *United States v. Jones*, 332 F.3d 688, 696 (3d Cir.2003) (because due process does not require providing juveniles with the right to a jury trial, it follows that when a juvenile is adjudicated guilty beyond a reasonable doubt in a bench trial that affords all the due process protections that are required, the adjudication can properly be characterized as a prior conviction for *Apprendi* purposes); *United States v. Burge*, 407 F.3d 1183, 1191 (11th Cir.2005) (a prior nonjury juvenile adjudication that was afforded all constitutionally required procedural safeguards can be characterized as a prior conviction for *Apprendi* purposes); United *States v. Crowell*, 493 F.3d 744, 750 (6th Cir.2007) (the use of "procedurally sound" juvenile adjudications to enhance a sentence does not violate due process because juvenile adjudication proceedings provide sufficient procedural safeguards to satisfy the reliability requirement "that is at the heart of *Apprendi*"); *United States v. Matthews*, 498 F.3d 25, 35 (1st Cir.2007) (finding no distinction between juvenile adjudications and adult convictions for purposes of *Apprendi*'s prior-conviction exception since both reflect "the sort of proven prior conduct that courts historically have used in sentencing"); *United States v. Wright*, 594 F.3d 259, 264 (4th Cir.2010) (because the defendant received all the process that was due at his nonjury juvenile delinquency proceeding, the use of his juvenile adjudication to enhance his sentence did not violate *Apprendi*); *Welch v. United States*, 604 F.3d 408, 429

(7th Cir.2010) (a prior juvenile adjudication, where the defendant received all the protections to which he was constitutionally entitled, is a prior conviction under *Apprendi*).

¶22 State supreme courts that have also joined the majority view are Kansas, Indiana, Minnesota, Washington, and California. See *State v. Hitt*, 273 Kan. 224, 42 P.3d 732, 739–40 (2002); *Ryle v. State*, 842 N.E.2d 320, 321–23 (Ind.2005); *State v. McFee*, 721 N.W.2d 607, 616–19 (Minn.2006); *State v. Weber*, 159 Wash.2d 252, 149 P.3d 646, 653 (2006) (*en banc*); *People v. Nguyen*, 46 Cal.4th 1007, 95 Cal.Rptr.3d 615, 209 P.3d 946, 957–58 (2009).

¶23 Taking a middle ground position is the Supreme Court of Oregon. In *State v. Harris*, 339 Or. 157, 118 P.3d 236, 245–46 (2005) (*en banc*), the court held that the use of prior juvenile adjudications as sentencing factors does not violate the jury trial right guaranteed by the Sixth Amendment. *Id.* However, the court qualified its holding by stating that the Sixth Amendment also requires that when such an adjudication is offered as an enhancement factor to increase a criminal sentence, its existence must either be proved to a trier of fact or be admitted by a defendant for sentencing purposes following an informed and knowing waiver. *Id.* at 246.

¶24 Agreeing with *Tighe* and joining the minority viewpoint is the Supreme Court of Louisiana. In *State v. Brown*, 879 So.2d 1276 (La.2004), the court held that because juveniles do not have a right to a jury trial in juvenile

adjudicatory proceedings, juvenile adjudications cannot be used to enhance adult felony convictions. *Id.* at 1288. The court reasoned that although juvenile adjudications are sufficiently reliable without a jury trial to support dispositions within the juvenile system, those adjudications are not sufficiently reliable under *Apprendi* to support enhanced sentencing for adults. *Id.* The dissenting justice disagreed, concluding that "a fair reading of *Apprendi*" did not preclude the use of a juvenile adjudication to enhance an adult criminal sentence. *Id.* at 1290–91 (Traylor, J., dissenting). The dissent reasoned that when a juvenile adjudication comports with the requirements of fundamental fairness as set forth by the Supreme Court, it is constitutionally permissible to use that adjudication to enhance an adult criminal sentence. *Id.* at 1291.

¶25 Turning to this court's case law, although this issue is one of first impression, we did acknowledge and briefly discuss the issue in *People v. Taylor*, 221 Ill.2d 157, 302 Ill.Dec. 697, 850 N.E.2d 134 (2006). In *Taylor*, we considered whether a minor who had been adjudicated delinquent was considered a "person convicted of a felony" for purposes of the offense of escape as set forth in section 31–6(a) of the Criminal Code of 1961 (720 ILCS 5/31–6(a) (West 1998)). Ultimately, we concluded that for purposes of the escape statute, a juvenile adjudication could not be considered tantamount to a felony conviction. *Taylor*, 221 Ill.2d at 170, 302 Ill.Dec. 697, 850 N.E.2d 134. Relevant here is our statement that the issue addressed in *Taylor* was "to be distinguished from the somewhat analogous issue of whether a juvenile adjudication is

considered a 'prior conviction' for sentencing enhancement purposes under *Apprendi*." *Id.* at 173, 302 Ill.Dec. 697, 850 N.E.2d 134. We noted the split among the federal circuits in addressing this issue and stated "[w]e take no position here with respect to the division among the federal circuits." *Id.* at 175, 302 Ill.Dec. 697, 850 N.E.2d 134. Although *Taylor* included a brief discussion of the issue we address in this appeal, it is clear that our holding in *Taylor* is distinct from the question now presented, and our conclusion in *Taylor* has no bearing on our analysis here.

¶26 Thus, we turn to the Supreme Court's decision in *McKeiver v. Pennsylvania*, 403 U.S. 528, 91 S.Ct. 1976, 29 L.Ed.2d 647 (1971) (plurality opinion). In *McKeiver*, the Supreme Court held that there is no constitutional right to a jury trial in juvenile adjudicatory proceedings. *Id.* at 545, 91 S.Ct. 1976. The Court reasoned that "[t]he imposition of the jury trial on the juvenile court system would not strengthen greatly, if at all, the factfinding function, and would, contrarily, provide an attrition of the juvenile court's assumed ability to function in a unique manner." *Id.* at 547, 91 S.Ct. 1976.

¶27 In Illinois, article V of the Juvenile Court Act of 1987 (Juvenile Court Act) (705 ILCS 405/5–101 *et seq.* (West 2010)) governs juvenile delinquency proceedings. It aims to balance a community's interest in holding juveniles accountable for their unlawful conduct with attempting to rehabilitate those juveniles. *In re Rodney H.*, 223 Ill.2d 510, 520, 308 Ill.Dec. 292, 861

N.E.2d 623 (2006). The "important purposes" of article V are to protect citizens from juvenile crime, hold each juvenile offender directly accountable for his or her acts, provide an individualized assessment of each alleged and adjudicated delinquent juvenile in order to rehabilitate and to prevent further delinquent behavior, and provide due process as required by the constitutions of the United States and the State of Illinois. 705 ILCS 405/5–101(1) (West 2010). Further, article V provides that "minors shall have all the procedural rights of adults in criminal proceedings, unless specifically precluded by laws that enhance the protection of such minors," except that "[m]inors shall not have the right to a jury trial unless specifically provided by this Article." 705 ILCS 405/5–101(3) (West 2010). Article V only provides the right to a jury trial when a minor is tried (1) as a habitual juvenile offender (705 ILCS 405/5–815(d) (West 2010)), (2) as a violent juvenile offender (705 ILCS 405/5–820(d) (West 2010)), or (3) under the extended juvenile jurisdiction provision (705 ILCS 405/5–810 (West 2010)). Because defendant's delinquency proceedings did not involve any of the above provisions, he did not have the right to a jury trial in those proceedings.

¶28 Here, we find the majority position persuasive and conclude that a prior juvenile adjudication of delinquency falls within *Apprendi*'s prior-conviction exception and the exception in section 111–3(c–5) of the Criminal Code. The Supreme Court made clear in *McKeiver* that due process does not require the right to a jury trial in juvenile proceedings, reasoning that a jury trial

"would not strengthen greatly, if at all, the factfinding function." *McKeiver*, 403 U.S. at 545–47, 91 S.Ct. 1976. In *Almendarez–Torres*, the Court repeatedly emphasized the tradition of regarding recidivism as a sentencing factor, and in *Jones*, the Court explained that a prior conviction was different from other factors that increase the sentence for an offense because of the procedural safeguards inherent in the proceedings that resulted in that conviction. *Almendarez–Torres*, 523 U.S. at 230, 118 S.Ct. 1219; *Jones*, 526 U.S. at 249, 119 S.Ct. 1215. The Court solidified those holdings in *Apprendi*, further noting the "vast" difference between accepting the validity of a prior conviction and allowing a judge to find a required fact under a lesser standard of proof. *Apprendi*, 530 U.S. at 496, 120 S.Ct. 2348.

¶29 A juvenile adjudication of delinquency is similar to a prior conviction in the sense that both are the result of a person's prior unlawful behavior or recidivism. The proceedings that result in a juvenile adjudication contain the same constitutional procedural safeguards as those proceedings that result in a prior conviction, except the jury trial right (unless specified by article V of the Juvenile Court Act). However, because there is no constitutional right to a jury trial in juvenile proceedings, a juvenile adjudication and a prior conviction both result from proceedings in which the minor or the defendant received constitutionally sufficient procedural safeguards. A juvenile adjudication, therefore, is no less valid or reliable a form of recidivism than is a prior conviction. For purposes of extended-term sentencing, they are on equal footing.

Though defendant did not have the right to a jury trial in his delinquency proceedings, he did have all the other procedural rights of adults in criminal proceedings, such as the right to notice, counsel, confrontation, cross-examination, and proof of guilt beyond a reasonable doubt. See 705 ILCS 405/5–101(3), 5–525, 5–530, 5–605, 5–610 (West 2010). The presence of such process in juvenile proceedings forecloses any conclusion that a juvenile adjudication is not the equivalent of a prior conviction under *Apprendi*. We note the following reasoning of the Fourth Circuit. In *Wright*, the court stated, "there is no reason to hold that an adjudication that is constitutionally sufficient to commit a juvenile to confinement, in some instances until age twenty-one, is somehow off limits for sentencing consideration if the same juvenile later [commits an offense as an adult]." *Wright*, 594 F.3d at 264. While the Juvenile Court Act promotes accountability as well as rehabilitation, section 5–5–3.2(b)(7) of the Code of Corrections anticipates that those juveniles who are not rehabilitated and commit crimes as adults may be punished in accordance with their entire criminal history. Considering a defendant's entire recidivist past is in no way incongruent with the aims of the Juvenile Court Act.

¶30 Moreover, we do not believe that the Supreme Court's language in *Apprendi* and *Jones* that referred to the jury trial right was intended to include only those prior convictions that included that right. The *Apprendi* Court noted the jury trial right as one of the procedural safeguards that assured the validity of a prior conviction, but it did not specifically condition the prior-conviction

exception upon that right. *Apprendi*, 530 U.S. at 496, 120 S.Ct. 2348. Nor did it specifically identify a jury trial as a required procedural safeguard. We agree with the Eighth Circuit's view that "while the [*Apprendi*] Court established what constitutes sufficient procedural safeguards (a right to jury trial and proof beyond a reasonable doubt), and what does not (judge-made findings under a lesser standard of proof), the Court did not take a position on possibilities that lie in between these two poles." *Smalley*, 294 F.3d at 1032.

¶31 We are not persuaded by defendant's contentions to the contrary. Defendant argues that because section 5–5–3.2(b)(7) of the Code of Corrections and section 111–3(c–5) of the Criminal Code do not expressly define a prior delinquency adjudication as a prior conviction, defendant's prior adjudication does not fall within *Apprendi*'s prior-conviction exception. He maintains that although section 5–5–3.2(b)(7) of the Code of Corrections allows a court to use an adult offender's prior delinquency adjudication for a Class X or Class 1 felony as a basis for imposing an extended-term sentence, the statute is silent as to the manner in which the prior adjudication must be pled or proven. Defendant relies on case law for support as well as the Sex Offender Registration Act (Registration Act) (730 ILCS 150/1 *et seq.* (West 2010)), wherein the legislature expressly equated a juvenile adjudication with a conviction. 730 ILCS 150/2 (West 2010).

¶32 We find defendant's reliance on case law and the Registration Act misplaced. He relies on *People v. Villa*, 2011 IL 110777, 355 Ill.Dec. 220, 959

N.E.2d 634, where we rejected the State's argument that juvenile adjudications should be put on equal footing with criminal convictions for impeachment purposes, and *In re W.W.*, 97 Ill.2d 53, 73 Ill.Dec. 347, 454 N.E.2d 207 (1983), where we determined that a conviction was not the same as a juvenile adjudication for purposes of a statute authorizing State's Attorney fees to defend an appeal. *Villa*, 2011 IL 110777, ¶ 40, 355 Ill.Dec. 220, 959 N.E.2d 634; *In re W.W.*, 97 Ill.2d at 57–58, 73 Ill.Dec. 347, 454 N.E.2d 207.[2] However, both *Villa* and *In re W.W.* involved the interpretation of statutes, which has no bearing on the issue presented here. We reiterate that in *Taylor* we made clear that our interpretation of the phrase "person convicted of a felony" for purposes of the offense of escape was to be distinguished from the issue of whether a juvenile adjudication is considered a prior conviction for sentencing enhancement purposes under *Apprendi*. Likewise, regarding defendant's reliance on the Registration Act, the fact that the legislature expressly equated a juvenile adjudication with a conviction in that statute also has no bearing on the issue presented here. Further, the purpose of the amendment to section 111–3(c–5) of the Criminal Code was to codify *Apprendi*'s holding to bring the Criminal Code into conformity with *Apprendi*. Thus, we reject defendant's contention that because section 5–5–3.2(b)(7) of the Code of Corrections and section 111–3(c–5) of the Criminal Code do not expressly

[2] Defendant also relies on *People v. Rankin*, 297 Ill.App.3d 818, 232 Ill.Dec. 316, 697 N.E.2d 1246 (1998); however, he concedes that due to an amendment to the sentencing statute, it does not address the issue presented here. Therefore, we need not address it.

define a juvenile adjudication as a prior conviction, his prior adjudication does not fall within *Apprendi*'s prior-conviction exception.

¶33 We conclude that defendant's prior juvenile adjudication, which qualified defendant for an extended-term sentence, is the equivalent of a prior conviction under *Apprendi* and falls within *Apprendi*'s prior-conviction exception as well as the exception in section 111–3(c–5) of the Criminal Code. The State was not required to allege the fact of his juvenile adjudication in the indictment or prove its existence beyond a reasonable doubt. Since we find that no error occurred here, defendant cannot establish plain error.

¶ 34 B. Defendant's PSI

¶35 We next consider whether the information contained in defendant's PSI established that he had been adjudicated delinquent of residential burglary. Defendant contends that the information contained in the PSI was "too ambiguous, and too tenuous, to conclusively establish" that he had been adjudicated delinquent of residential burglary. He argues that his PSI suffered from the same infirmities as the documents found unreliable in *Shepard*.

¶36 The issue in *Shepard* concerned what sources a court may constitutionally rely upon in its role as fact finder at sentencing. In *Shepard*, the United States Supreme Court held that a court sentencing a defendant under the Armed Career Criminal Act of 1984 (ACCA) (18 U.S.C. § 924(e) (2006)), which is thus required to determine whether

a burglary is a "generic burglary" under the statute, is generally limited to examining the statutory definition, charging document, written plea agreement, transcript of plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented. *Shepard*, 544 U.S. at 16, 125 S.Ct. 1254. A sentencing judge may not look to police reports or complaint applications to make the determination. *Id.*

¶37 This court has previously held that a PSI is generally a reliable source for the purpose of inquiring into a defendant's criminal history. *People v. Williams*, 149 Ill.2d 467, 491, 174 Ill.Dec. 829, 599 N.E.2d 913 (1992). A PSI is compiled pursuant to statutory guidelines set forth in the Code of Corrections, which require the inclusion of certain information, including the defendant's "history of delinquency." 730 ILCS 5/5–3–2(a)(1) (West 2010). Additionally, the Juvenile Court Act permits juvenile court records to be accessed under certain circumstances, including when a minor becomes 18 years or older and is the subject of criminal proceedings. 705 ILCS 405/1–8(A)(4)(d) ((West 2014)).

¶38 We initially note that the accuracy of the PSI with regard to defendant's prior adjudication for residential burglary was not disputed at the sentencing hearing. Defense counsel only sought to amend the PSI to include defendant's claim that he was a father, which the PSI did not reflect. An extensive discussion thus ensued as to whether defendant could have been the father of a recently born child based on the dates of his incarceration.

However, there was no question or discussion as to defendant's criminal history as set forth in the PSI, despite several references that defendant was eligible for an extended-term sentence based on his prior juvenile adjudication for residential burglary. Although defendant points out that prior to trial he denied having a prior adjudication for residential burglary, he clearly abandoned that claim at sentencing. Had defendant continued to believe he did not have a prior adjudication for residential burglary, he certainly knew how to inform defense counsel and the court as to the alleged inaccuracy of the PSI, as he did with his claim that he was a father.

¶39 Here, we find that defendant's PSI established he had been adjudicated delinquent of residential burglary. As set forth above, the PSI provided that in 2005, defendant had been adjudicated delinquent of the offenses alleged in the numerous petitions, including a supplemental petition alleging three counts of residential burglary, and had been sentenced to probation until his twenty-first birthday for the aforementioned offenses. In addition to the above language, the PSI enumerated each of the offenses alleged in the petitions and listed a disposition next to each one. The disposition for each of the offenses, which included the three counts of residential burglary, was "Juvenile Probation." As the appellate court aptly found, defendant's PSI was "unequivocal" with respect to his prior juvenile adjudication. We disagree with defendant that the information contained in the PSI was ambiguous or tenuous.

¶40 Further, the use of defendant's PSI does not run afoul of *Shepard*. The Court in *Shepard* was concerned with what types of documents a court can rely upon at sentencing to determine the facts *about* a conviction, rather than determining *if* the defendant had a prior conviction. *Shepard*, 544 U.S. at 25–26, 125 S.Ct. 1254. Here, the circuit court only recognized that defendant had a prior adjudication for residential burglary; it did not engage in any judicial fact finding about that adjudication. Additionally, a PSI is of a markedly different character than a police report or complaint application, with which the Court in *Shepard* was concerned. As noted above, a PSI, with its statutorily mandated requirements, is generally viewed as a reliable source of a defendant's criminal history. We conclude that defendant's PSI conclusively established he had been adjudicated delinquent of residential burglary and find no error in the court's reliance on the PSI. Accordingly, since there is no error, there can be no plain error and no basis to excuse defendant's procedural default. See, e.g., *People v. Ceja*, 204 Ill.2d 332, 356, 273 Ill.Dec. 796, 789 N.E.2d 1228 (2003); *People v. Sims*, 192 Ill.2d 592, 624, 249 Ill.Dec. 610, 736 N.E.2d 1048 (2000).

¶41 III. CONCLUSION

¶42 We conclude that defendant's prior juvenile adjudication is the equivalent of a prior conviction under *Apprendi* and falls within *Apprendi's* prior-conviction exception, as well as the exception in section 111–3(c–5) of the Criminal Code, and that defendant's PSI conclusively established the fact of his prior juvenile adjudication for residential

burglary. For the foregoing reasons, we affirm the judgment of the appellate court.

¶43 Appellate court judgment affirmed.

Justices THOMAS, KARMEIER, and THEIS concurred in the judgment and opinion.

Justice BURKE dissented, with opinion, joined by Chief Justice GARMAN and Justice KILBRIDE.

¶44 Justice BURKE, dissenting:

¶45 Defendant's principal argument in this appeal is that his extended-term sentence was imposed in violation of section 111–3(c–5) of the Code of Criminal Procedure of 1963 (725 ILCS 5/111–3(c–5) (West 2010)) because the sentence was based, in part, on a prior juvenile delinquency adjudication which was neither pled in the indictment nor proved to the jury beyond a reasonable doubt. I agree. For this reason I cannot join the majority opinion and, therefore, must respectfully dissent.

¶46 I

¶47 There is no dispute that, under Illinois law, a trial court may use an adult offender's prior juvenile delinquency adjudication as a factor to consider when deciding whether to impose an extended-term sentence, so long as the adjudication involved an act that, if committed by an adult, would be a Class X or Class 1 felony and the conviction occurred within 10 years after the adjudication. 730

ILCS 5/5–5–3.2(b)(7) (West 2010). What is at issue in this appeal is the manner in which the prior adjudication must be pled or proven before it may be used by the trial court in this way.

¶48 In *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), the United States Supreme Court held that the due process clause of the fourteenth amendment requires any fact that increases the penalty for a crime beyond the prescribed statutory maximum, other than the fact of a "prior conviction," to be submitted to a jury and proved beyond a reasonable doubt. *Id.* at 476, 490, 120 S.Ct. 2348. After *Apprendi* was decided, the General Assembly enacted section 111–3(c–5) of the Code of Criminal Procedure of 1963 (725 ILCS 5/111–3(c–5) (West 2010)) to bring our state law into conformity with *Apprendi*'s constitutional requirements.

¶49 Section 111–3(c–5) provides, in pertinent part:

> "[I]f an alleged fact (other than the fact of a prior conviction) is not an element of an offense but is sought to be used to increase the range of penalties for the offense beyond the statutory maximum that could otherwise be imposed for the offense, the alleged fact must be included in the charging instrument or otherwise provided to the defendant through a written notification before trial, submitted to a trier of fact as an aggravating factor, and proved beyond a reasonable doubt."

¶50 Both *Apprendi* and section 111–3(c–5) explicitly exempt only "prior convictions" from those facts that must be pled in the charging instrument and proved beyond a reasonable doubt before they can be used as an aggravating factor to increase the penalty for an offense. Neither *Apprendi* nor section 111–3(c–5) makes any mention of prior juvenile delinquency adjudications.

¶51 Before this court, defendant contends that a juvenile delinquency adjudication is not a "conviction" within the meaning of section 111–3(c–5). Therefore, defendant maintains, a trial court may only base an extended-term sentence on a prior adjudication if that adjudication was included in the charging instrument and proved to the fact finder beyond a reasonable doubt. In this case, however, defendant's prior adjudication was referenced only in a presentencing investigative report. Accordingly, defendant asserts that the trial court violated section 111–3(c–5) and committed plain error when it imposed an extended-term sentence.

¶52 Defendant's argument raises a question of statutory construction. When construing a statute, we first look to the language of the statute itself, which is the surest and most reliable indicator of the legislature's intent. *People v. Pullen*, 192 Ill.2d 36, 42, 248 Ill.Dec. 237, 733 N.E.2d 1235 (2000). The language of the statute must be given its plain and ordinary meaning, and where the statutory language is clear and unambiguous, we may not resort to other aids of construction. *People v. Taylor*, 221 Ill.2d 157, 162, 302 Ill.Dec. 697, 850 N.E.2d 134 (2006); *People v. Tucker*, 167 Ill.2d 431, 435, 212

Ill.Dec. 664, 657 N.E.2d 1009 (1995). In addition, this court may not correct what we believe to be a legislative oversight by rewriting a statute in a manner inconsistent with its clear and unambiguous language under the guise of statutory interpretation. *Taylor*, 221 Ill.2d at 162–63, 302 Ill.Dec. 697, 850 N.E.2d 134; *Pullen*, 192 Ill.2d at 42, 248 Ill.Dec. 237, 733 N.E.2d 1235.

¶53 In construing the term "conviction" in section 111–3(c–5), we do not write on a clean slate. Illinois courts have long held that, when used in a statutory enactment, the word "conviction" does not include juvenile adjudications. For example, in *In re W.W.*, 97 Ill.2d 53, 73 Ill.Dec. 347, 454 N.E.2d 207 (1983), this court held that section 8 of "An Act concerning fees and salaries, and to classify the several counties of this state with reference thereto" (Ill.Rev.Stat.1979, ch. 53, ¶ 8), which provided that State's Attorney fees are to be taxed as costs and collected from the "defendant" upon "conviction," had no application to juvenile proceedings. In so holding, this court concluded that "a minor is neither 'convicted' nor considered a 'defendant' or an 'accused.' " *In re W.W.*, 97 Ill.2d at 57, 73 Ill.Dec. 347, 454 N.E.2d 207.

¶54 Similarly, in *People v. Rankin*, 297 Ill.App.3d 818, 232 Ill.Dec. 316, 697 N.E.2d 1246 (1998), our appellate court found no authority for a trial court to impose an extended-term sentence based on the defendant's juvenile adjudication under the then-existing version of the statute. The court reached this conclusion because juvenile proceedings are not criminal and a juvenile adjudication does not

constitute a conviction. *Id.* at 824–25, 232 Ill.Dec. 316, 697 N.E.2d 1246.

¶55 In *People v. Taylor*, 221 Ill.2d 157, 302 Ill.Dec. 697, 850 N.E.2d 134 (2006), this court considered whether a minor who had been adjudicated delinquent for a felony offense could be considered a "person convicted of a felony" for purposes of our escape statute (720 ILCS 5/31–6(a) (West 1998)). In our discussion in *Taylor*, we distinguished the issue that was then before us from "the somewhat analogous issue of whether a juvenile adjudication is considered a 'prior conviction' for sentencing enhancement purposes under *Apprendi v. New Jersey*, 530 U.S. 466 *** (2000)." *Taylor*, 221 Ill.2d at 173, 302 Ill.Dec. 697, 850 N.E.2d 134. We said:

> "We take no position here with respect to the division among the federal circuits. We only discuss the jurisprudence on the use of nonjury juvenile adjudications for *Apprendi* purposes because we find it helpful to our analysis to illustrate the important differences between the case before us and the federal cases cited above. In each of the federal cases, a statute specifically defined a 'conviction' as a prior juvenile adjudication for purposes of the offense at issue. Here, in contrast, the legislature has not defined the term 'conviction' in the escape statute to include juvenile adjudications. Moreover, the key issue in the present case involves proof of a

> prior conviction as *an element of the offense* where the applicable statute fails to define an 'adjudication' as a 'conviction.' Thus, the primary issue here turns on a question of statutory construction, while the principal issue in the federal cases turned on whether an adjudication could be classified as a prior conviction for *Apprendi* purposes, not on whether it could be classified as a 'conviction' for purposes of establishing an element of an offense. The distinction is critical, of course, because nothing in a penal statute may be construed against a defendant by intendment or implication ([*People v. Laubscher*, 183 Ill.2d 330, 337 [233 Ill.Dec. 639, 701 N.E.2d 489] (1998)])." (Emphasis in original.) *Id.* at 175–76, 302 Ill.Dec. 697, 850 N.E.2d 134

Citing *In re W.W.* and *Rankin*, we then went on to state the governing rule:

> "In the absence of a statute expressly defining a juvenile adjudication as a conviction, Illinois courts have consistently held that juvenile adjudications do not constitute convictions." *Id.* at 176, 302 Ill.Dec. 697, 850 N.E.2d 134.

¶56 Finally, and more recently, in *People v. Villa*, 2011 IL 110777, 355 Ill.Dec. 220, 959 N.E.2d 634, this court held that a juvenile adjudication was

inadmissible against a testifying defendant for impeachment purposes. This conclusion rested, in part, on the fact that a juvenile adjudication is not the same as a criminal conviction. *Id.* ¶ 40.

¶57 Section 111–3(c–5) exempts only "convictions" from those facts that must be pled in the indictment and proved beyond a reasonable doubt before they can be used as an aggravating factor to increase the penalty for an offense. Under long-standing case law, a juvenile delinquency adjudication is not a "conviction."

¶58 Further, it is worth noting that the General Assembly may have had good reason for treating juvenile adjudications differently than adult convictions under section 111–3(c–5). Requiring a juvenile adjudication to be pled and proven to a jury before it may be considered for extended-term sentencing provides the sentencing judge with additional information regarding the nature of the prior offense, including, in particular, the extent of the juvenile's culpability. See, e.g., *Miller v. Alabama,* 567 U.S. ——, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012) (noting the lack of maturity and diminished culpability of juveniles). In this way, the sentencing judge can make a more informed decision as to whether extended-term sentencing should be imposed on the adult offender.

¶59 Since section 111–3(c–5) does not equate juvenile adjudications with criminal convictions, the requirements of the statute had to be met before defendant's juvenile adjudication could be considered by the trial court in imposing an extended-term

sentence. This means that the fact of the defendant's qualifying juvenile adjudication had to be included in the charging instrument or otherwise provided to the defendant through a written notification before trial, submitted to the trier of fact as an aggravating factor, and proved beyond a reasonable doubt. That did not occur here. In my view, the imposition of defendant's extended-term sentence under these circumstances constituted plain error.

¶60 II

¶61 Despite the foregoing, the majority holds that a juvenile adjudication is a "conviction" within the meaning of section 111–3(c–5). *Supra* ¶ 33. Notably, however, the majority reaches this conclusion without ever conducting any statutory analysis. Instead, the majority's determination is based solely on their examination of cases from other jurisdictions, both federal and state, which have considered whether, under *Apprendi*, it would violate a defendant's due process rights to treat a juvenile adjudication like a "prior conviction" and exempt the adjudication from *Apprendi*'s pleading and proof requirements.

¶62 After reviewing the split of authority on this issue, the majority agrees with the line of cases which holds that, even though a juvenile offender is not afforded the right to a jury trial, juvenile adjudications may be treated like "prior convictions" for *Apprendi* purposes because juvenile adjudications, like adult convictions, are sufficiently reliable so that due process is not offended by such an exemption. See, e.g., *United States v. Smalley*,

294 F.3d 1030, 1033 (8th Cir.2002). Having adopted this view, the majority then reasons that, because it would not violate defendant's due process rights to treat a juvenile adjudication like a "prior conviction," then it must follow that juvenile adjudications are included within the "prior conviction" exception in section 111–3(c–5). *Supra* ¶¶ 15, 33. I disagree.

¶63 The majority appears to be laboring under the misconception that a finding that it would not violate due process to treat a juvenile adjudication like a "prior conviction" under *Apprendi* means that an adjudication is equivalent to a conviction under section 111–3(c–5). But this is not true. Whether treating defendant's prior delinquency adjudication like a conviction for purposes of the *Apprendi* exception violates due process concerns is a separate question from whether our legislature intended the term "conviction" in our statutory provision to include a juvenile adjudication. Or, stated otherwise, it is one thing to say that a certain practice does not violate due process; it is a completely different thing to say that the practice was authorized by our legislature in the first place.

¶64 Furthermore, as a general principle, courts of this state rely, whenever possible, on nonconstitutional grounds to decide cases (*Mulay v. Mulay*, 225 Ill.2d 601, 312 Ill.Dec. 263, 870 N.E.2d 328 (2007) (citing *In re E.H.*, 224 Ill.2d 172, 178, 309 Ill.Dec. 1, 863 N.E.2d 231 (2006) (listing cases))). The majority should therefore have considered first whether a juvenile adjudication may be deemed a "conviction" for purposes of section 111–3(c–5), as a matter of statutory interpretation, before

determining whether defendant's due process rights were violated under *Apprendi*.

¶65 In Illinois, the rule is clear that, for statutory purposes, the term "conviction" does not include juvenile delinquency adjudications. It follows, therefore, that a juvenile adjudication is not a "conviction" within the meaning of section 111–3(c–5). Whether it would violate due process to base an extended-term sentence on a juvenile adjudication, as was done in this case, is an important issue. However, until such time as the General Assembly actually authorizes that practice under section 111–3(c–5), there is no need to reach the issue.

¶66 For the reasons set forth above, I dissent.

Appendix B

32 N.E.3d 198
Appellate Court of Illinois, Third District

The PEOPLE of the State of Illinois, Plaintiff-Appellee,

v.

Derrick JONES, Defendant-Appellant

No 3-13-0053.

|

May 15, 2015.

Attorneys and Law Firms

Josette M. Skelnik, of State Appellate Defender's Office, of Elgin, for appellant.

James Glasgow, State's Attorney, of Joliet (Judith Z. Kelly, of State's Attorneys Appellate Prosecutor's Office, of counsel), for the People.

OPINION

Presiding Justice McDADE delivered the judgment of the court, with opinion.

¶1 Following a jury trial, defendant, Derrick Jones, was convicted of aggravated robbery, a Class 1 felony (720 ILCS 5/18–5(a) (West 2010)). The trial court found defendant extended-term eligible based, in part, on a prior adjudication of juvenile delinquency referenced in the presentence investigation report (PSI). The court imposed an

extended-term sentence of 24 years' imprisonment. On appeal, defendant does not challenge his conviction, but does challenge his extended-term eligibility. He argues that his sentence violates the rules set forth in *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), and *Shepard v. United States*, 544 U.S. 13, 125 S.Ct. 1254, 161 L.Ed.2d 205 (2005). We affirm.

¶2 FACTS

¶3 Defendant was charged by indictment with aggravated robbery (720 ILCS 5/18–5(a) (West 2010)) and unlawful possession of a credit card (720 ILCS 5/17–32(b) (West 2010)). Prior to trial, the State elected to proceed on only the first count of the indictment, aggravated robbery.

¶4 Immediately before commencement of the jury trial, the court asked if the sentencing range on the aggravated robbery charge, a Class 1 felony, would be 4 to 30 years. The State responded that this was, indeed, the case. Assistant Public Defender Litricia Payne confirmed to the court that the State had tendered to her a docket sheet indicating that defendant had been previously adjudicated delinquent on multiple counts of residential burglary, and that those adjudications would make defendant's sentencing range in the present matter 4 to 30 years. Defendant, however, refuted having any such adjudications. Payne relayed this to the court:

> "I did speak with [defendant] regarding that court docket and it was relayed back to me that he did not have any

> priors for residential burglary. So as far as my conversation went on that issue I left it at if that's the case that it's four to 15. But the docket that was tendered to me did indicate adjudications for residential burglary, which would make him four to 30."

¶5 The court admonished defendant that he faced a sentencing range of 4 to 30 years' imprisonment. Because, as the court noted, this was the first time it had admonished defendant on this issue, the court allowed defendant to consult further with counsel. Following the discussion, Payne stated that defendant still wished to proceed to trial.

¶6 The State's evidence at trial was limited to the facts related to the aggravated robbery; no evidence was introduced regarding defendant's prior adjudication of delinquency. After the trial, the jury returned a verdict finding defendant guilty of the charged offense. Following hearings on posttrial motions, the cause proceeded to sentencing.

¶7 At sentencing, the court took into account, *inter alia*, a PSI. In a section labeled "Prior Record–Juvenile," the PSI listed a number of charges—including assault, burglary, criminal trespass to land, knowing damage to property, and three counts of residential burglary—brought in a delinquency proceeding filed under case No. 04 JD 00276. In the PSI, the description of that proceeding stated in part:

> "On April 28, 2005, with the then minor, [defendant], having been

> adjudicated delinquent in the original Petition alleging Assault, and the 1st, 2nd and 3rd Supplemental Petitions alleging: Burglary, Criminal Trespass to Land, Knowingly Damage to Property and Residential Burglary, three (3) Counts. [Defendant] was sentenced to 5 years and 8 months Probation, until his 21st Birthday in the aforementioned offenses, with the first nine (9) months of Probation to be under the directive of Intensive Probation Supervision."

The State remarked that defendant was extended-term eligible, asking the court to impose a "lengthy" sentence. The court ultimately sentenced defendant to an extended-term sentence of 24 years' imprisonment. Defendant's motion to reconsider the sentence was denied.

¶8 On appeal, defendant argues that the State failed to prove to a jury beyond a reasonable doubt the fact of defendant's prior juvenile adjudication or to allege that fact in the indictment. Accordingly, defendant contends, the court's decision to impose an extended-term sentence violated his sixth amendment right to a jury under the Supreme Court's ruling in *Apprendi*, 530 U.S. 466, 120 S.Ct. 2348. Alternatively, defendant contends that the trial court improperly relied upon the PSI in determining the fact of defendant's prior adjudication of delinquency, in contravention of the Supreme Court's ruling in *Shepard*, 544 U.S. 13, 125 S.Ct. 1254. The State maintains that the *Apprendi*

prior-conviction exception is applicable to juvenile adjudications and, as a result, it was not required to submit the fact of defendant's prior adjudication to a jury.

¶9 ANALYSIS

¶10 I. Whether *Apprendi*'s Prior Conviction Exception Applies to Adjudications of Delinquency

¶11 A. Introduction

¶12 The offense of aggravated robbery is categorized as a Class 1 felony in Illinois. 720 ILCS 5/18–5(a) (West 2010). The standard sentencing range for a Class 1 felony is between 4 and 15 years' imprisonment. 730 ILCS 5/5–4.5–30(a) (West 2010). The extended-term sentencing range for a Class 1 felony is between 15 and 30 years' imprisonment. *Id.* Section 5–5–3.2(b) of the Unified Code of Corrections sets forth a number of factors that a court may consider as a reason to impose an extended-term sentence, including the following factor relevant here:

> "When a defendant who was at least 17 years of age at the time of the commission of the offense is convicted of a felony and has been previously adjudicated a delinquent minor under the Juvenile Court Act of 1987 for an act that if committed by an adult would be a Class X or Class 1 felony when the conviction has occurred within 10 years after the previous adjudication, excluding time spent in custody." 730 ILCS 5/5–5–3.2(b)(7) (West 2010).

The offense of residential burglary—which the PSI indicated to be an underlying offense of defendant's adjudication of delinquency—is, when committed by an adult, a Class 1 felony. 720 ILCS 5/19–3(b) (West 2010).

¶13 In *Apprendi*, the United States Supreme Court held that, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi*, 530 U.S. at 490, 120 S.Ct. 2348. This result, the Court reasoned, was required by the fifth amendment, as well as the jury trial guarantees of the sixth amendment. *Id.* at 476, 120 S.Ct. 2348; see also U.S. Const., amends. V, VI. In response to the decision in *Apprendi*, the Illinois legislature enacted section 111–3(c–5) of the Code of Criminal Procedure of 1963, which reads in part:

> "[I]f an alleged fact (other than the fact of a prior conviction) is not an element of an offense but is sought to be used to increase the range of penalties for the offense beyond the statutory maximum that could otherwise be imposed for the offense, the alleged fact must be included in the charging instrument or otherwise provided to the defendant through a written notification before trial, submitted to a trier of fact as an aggravating factor, and proved beyond a reasonable doubt." 725 ILCS 5/111–3(c–5) (West 2010).

¶14 Defendant argues that the State failed to fulfill these requirements with respect to the adjudication of delinquency, which was used to make him eligible for an extended-term sentence.[1] Therefore, defendant contends, the trial court's decision to impose an extended-term sentence violated the Supreme Court's directive in *Apprendi*, and, in turn, the Illinois statute codifying the *Apprendi* decision. The State counters that defendant's adjudication of delinquency should fall under the *Apprendi* exception for prior convictions, and that the State was therefore not required to prove that fact to the jury.

¶15 Although defendant asserts that our supreme court has already decided this issue, his reliance upon *People v. Taylor*, 221 Ill.2d 157, 302 Ill.Dec. 697, 850 N.E.2d 134 (2006) is misplaced. In *Taylor*, the court found that a prior juvenile adjudication does not satisfy the statutory definition of "conviction" for the purposes of the escape statute (720 ILCS 5/31–6(a) (West 1998)). *Taylor*, 221 Ill.2d at 163–64, 302 Ill.Dec. 697, 850 N.E.2d 134. However, the court stated expressly that "[t]he question before us is to be distinguished from the somewhat analogous issue of whether a juvenile adjudication is considered a 'prior conviction' for sentencing enhancement purposes under *Apprendi*." *Id.* at 173, 302 Ill.Dec. 697, 850 N.E.2d 134. Though the court briefly discussed the split among the federal circuits concerning the *Apprendi* issue, it explicitly did not rule on the issue: "We take no position here with respect to the division among the

[1] On appeal, defendant does not challenge the veracity of the delinquency adjudication itself.

federal circuits. *** [T]he primary issue here turns on a question of statutory construction, while the principal issue in the federal cases turned on whether an adjudication could be classified as a prior conviction for *Apprendi* purposes ***." *Id.* at 175–76, 302 Ill.Dec. 697, 850 N.E.2d 134.

¶16 Thus, contrary to defendant's position, the question of whether an adjudication of delinquency falls under *Apprendi*'s prior conviction exception—and whether the State may in turn forego proving the adjudication to a jury before it may be used for sentence enhancement—remains unsettled in Illinois. Indeed, it appears that it is a matter of first impression for this or any other reviewing court in the state.

¶17 Before addressing the issue itself, we note—and defendant concedes—that defendant failed to preserve the issue for appeal by raising a contemporaneous objection and raising the issue in a posttrial motion. The issue is thus forfeited unless defendant can demonstrate that the error rises to the level of plain error. *People v. Thompson*, 238 Ill.2d 598, 613, 345 Ill.Dec. 560, 939 N.E.2d 403 (2010). Our supreme court has held that potential *Apprendi* violations are subject to traditional plain error analysis, and that a defendant also bears the burden of showing that the *Apprendi* violation was prejudicial. *People v. Nitz*, 219 Ill.2d 400, 410, 302 Ill.Dec. 418, 848 N.E.2d 982 (2006). The first step in any plain error analysis is determining whether any error occurred (*Thompson*, 238 Ill.2d at 613, 345 Ill.Dec. 560, 939 N.E.2d 403), and this step represents the majority of our analysis of the present

issue. Because determination of *Apprendi*'s scope is purely a question of law, our review will be *de novo*. *People v. Johnson*, 206 Ill.2d 348, 360, 276 Ill.Dec. 399, 794 N.E.2d 294 (2002).

¶18 B. *Apprendi* and its Predecessors

¶19 The roots of the *Apprendi* prior-conviction exception can be found in a case decided by the Supreme Court two years earlier, *Almendarez–Torres v. United States*, 523 U.S. 224, 118 S.Ct. 1219, 140 L.Ed.2d 350 (1998). In *Almendarez–Torres*, the Court considered whether a certain statutory provision created a separate crime or was merely a penalty provision authorizing an enhanced sentence. Section 1326(a) of Title 8 of the United States Code authorized a sentence of not more than two years' imprisonment for any deported alien who returns to the United States. 8 U.S.C. § 1326 (1988). Subsection (b), at issue in *Almendarez–Torres*, authorized a sentence of up to 10 years' imprisonment for aliens returning after being deported pursuant to a felony conviction, and a sentence of up to 20 years' imprisonment for aliens returning after being deported pursuant to a conviction for an *aggravated* felony. *Almendarez–Torres*, 523 U.S. 224, 118 S.Ct. 1219.

¶20 The Supreme Court found that the provisions in subsection (b) were sentence enhancers rather than separate offenses, and that the State was therefore not required to set forth those provisions in the charging document. *Almendarez–Torres*, 523 U.S. at 228, 118 S.Ct. 1219; see also *McMillan v. Pennsylvania*, 477 U.S. 79, 84–91, 106

S.Ct. 2411, 91 L.Ed.2d 67 (1986) (factors relevant only to sentencing of an offender found guilty of the charged crime need not be set forth in the indictment). In so ruling, the Court put great emphasis on the fact that the subject matter in question was recidivism, noting that the "subject matter—prior commission of a serious crime—is as typical a sentencing factor as one might imagine." *Almendarez–Torres*, 523 U.S. at 230, 118 S.Ct. 1219. Indeed, the Court stressed the traditional role that recidivism has played as a basis for enhancing an offender's sentencing: "[T]o hold that the Constitution requires that recidivism be deemed an 'element' of petitioner's offense would mark an abrupt departure from a longstanding tradition of treating recidivism as 'go[ing] to the punishment only.' " *Id.* at 244, 118 S.Ct. 1219 (quoting *Graham v. West Virginia*, 224 U.S. 616, 629, 32 S.Ct. 583, 56 L.Ed. 917 (1912)).

¶21 The Court would turn to its reasoning in *Almendarez–Torres* the next year in deciding *Jones v. United States*, 526 U.S. 227, 119 S.Ct. 1215, 143 L.Ed.2d 311 (1999). In *Jones*, the Court was once again tasked with deciding whether a statutory provision[2] should be considered a sentencing factor or a separate offense, requiring notice in the charging instrument, proof beyond a reasonable doubt, and submission to a jury. *Jones*, 526 U.S. at

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[2] At issue in *Jones* was the federal carjacking statute, which provided for a base sentence of no more than 15 years' imprisonment, a sentence of no more than 25 years' imprisonment if serious bodily injury results from the unlawful conduct, and a sentence of up to life imprisonment or death if death results from the unlawful conduct. 18 U.S.C. § 2119 (1994).

251–52, 119 S.Ct. 1215. The Court distilled the issue down to a single question: "[M]ay judicial factfinding by a preponderance support the application of a provision that increases the potential severity of the penalty for a variant of a given crime?" *Id.* at 242, 119 S.Ct. 1215. The Court found that such a result would shrink the role of the jury, and that "the relative diminution of the jury's significance would merit Sixth Amendment concern." *Id.* at 248, 119 S.Ct. 1215. Also citing the traditional view of aggravated offenses as separate offenses, the Court held that the requirement of serious bodily injury constituted an element of a separate offense, and was subject to the above requirements. *Id.*

¶22 The *Jones* Court recognized that in reaching that result, it would be required to distinguish *Almendarez–Torres*. The Court emphasized that the holding in *Almendarez–Torres* "rested in substantial part on the tradition of regarding recidivism as a sentencing factor, not as an element to be set out in the indictment." *Id.* at 249, 119 S.Ct. 1215. The fact of a prior conviction was "potentially distinguishable for constitutional purposes from other facts that might extend the range of possible sentencing." *Id.* The Court then expounded on one of the reasons for the constitutional distinctiveness of recidivism: "[U]nlike virtually any other consideration used to enlarge the possible penalty for an offense, and certainly unlike the factor before us in this case, a prior conviction must itself have been established through procedures satisfying the fair notice, reasonable doubt, and jury trial guarantees." *Id.*

¶23 The next term, the Court decided *Apprendi*, putting constitutional weight behind much of what it had alluded to the previous year in *Jones*. The Court held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi*, 530 U.S. at 490, 120 S.Ct. 2348. By giving force to the recidivism—or prior conviction—exception, the Court thus implicitly affirmed its earlier ruling in *Almendarez–Torres*. However, the statutory provision at issue in *Apprendi* was not recidivism, but a hate crime statute. As such, the *Apprendi* Court pointed out that its holding did not strictly require it to revisit the *Almendarez–Torres* recidivism exception:

> "Even though it is arguable that *Almendarez–Torres* was incorrectly decided, and that a logical application of our reasoning today should apply if the recidivist issue were contested, *Apprendi* does not contest the decision's validity and we need not revisit it for purposes of our decision today to treat the case as a narrow exception to the general rule we recalled at the outset. Given its unique facts, it surely does not warrant rejection of the otherwise uniform course of decision during the entire history of our jurisprudence." *Id.* at 489–90, 120 S.Ct. 2348.

The Court also touched upon—albeit briefly—the logic underlying *Almendarez–Torres* and the prior-conviction exception:

> "[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 guilt beyond a reasonable doubt, and allowing the judge to find the required fact under a lesser standard of proof." *Id.* at 496, 120 S.Ct. 2348.

¶24 C. Nonjury Adjudications of Delinquency

¶25 The exact parameters of the prior-conviction exception remain undefined. Indeed, aside from the *Almendarez–Torres* Court's extensive reliance on tradition, the Supreme Court's only stated rationale for the exception was provided in brief passages in *Jones* and *Apprendi*—two cases in which the prior-conviction exception itself was not directly at issue. The Court has not addressed the issue of whether an adjudication of delinquency is encompassed by the prior-conviction exception, and lower federal courts and state courts are split on the issue. However, as discussed *infra*, the majority of lower courts have held that an adjudication of delinquency *does* fall under the exception, and thus need not be set out in the indictment, submitted to a jury, or proven beyond a reasonable doubt.

¶26 1. Procedural Safeguards Attendant to Juvenile Delinquency Proceedings

¶27 In *Jones* and *Apprendi*, the Supreme Court opined that the prior-conviction exception was constitutionally justified by the procedural safeguards in place at the time of the earlier conviction. Because criminal convictions are only achieved when a defendant has been protected by the requirements of fair notice, the right to a jury, and the right to have guilt proven beyond a reasonable doubt, the safeguards required when using that conviction to later enhance a sentence need not be as stringent. See *Apprendi*, 530 U.S. at 496, 120 S.Ct. 2348. Because juvenile delinquency proceedings provide some, but not all, of those procedural safeguards provided in an adult criminal trial, lower courts have sought to determine whether delinquency proceedings provide *enough* safeguards to later qualify for the prior-conviction exception. As the Eighth Circuit Court of Appeals described the issue: " [W]hile the Court established what constitutes sufficient procedural safeguards (a right to jury trial and proof beyond a reasonable doubt), and what does not (judge-made findings under a lesser standard of proof), the Court did not take a position on possibilities that lie in between these two poles." *United States v. Smalley*, 294 F.3d 1030, 1032 (8th Cir.2002).

¶28 The precise set of due process safeguards required in the adjudicatory phase of juvenile proceedings was largely established through a series of Supreme Court cases decided more than four decades ago. In *In re Gault*, 387 U.S. 1, 33, 41, 55, 87

S.Ct. 1428, 18 L.Ed.2d 527 (1967), the Court held that the due process requirements of fair notice, the right to counsel, and the privilege against self-incrimination were applicable in the adjudicatory phase of juvenile proceedings. In *In re Winship*, 397 U.S. 358, 365, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970), the Court found that juveniles, like adults, are constitutionally entitled to proof beyond a reasonable doubt when charged with a violation of a criminal law. After tracing the history and reasoning behind beyond-the-reasonable-doubt standard, the *Winship* Court concluded that "[t]he same considerations that demand extreme caution in factfinding to protect the innocent adult apply as well to the innocent child." *Id.* One year later, in *McKeiver v. Pennsylvania*, 403 U.S. 528, 91 S.Ct. 1976, 29 L.Ed.2d 647 (1971), the Court held that the Constitution's due process clause does *not* require that a juvenile be afforded the right to a trial by jury, thus determining that the rights conferred in adult criminal proceedings are not perfectly congruent with those due to juveniles in delinquency proceedings. *Id.* at 533, 91 S.Ct. 1976.

¶29 Courts analyzing adjudications of delinquency in the context of the prior-conviction exception have done so with those constitutional requirements in mind. *E.g.*, *Welch v. United States*, 604 F.3d 408 (7th Cir.2010). In Illinois, the Juvenile Court Act of 1987 (Act) codifies the constitutional requirements. 705 ILCS 405/1–1 *et seq.* (West 2010). Section 1–5 of the Act provides to the minor who is the subject of the proceeding "the right to be present, to be heard, to present evidence material to the proceedings, to cross-examine witnesses, to examine pertinent court files and records and also, although

proceedings under this Act are not intended to be adversary in character, the right to be represented by counsel." 705 ILCS 405/1–5 (West 2004). Section 5–605 provides that all trials under the Act shall be held before the court and the standard of proof and rules of procedure in those trials shall be the same as those applicable in criminal proceedings.[3] 705 ILCS 405/5–605 (West 2010).

¶30 2. Lower Court Treatment

¶31 The first court to address the present issue was the Ninth Circuit Court of Appeals. In *United States v. Tighe*, 266 F.3d 1187 (9th Cir.2001), the Ninth Circuit concluded that a prior nonjury adjudication of delinquency does not fall under the prior-conviction exception to *Apprendi*. *Id.* at 1194–95. Relying upon the Supreme Court's commentary in *Jones*, the *Tighe* court reasoned that the Supreme Court's "recognition of prior convictions as a constitutionally permissible sentencing factor was rooted in the concept that prior convictions have been, by their very nature, subject to the fundamental triumvirate of procedural protections intended to guarantee the reliability of criminal convictions: fair notice, reasonable doubt and the right to a jury trial." *Id.* at 1193. Because juvenile proceedings do not provide the right to a jury trial,

[3] While the Act does provide for a right to a jury trial in certain situations, such as adjudication of whether a minor is deemed a "Violent Juvenile Offender" (705 ILCS 405/5–820(a), (d) (West 2010)), defendant was not afforded that right here. An adjudication of delinquency pursuant to a jury trial would fall under the prior-conviction exception, as it would have met all of the procedural safeguards mentioned by the *Jones* and *Apprendi* courts.

adjudications arising from those proceedings could not fall under the prior-conviction exception. *Id.* at 1194. Noting that the Supreme Court in *Apprendi* had expressed skepticism toward *Almendarez–Torres* and the prior-conviction exception, the *Tighe* court refused to extend the exception any further. *Id.*

¶32 Dissenting from the *Tighe* majority, Judge Brunetti pointed out that the Supreme Court's language in Jones, reiterated in *Apprendi*, referred strictly to prior criminal convictions. *Id.* at 1200 (Brunetti, J., dissenting). "In my view," Judge Brunetti wrote, "the language in *Jones* stands for the basic proposition that Congress has the constitutional power to treat prior convictions as sentencing factors subject to a lesser standard of proof because the defendant presumably received all the process that was due when he was convicted of the predicate crime." *Id.* Extending the logic of *Jones* to juvenile adjudications, Judge Brunetti argued that when a minor receives all the process that is constitutionally due in a juvenile proceeding, there is no constitutional problem in later using that adjudication as a sentencing enhancement. *Id.* Because, under *McKeiver*, the right to a jury trial for a juvenile is not mandated by due process, a nonjury adjudication of delinquency would fall under *Apprendi*'s prior-conviction exception. *Id.*

¶33 The reasoning found in Judge Brunetti's dissent would be echoed in a number of opinions over the next decade as numerous courts found that nonjury juvenile adjudications fell under the exception. In *Smalley*, the Eighth Circuit Court of Appeals disagreed with the *Tighe* majority, holding

that adjudications of delinquency can properly be characterized as prior convictions for *Apprendi* purposes. *Smalley*, 294 F.3d at 1032. The *Smalley* court reasoned that it is incorrect to assume that the " 'fundamental triumvirate of procedural protections' " are not only sufficient, but necessary before an adjudication may qualify for the *Apprendi* exception. *Id.* (quoting *Tighe,* 266 F.3d at 1193). The court wrote:

> "[W]e conclude that the question of whether juvenile adjudications should be exempt from *Apprendi*'s general rule should not turn on the narrow parsing of words, but on an examination of whether juvenile adjudications, like adult convictions, are so reliable that due process of law is not offended by such an exemption." *Smalley*, 294 F.3d at 1032–33.

After citing the many due process protections that are afforded to minors, the court concluded that adjudications of juvenile delinquency are sufficiently reliable to fall under the prior-conviction exception. *Id.* at 1033.

¶34 In *Welch*, 604 F.3d 408, the Seventh Circuit Court of Appeals also held that a nonjury adjudication of delinquency could be used to enhance a sentence without the requirement that the adjudication be proven beyond a reasonable doubt to a jury. The *Welch* court opined that "[p]rior convictions are not subject to the *Apprendi* rule if the defendant received all the protections to which

he was constitutionally entitled, and the integrity of the fact-finding procedures are thereby ensured." *Id.* at 429. Citing to *Winship*, *Gault*, and *McKeiver*, the court found that the Supreme Court had been vigilant in ensuring that juvenile adjudicative proceedings meet constitutional standards. *Id.* "[B]ecause juvenile adjudications are reliable," the court concluded, "they are not subject to the *Apprendi* rule." *Id.* In so holding, the Seventh Circuit joined the Eighth Circuit, Third Circuit (*United States v. Jones*, 332 F.3d 688 (3d Cir.2003)), Eleventh Circuit (*United States v. Burge*, 407 F.3d 1183 (11th Cir.2005)), Sixth Circuit (*United States v. Crowell*, 493 F.3d 744 (6th Cir.2007)), First Circuit (*United States v. Matthews*, 498 F.3d 25 (1st Cir.2007)), and Fourth Circuit (*United States v. Wright*, 594 F.3d 259 (4th Cir.2010)), in finding the prior-conviction exception applicable to juvenile adjudications.

¶35 A majority of state courts have also taken the same position on the juvenile adjudication issue. In 2009, the California supreme court sided with the majority in holding that the exception did apply to prior adjudications of delinquency. *People v. Nguyen*, 46 Cal.4th 1007, 95 Cal.Rptr.3d 615, 209 P.3d 946 (2009). The court held that a trial court's authority to impose a greater punishment based upon a defendant's recidivism "may properly be exercised *** when the recidivism is evidenced *** by a *constitutionally valid* prior adjudication of criminal conduct." (Emphasis in original.) *Id.*, 95 Cal.Rptr.3d 615, 209 P.3d at 949; see also, e.g., *State v. Hitt*, 273 Kan. 224, 42 P.3d 732 (2002); *Ryle v. State*, 842 N.E.2d 320 (Ind.2005); *State v. McFee*, 721 N.W.2d

607 (Minn.2006). Rulings on the issue at the state level have not been unanimous, however, as multiple state courts have, instead, followed the stricter logic of *Tighe*. See, e.g., *State v. Brown*, 2003–2788 (La.7/6/04); 879 So.2d 1276; *State v. Harris*, 339 Or. 157, 118 P.3d 236 (2005).

¶36 After studying the opinions of the courts that have addressed this matter, at both the federal and state levels, we join the majority. We agree that an adjudication of juvenile delinquency, reached only where all constitutionally required procedural safeguards are in place, is a no less reliable basis for the enhancement of a sentence than is a standard adult criminal conviction. To hold otherwise would be " 'to hold that the enhancement of an adult criminal sentence requires a higher level of due process protection than the imposition of a juvenile sentence.' " *Tighe*, 266 F.3d at 1199 (Brunetti, J., dissenting) (quoting *United States v. Williams*, 891 F.2d 212, 215 (9th Cir.1989)). These concerns are more persuasive on the issue than is a "narrow parsing" of the Supreme Court's brief *dicta* in *Jones* and *Apprendi*. *Smalley*, 294 F.3d at 1033. As the Fourth Circuit stated in *Wright*: "As a jury is not required in a juvenile adjudication on the merits, we see no reason to impose such a requirement through the back door by allowing former juveniles who have subsequently reached adulthood to overturn their adjudications in subsequent sentencing hearings." *Wright*, 594 F.3d at 263–64.

¶37 This conclusion is further bolstered by the Supreme Court's decision in *McKeiver*. In holding that due process does not require the right to a jury

trial in juvenile proceedings, a majority of the Court emphasized that a jury is not "a necessary component of accurate factfinding." *McKeiver*, 403 U.S. at 543, 547, 91 S.Ct. 1976 ("[t]he imposition of the jury trial on the juvenile court system would not strengthen greatly, if at all, the factfinding function"). In concurrence, Justice White agreed, opining that a jury "is not necessarily or even probably better at the job than the conscientious judge." *McKeiver*, 403 U.S. at 551, 91 S.Ct. 1976 (White, J., concurring). Thus, the proposition that the absence of a right to a jury trial does not undermine the reliability of a juvenile proceeding finds support in Supreme Court jurisprudence.

¶38 In the case *sub judice*, defendant was provided with all required constitutional safeguards in his prior juvenile proceedings, including the right to fair notice and the right to have facts proven beyond a reasonable doubt. As the adjudication of delinquency provided all process that was due, we find that it is sufficiently analogous to a prior criminal conviction to fall under the exception in *Apprendi*. The State was thus not required to put the fact of defendant's prior adjudication in its indictment, present the fact to a jury, or prove the fact of the adjudication beyond a reasonable doubt. As we find that no error was committed by the trial court, we need not proceed any further in our plain error analysis.

¶39 II. Trial Court's Use of the PSI

¶40 As prior adjudications of delinquency fall under the *Apprendi* exception for prior convictions,

and thus need not be proven to a jury, reason dictates that such adjudications are a subject properly within the scope of judicial factfinding at sentencing. However, defendant takes issue with the trial court's reliance upon the PSI as the basis for determining that he had been adjudicated delinquent for an offense that would be a Class 1 felony. Like the *Apprendi* issue, defendant concedes that this error was not preserved, and argues instead that plain error was committed. Once again, the first step in plain error analysis is determining whether any error occurred. *Thompson*, 238 Ill.2d at 613, 345 Ill.Dec. 560, 939 N.E.2d 403.

¶41 The issue of what sources a court may constitutionally rely upon in its role as factfinder at sentencing was discussed at length in *Shepard*, 544 U.S. 13, 125 S.Ct. 1254. Specifically, the Supreme Court looked to the Armed Career Criminal Act (ACCA), which mandated a minimum of 15 years' imprisonment for anyone found in possession of a firearm "after three prior convictions for serious drug offenses or violent felonies." *Id.* at 15, 125 S.Ct. 1254 (citing 18 U.S.C. § 924(e) (2000 ed. and Supp. II)). Under ACCA, only generic burglary—a burglary committed in a building or enclosed space, rather than a boat or motor vehicle—was considered a violent felony. *Shepard*, 544 U.S. at 15–16, 125 S.Ct. 1254; see *Taylor v. United States*, 495 U.S. 575, 110 S.Ct. 2143, 109 L.Ed.2d 607 (1990) (interpreting burglary provision of ACCA). Because statutes in some states define burglary in a broader fashion, encompassing both generic and nongeneric burglary, whether a prior conviction may stand as a predicate

offense under ACCA is not always immediately clear.

¶42 The Court had addressed the same issue 15 years earlier in *Taylor*, holding that a trial court may only look to the fact of conviction and the statutory definition of the prior offense in determining whether an offender had previously committed generic burglary. *Taylor*, 495 U.S. at 602, 110 S.Ct. 2143. The *Shepard* Court affirmed its previous ruling in *Taylor*, finding that a later court tasked with determining the nature of a burglary conviction "is generally limited to examining the statutory definition, charging document, written plea agreement, transcript of plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented." *Shepard*, 544 U.S. at 16, 125 S.Ct. 1254. The Court later added that "some comparable judicial record of this information" would also be suitable. *Id.* at 26, 125 S.Ct. 1254. The Court rejected the government's argument that a sentencing judge should be permitted to read police reports in order to make the determination. *Id.*

¶43 Justice Souter included in his majority opinion[4] a discussion on the impact of *Apprendi* on the issue before the court, writing:

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[4] A five-justice majority, consisting of Justices Souter, Stevens, Scalia, Ginsburg, and Thomas, agreed in the holding. Justice Thomas, however, did not join in the section discussing *Apprendi* (Part III). Nevertheless, because the dissenting Justices argued that recidivism enhancements *never* trigger constitutional concerns, "Part III speaks for the Court as a practical matter." *United States v. Carpenter*, 406 F.3d 915, 917 (7th Cir.2005).

> "While the disputed fact here [(whether a defendant committed generic burglary)] can be described as a fact about a prior conviction, it is too far removed from the conclusive significance of a prior judicial record, and too much like the findings subject to *Jones* and *Apprendi*, to say that *Almendarez–Torres* clearly authorizes a judge to resolve the dispute." *Shepard*, 544 U.S. at 25, 125 S.Ct. 1254.

Defendant relies upon this language, arguing that while the sentencing court may consider the fact of a prior conviction, "the sources upon which the sentencing court may rely to make that determination are severely limited." Thus defendant contends that a PSI, similar to the police reports at issue in *Shepard*, may not be relied upon by the sentencing court without offending *Apprendi*.

¶44 In the immediate aftermath of *Shepard*, the Fourth District addressed a similar argument. In *People v. James*, 362 Ill.App.3d 285, 289, 298 Ill.Dec. 115, 838 N.E.2d 1008 (2005), the defendant argued that "the trial court erroneously relied solely on the [PSI] report to sentence him to an extended term." The Fourth District held that under *Apprendi*, the fact of a prior conviction need not be proven beyond a reasonable doubt, and that a PSI is an appropriate and reliable source for judicial determination of that fact. The court put particular emphasis on *People v. Williams*, 149 Ill.2d 467, 174 Ill.Dec. 829, 599 N.E.2d 913 (1992), in which our supreme court "acknowledged that a variety of documents

containing a defendant's criminal history have been found to be properly relied upon at sentencing." *James*, 362 Ill.App.3d at 292, 298 Ill.Dec. 115, 838 N.E.2d 1008. Specifically, the *Williams* court found that "[a] presentence report *** is generally a reliable source for the purpose of inquiring into a defendant's criminal history." *Williams*, 149 Ill.2d at 491, 174 Ill.Dec. 829, 599 N.E.2d 913.

¶45 Other Illinois courts subsequently analyzing this issue have addressed *Shepard* directly. In *People v. Johnson*, 372 Ill.App.3d 772, 310 Ill.Dec. 736, 867 N.E.2d 49 (2007), the First District addressed the question of "whether[,] under *Shepard*[,] the information provided by defendant's PSI can be used by the trial court to establish the existence of a prior conviction for purposes of imposing an extended-term sentence." *Id.* at 779, 310 Ill.Dec. 736, 867 N.E.2d 49. The court pointed out that the inquiry in *Shepard* was a fact-based inquiry into the elements of an underlying crime; in *Johnson* there was no question as to how the prior felonies were committed, but only the question of if those felonies were committed. *Id.* at 780, 310 Ill.Dec. 736, 867 N.E.2d 49. The *Johnson* court noted that under *Apprendi*, the fact of a prior conviction need not be proven beyond a reasonable doubt, and found that this exception remained viable after *Shepard*. *Id.* at 781, 310 Ill.Dec. 736, 867 N.E.2d 49. "Consistent with *Apprendi* and *Shepard*, a judge can use appropriate judicial documents and records to enhance a sentence based on prior convictions. Accordingly, the PSI is an acceptable source for the trial judge to use when considering the defendant's prior criminal background." *Id.*

¶46 One year later, in *People v. Bolton*, 382 Ill.App.3d 714, 321 Ill.Dec. 153, 888 N.E.2d 672 (2008), the Second District found that the trial court did not err when it considered an ambiguous PSI at sentencing.[5] In so ruling, the court relied upon the Seventh Circuit Court of Appeals' summary of the Shepard decision. In *Carpenter*, 406 F.3d at 917, the Seventh Circuit explained: "[A] sentencing court is entitled to classify and take into account the nature of a defendant's prior convictions, provided that the judge does not engage in fact-finding about what the accused did (as opposed to what crime he has been convicted of)." (Emphasis in original.) Because the trial court in *Bolton* did not go " 'behind the existence of [the defendant's] priors to engage in a factual rather than a legal analysis of his former criminal behavior,' " the Second District found that it had "remained within the bounds of the inquiry permitted by *Shepard*." *Bolton*, 382 Ill.App.3d at 725, 321 Ill.Dec. 153, 888 N.E.2d 672 (quoting *Carpenter*, 406 F.3d at 917).

¶47 We agree with our colleagues in the other districts that information from a PSI may be used as the basis for sentence enhancement, and that this does not run afoul of *Shepard*. The mere inquiry into the fact of a prior conviction, a fact which need not

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[5] The defendant in *Bolton* claimed that his prior conviction was for simple possession (a Class 4 felony), while the State maintained that the conviction was for unlawful possession with intent to deliver (a Class 2 felony). The PSI only indicated that the defendant was convicted of " 'Possession of Controlled Substance' " and sentenced to three years' imprisonment, a term within the range of both a Class 2 and a Class 4 felony. *Bolton*, 382 Ill.App.3d at 722, 321 Ill.Dec. 153, 888 N.E.2d 672.

be proven beyond a reasonable doubt, is not the kind of fact-based inquiry with which the *Shepard* court was concerned. Though defendant contends that a PSI is particularly unreliable in determining the fact of a prior adjudication of delinquency, as opposed to a prior criminal conviction, this argument is unconvincing. The PSI here, unlike that in *Bolton*, is unequivocal. It indicates that defendant was adjudicated delinquent pursuant to a petition alleging three counts of residential burglary, a Class 1 felony.

¶48 Having decided that a prior adjudication of delinquency is sufficiently analogous to a prior conviction so as to fall under the exception to *Apprendi*, we find that the fact of the prior adjudication may be determined by the sentencing court through reference to the PSI. The trial court here committed no error. As we find that there has been no error, we need not proceed any further in our plain error analysis.

¶49 CONCLUSION

¶50 The judgment of the circuit court of Will County is affirmed.

¶51 Affirmed.

Justices HOLDRIDGE and LYTTON concurred in the judgment and opinion.

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Sixth Amendment to the United States Constitution provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury . . . ."

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

730 Ill. Comp. Stat. 5/5–4.5–30(a) provides: "The sentence of imprisonment, other than for second degree murder, shall be a determinate sentence of not less than 4 years and not more than 15 years."

730 Ill. Comp. Stat. 5/5–5–3.2(b)(7) provides: "The following factors, related to all felonies, may be considered by the court as reasons to impose an extended term sentence under Section 5–8–2 upon any offender: . . . When a defendant who was at least 17 years of age at the time of the commission of the offense is convicted of a felony and has been previously adjudicated a delinquent minor under the Juvenile Court Act of 1987 for an act that if committed by an adult would be a Class X or Class 1 felony when the conviction has occurred within 10 years after the previous adjudication, excluding time spent in custody."

730 Ill. Comp. Stat. 5/5–8–2(a) provides: "A judge shall not sentence an offender to a term of

imprisonment in excess of the maximum Ill. Comp. Stat. sentence authorized by [730 Ill. Comp. Stat. 5/5–4.5] for an offense or offenses within the class of the most serious offense of which the offender was convicted unless the factors in aggravation set forth in Section 5–5–3.2 . . . were found to be present. If the pre-trial and trial proceedings were conducted in compliance with subsection (c-5) of Section 111-3 of the Code of Criminal Procedure of 1963, the judge may sentence an offender to an extended term as provided in [730 Ill. Comp. Stat. 5/5–4.5].