Supreme Court of Ohio Clerk of Court - Filed July 28, 2015 - Case No. 2014-1814

In the
Supreme Court of Ohio

STATE OF OHIO,	:	Case No. 2014-1814
	:	
Plaintiff-Appellee,	:	On Appeal from the
	:	Montgomery County
v.	:	Court of Appeals,
	:	Second Appellate District
ADRIAN L. HAND, JR.,	:	
	:	Case No. 25840
Defendant-Appellant.	:	

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INTRODUCTION

Defendant Adrian Hand's appeal asserts a *right* under *Apprendi v. New Jersey*, 530 U.S. 466 (2000), but seeks a *remedy* that is foreign to that line of cases. Hand's asserted *right* is contrary to the overwhelming weight of authority, is inconsistent with the *Apprendi* line of cases, and is unsupported by historic practice. Hand's asserted *remedy* (invalidating a recidivism statute) is unavailable because the *Apprendi* line of cases create a procedural right to a jury trial for all elements of the crime, not a substantive right barring sentencing enhancements. In that respect, the remedy that would be available to Hand under *Apprendi* (putting his recidivism enhancement *before a jury*) reinforces that he (and those like him) cannot get relief because the State's alleged error here would be harmless. More importantly, *Apprendi*'s remedy could greatly prejudice future defendants by constitutionally *requiring* the prosecution to present to a jury prejudicial "bad acts" evidence of a defendant's prior juvenile offenses.

The Sixth Amendment requires that every element of a crime be submitted to a jury. Under the *Apprendi* line of cases up to *Alleyne*, any fact that increases the penalty for a crime beyond the statutory maximum (or raises the statutory minimum) is an element of the offense, and thus must be submitted to a jury. But the *Apprendi* line of cases has consistently maintained an exception for recidivism evidence. In those circumstances, proving the fact of a prior conviction increases the penalty for the current offense, but that fact is not an element of the current offense, and thus does not need to be submitted to a jury.

Ohio's recidivism enhancement statute requires a mandatory prison term for certain felonies (and so raises the statutory minimum) if the offender has a prior felony conviction *or* a prior juvenile delinquency for a substantially equivalent offense. This appeal asks whether *Apprendi*'s recidivism exception applies if the enhancement is based on an adult offender's prior

juvenile offense. The answer from courts around the country is a resounding and overwhelming "yes"—defendants have no right to a jury finding on the fact of a prior juvenile delinquency.

It is not hard to see why. A *remedy* under *Apprendi* (even if it applied) would typically be useless to defendants like Hand while at the same time causing them significant prejudice. While Hand asks the court to find that a juvenile offense can never "be used to enhance an adult sentence" (App. Br. at 2), the only remedy *Apprendi* can get him is the right to a jury finding on the fact of his prior juvenile delinquency. In Hand's particular case, that remedy gets him nowhere: Hand already concedes that fact, so whether a judge or jury makes the undisputed finding cannot possibly alter the outcome, and any potential *Apprendi* error is harmless. This will be true for most defendants: prior juvenile delinquencies are easily proved by reference to state records. And because *Apprendi*'s remedy is to present facts to the jury, it would cause significant *prejudice* to future defendants like Hand by constitutionally requiring the State to present a defendant's juvenile offenses to the jury at trial. Applying *Apprendi* would likely do defendants more harm than good.

Defendants like Hand also have no *right* to a jury finding under *Apprendi* because the fact of a prior juvenile offense falls within the scope of the recidivism exception. Only a fact that is an element of the offense must be presented to the jury. As a matter of both state and federal history and precedent, recidivism enhancements are not an element of the offense. This principle gives no basis to distinguish between prior juvenile and adult offenses. More broadly, history shows that courts have long treated the fact of recidivism differently than other facts, in part because presenting recidivism evidence to the jury is so prejudicial to the defendant. Again, this history does not distinguish between prior juvenile and adult offenses. Finally, if reliable factfinding is the appropriate standard, juvenile proceedings meet that standard too.

STATEMENT OF AMICUS INTEREST

As Ohio's chief law officer, the Attorney General has a keen interest in the proper application of Ohio's sentencing laws. In addition, the Attorney General provides guidance to numerous local law enforcement agencies involved with both the juvenile system and the adult criminal system. Finally, the Attorney General has an interest in defending state laws against constitutional challenges like the one presented here.

STATEMENT OF THE CASE AND FACTS

Defendant Adrian L. Hand was convicted on charges of aggravated burglary, aggravated robbery, felonious assault, and a firearm specification after pleading no contest to the same. He was sentenced to an aggregate six-year prison sentence consisting of (1) concurrent three-year terms for each of the three felonies, and (2) a three-year term for the firearm specification. The trial court held that both three-year terms were mandatory and had to be served consecutively. Hand disputes the court's sentencing decision as to the first three-year term.

Ohio law requires a mandatory prison term for certain first or second degree felonies if the offender was previously convicted of a first or second degree felony or the substantial equivalent. R.C. 2929.13(F)(6). Under Ohio law, a prior juvenile delinquency counts as a prior "conviction for a violation of the law" for purposes of determining the sentence for a subsequent adult offense. R.C. 2901.08(A). Hand concedes that he was previously adjudicated delinquent for aggravated robbery as a juvenile, and that his delinquency would have been a first degree felony if committed as an adult. (App. Br. at 3.) Accordingly, Hand's three-year sentence for his current felonies is mandatory due to his prior juvenile adjudication for aggravated robbery.

Hand does not dispute that this is the proper outcome under Ohio's statutes, but argues that a jury, not the judge, should have found that he was previously adjudicated delinquent, because that factual finding of juvenile delinquency triggers the sentence enhancement under

R.C. 2929.13(F)(6). The judge's factual finding, he contends, violated the Sixth and Fourteenth Amendments as interpreted by the United States Supreme Court in *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000), as well as parallel provisions in the Ohio Constitution. Following the overwhelming majority of courts both within Ohio and in other jurisdictions, the court of common pleas and the Second District held that prior juvenile adjudications fall within *Apprendi*'s well-established exemption for prior convictions. *State v. Hand*, 2d Dist. Montgomery No. 25840, 2014-Ohio-3838 ¶¶ 6-7. That is, both courts held that the judge, rather than a jury, can decide the fact of a prior juvenile delinquency.

LAW AND ARGUMENT

Amicus Curiae's Proposition of Law:

> *Although recidivism increases the penalty for a crime, it is not an element of the offense, and so the historic practice outlined in* Apprendi v. New Jersey, *530 U.S. 466, 490 (2000), does not require the fact of recidivism, whether based on a prior juvenile delinquency or a prior adult conviction, to be presented to a jury.*

A. The vast majority of jurisdictions have recognized that *Apprendi* does not require a jury finding on the fact of a prior conviction.

The Sixth Amendment, through the Due Process Clause, requires that a jury prove each element of a crime beyond a reasonable doubt. *State v. Willan*, 2015-Ohio-1475 ¶ 13. "In *Apprendi*, the United States Supreme Court explained that the elements of a crime include not just those facts establishing guilt, but also those 'facts that expose a defendant to a punishment greater than that otherwise legally prescribed.'" *Id*. (quoting *Apprendi v. New Jersey*, 530 U.S. 466, 483 n.10 (2000)). That ruling also applies to any fact that increases the mandatory minimum sentence. *Alleyne v. United States*, 133 S.Ct. 2151, 2155 (2013). So any fact that increases the statutory mandatory minimum or maximum must be submitted to the jury. *Willan*, 2015-Ohio-1475 ¶¶ 13-14.

But *Apprendi* itself establishes an exception to this rule: a jury does *not* need to determine the fact of a prior conviction, even if that fact increases the punishment. 530 U.S. at 490 ("*Other than the fact of a prior conviction*, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury") (emphasis added); *see also Almendarez-Torres v. United States*, 523 U.S. 224, 247 (1998) (holding that the fact of a prior conviction is not an element of the offense); *In re J.V.*, 134 Ohio St. 3d 1, 2012-Ohio-4961 ¶ 6 (recognizing this exception). Even as the U.S. Supreme Court has continued to refine the *Apprendi* doctrine, this recidivism exception has remained firmly in place. *See Alleyne*, 133 S.Ct. at 2160 n.1 (recognizing recidivism exception); *Oregon v. Ice*, 555 U.S. 160, 163 (2009) (same); *Blakely v. Washington*, 542 U.S. 296, 301 (2004) (same). Proving the fact of a prior conviction increases the penalty for the current offense, but that fact is not an element of the current offense, and thus does not need to be submitted to a jury. That much is uncontroversial.

Apprendi's recidivism exception directly applies here, where Ohio enhances the penalty for certain felonies if the offender has been previously convicted of similar adult or juvenile offenses. But Hand argues that he has a right to a jury finding on the fact of his prior finding of *juvenile* delinquency despite this exception, because juveniles do not have a right to a jury trial in those juvenile proceedings. A juvenile adjudication, he suggests, has not "passed the gauntlet of procedural safeguards" "required by due process" to ensure reliable factfinding simply because it "has never been presented to a jury." (App. Br. at 1-2.) Hand argues that the proper remedy for his asserted right is for the Court to find that a juvenile delinquency "cannot be used to enhance an adult sentence" at all. (App. Br. at 2.)

Courts in Ohio and around the country have overwhelmingly disagreed with these arguments, and overwhelmingly agree that *Apprendi*'s recidivism exception encompasses prior

juvenile delinquencies. At the federal level, the First, Third, Fourth, Sixth, Seventh, Eighth, and Eleventh Circuits all agree with the State's position; only the Ninth Circuit disagrees. *See United States v. Wright*, 594 F.3d 259, 264 (4th Cir. 2010); *Welch v. United States*, 604 F.3d 408, 426 (7th Cir. 2010); *United States v. Crowell*, 493 F.3d 744, 750 (6th Cir. 2007); *United States v. Matthews*, 498 F.3d 25, 34 (1st Cir. 2007); *United States v. Burge*, 407 F.3d 1183, 1191 (11th Cir. 2005); *United States v. Jones*, 332 F.3d 688, 696 (3d Cir. 2003); *United States v. Smalley*, 294 F.3d 1030, 1033 (8th Cir. 2002); *but see United States v. Tighe*, 266 F.3d 1187 (9th Cir. 2001). Among the states, the Kansas, Indiana, and California Supreme Courts all found that the fact of a prior juvenile delinquency is exempted from *Apprendi*; only the Louisiana Supreme Court disagrees. *People v. Nyugen*, 209 P.3d 946, 950 (Cal. 2009); *Ryle v. State*, 842 N.E.2d 320, 322 (Ind. 2005); *State v. Hitt*, 42 P.3d 732, 739-40 (Kan. 2002); *but see State v. Brown*, 879 So.2d 1276, 1290 (La. 2004). And within Ohio, all appellate courts to consider the question have sided with the State. *See State v. Hand*, 2d Dist. Montgomery No. 25840, 2014-Ohio-3838; *State v. Craver*, 2d Dist. Montgomery No. 25804, 2014-Ohio-3635; *State v. Parker*, 8th Dist. Cuyahoga No. 97841, 2012-Ohio-4741.

B. *Apprendi*'s remedy could prejudice similarly situated defendants.

It is not hard to see why most courts have reached that outcome. Begin with the question of *Apprendi*'s remedy. *Apprendi* creates only a *procedural* right: It is about who decides, not about substantive limits on what facts can be used at sentencing. *Apprendi*'s remedy is to require *jury* factfinding. That remedy is useless to most defendants in Hand's position, because the fact of their prior conviction is a well-documented one as a matter of state records. Any error is harmless. In fact, a remedy under *Apprendi* would be harmful: it would constitutionally require the prosecution to present prejudicial evidence of a defendant's juvenile record to the jury.

1. Any *Apprendi* error is harmless in this case, and likely will be in most future cases as well.

As a remedy for his alleged *Apprendi* right, Hand asks the Court to find that a juvenile offense can *never* "be used to enhance an adult sentence." (App. Br. at 2.) But even if *Apprendi* applied (and it does not, as explained below), it does not provide that relief. *State v. Foster*, 109 Ohio St. 3d 1, 2006-Ohio-856 ¶¶ 88-89 (rejecting a similar request for relief), *abrogated on other grounds in Ice*, 555 U.S. 160. The *Apprendi* cases are simply about who decides particular facts—the judge or the jury. *Willan*, 2015-Ohio-1475 ¶ 14 (the "practical upshot is simpler still: '[certain] facts . . . must be submitted to the jury'") (citation omitted). This means Ohio's statute is facially constitutional no matter what the outcome because it is silent on who must decide the fact of a prior conviction. *See* R.C. 2929.13(F)(6); *Foster*, 109 Ohio St. 3d 1 ¶ 96 (remedying perceived *Apprendi* violation by striking statutory references to mandatory *judicial* factfinding). And any as-applied error arising from the trial court's perceived failure to call a jury could be corrected on remand. Even if *Apprendi* applied, Ohio's statute would still be constitutional, Hand's case would be remanded for a jury finding on the fact of his prior offense, and Hand's sentence would still be mandatory.

The same analysis shows that any alleged error is harmless. "'An *Apprendi* error is harmless where the evidence overwhelmingly establishes the facts needed to justify the sentence.'" *Willan*, 2015-Ohio-1475 ¶ 28 (citations and brackets omitted). Here, as in *Willan*, the fact at issue is "simple, and the evidence is overwhelming." *Id*. There is no doubt that Hand was found delinquent as a juvenile; Hand himself admits to it. He pleaded no contest to the current offenses (App. Br. at 3) and concedes that he was "previously adjudicated delinquent for aggravated robbery when he was a juvenile" (*id.*). He also concedes that the judge properly applied the law to that fact, agreeing that his prior aggravated robbery "would have been a felony

of the first degree" if committed as an adult. (*Id.*) So placing evidence of this conceded fact before a jury would not alter the outcome: he indisputably *was* previously adjudicated delinquent and that delinquency indisputably makes his sentence mandatory as a matter of law.

Apprendi's remedy is also unlikely to help future defendants. The only fact that would be presented to a jury is the *fact* that a defendant was previously convicted, or of the "existence of a prior conviction," as the Supreme Court put it in *Ice*. 555 U.S. at 163. That inquiry, historically, is focused simply on proving the defendant's *identity*, that is, that he is in fact the same person as the one previously convicted. *See, e.g.*, *Graham v. West Virginia*, 224 U.S. 616, 626 (1912) (quoting *Reg. v. Shuttleworth*, 3 Car. & K 375, 376) (after conviction, the jury is to "'have the previous conviction stated to them; and the certificate of it is to be put in, and the prisoner's identity proved'"). That justification for presenting recidivism evidence to a jury is not particularly compelling in an era of fingerprints, DNA, and modern record keeping. But in those rare cases where defendant's identity is an issue, the judge is more than capable of resolving it.

2. *Apprendi*'s remedy would prejudice defendants with prior "bad acts" evidence.

Not only is an *Apprendi* remedy *unhelpful* to defendants like Hand, it also would be *prejudicial*. A defendant's prior criminal and juvenile record is quintessentially "bad acts" evidence, and applying *Apprendi* would *constitutionally require* the prosecution to present that juvenile record to the jury. Both this Court and the U.S. Supreme Court have repeatedly recognized the prejudicial nature of such evidence. *State v. Allen*, 29 Ohio St. 3d 53, 55 (1987) ("The existence of a prior offense is such an inflammatory fact that ordinarily it should not be revealed to the jury unless specifically permitted under statute or rule. The undeniable effect of such information is to incite the jury to convict based on past misconduct."); *see also Old Chief v. United States*, 519 U.S. 172, 185 (1997) ("there can be no question that evidence of the name

or nature of the prior offense generally carries a risk of unfair prejudice to the defendant"); *Spencer v. Texas*, 385 U.S. 554, 560 (1967) (explaining that prior crimes evidence "is usually excluded except when it is particularly probative" of certain requirements, given its "generally recognized" potential for prejudice).

Avoiding such a prejudicial outcome for future defendants is a strong argument to not apply *Apprendi* here. *See United States v. Santiago*, 268 F.3d 151, 156 (2d Cir. 2001) (Sotomayor, J.) (noting that a proposal like Hand's "is far more likely to prejudice rather than protect defendants"). Indeed, while applying *Apprendi* here would constitutionally require evidence of prior convictions to be presented to a jury, Chief Justice Warren expressed constitutional misgivings about doing so *at all* in in cases involving recidivism enhancements. *Spencer*, 385 U.S. at 570 (Warren, J., concurring in part and dissenting in part) ("the use of prior-convictions evidence" in recidivism cases "needlessly prejudices the accused"). Hand's argument would constitutionally *require* the rule Justice Warren questioned: allowing—indeed, requiring—prosecutors to present evidence of prior juvenile offenses to the jury.

3. *Apprendi* does not provide an opportunity to challenge the constitutionality of the prior proceeding

As explained earlier, Hand seeks (and needs) a remedy that is unavailable under *Apprendi*. Underlying Hand's misconception of *Apprendi*'s remedy is a thinly veiled challenge to the constitutionality of the prior juvenile proceeding itself. After all, Hand's argument that his prior juvenile proceeding did not "pass[] the gauntlet of procedural safeguards" "required by due process" because it "has never been presented to a jury" (App. Br. at 1-2) is a challenge to *that* proceeding, not *this* one. *Apprendi* does not give Hand the right to re-open his prior juvenile proceeding and raise constitutional challenges to it now, and, even if it did and such proceedings

were inadequate, the only remedy is to present the fact of prior conviction to a jury. Besides, Hand's challenges to the reliability of his prior conviction all fail. *See infra* Part C.3.

Hand had an opportunity to litigate any concerns about his prior offense at the time of those proceedings. The recidivism enhancement here (making a discretionary sentence mandatory) is punishment for the current crime, not the prior juvenile delinquency. *State v. Adkins*, 129 Ohio St. 3d 287, 2011-Ohio-3141, ¶ 17 (explaining that a recidivism enhancement for previous juvenile adjudications does "not change [defendant's] juvenile adjudication; it merely added another type of legal violation as an aggravating offense"); *Nichols v. United States*, 511 U.S. 738, 747 (1994) (recidivism enhancements "penaliz[e] only the last offense committed by the defendant"). Recidivism enhancements cannot be "construed as additional punishment for the previous offense; rather, they act to increase a sentence 'because of the manner in which [the defendant] committed the crime of conviction.'" *Monge v. California*, 524 U.S. 721, 728 (1998) (citation omitted). Otherwise, such enhancements could create potential double jeopardy and retroactivity problems. *Adkins*, 129 Ohio St.3d 287 ¶ 15 (holding that recidivism enhancements do not create a retroactivity problem); *Monge*, 524 U.S. at 728 (no double jeopardy problem).

As a result, "[f]or much of our history, it appears that state courts altogether prohibited defendants in recidivism proceedings from challenging prior convictions as erroneous." *Parke v. Raley*, 506 U.S. 20, 32 (1992); *Graham*, 224 U.S. at 627 ("the inquiry is not into the commission of an offense . . . [t]here remains simply the question as to the fact of previous conviction"); *see also State v. Brandon*, 45 Ohio St. 3d 85, 88 (1989) ("[W]here questions arise concerning a prior conviction, a reviewing court must presume all underlying proceedings were conducted in accordance with the rules of law and a defendant must introduce evidence to the contrary in

order to establish a prima-facie showing of constitutional infirmity."). Here, Hand has not even presented a prima-facie case of constitutional infirmity (nor could he), and his reliance on *Apprendi* belies any implied attempt to do so.

One last thing. This Court recently decided a case that at first blush may seem similar, *State v. Bode*, 2015-Ohio-1519, and which did examine the constitutionality of the prior offense. *Bode* held that a prior juvenile delinquency could not be used if the adjudication "carried the possibility of confinement, the adjudication was uncounseled, and there was no effective waiver of the right to counsel." *Id*. at syl. *Bode* is very different from this case for many reasons. First, *Bode* did present a prima-facie case of constitutional error in the prior proceeding, which was in fact unconstitutional, whereas Hand does not raise that issue and his prior proceedings undoubtedly were constitutional. *See infra* Part C.3. Second, *Bode* concerned the right to counsel, not the right to a jury trial under *Apprendi*, and so dealt with different remedies. *Third*, *Bode* challenged Ohio's unusual DUI statute, R.C. 4511.19(G)(1)(d), which—unlike the statute here—expressly makes recidivism an element of the offense (*see infra* Part C.1). *State v. Brooke*, 113 Ohio St. 3d 199, 2007-Ohio-1533 ¶ 8.

C. A defendant has no right to a jury finding on his prior juvenile delinquency.

The previous section demonstrates that an *Apprendi remedy* is a bad idea for defendants like Hand. He also has no Sixth Amendment *right* to a jury finding on the fact of his prior juvenile offense. Such a right would be inconsistent with the *Apprendi* line of cases, the rationale behind that line of cases, and the history of the Anglo-American jury.

1. The scope of *Apprendi*'s recidivism exception is determined by whether a fact is an element of the offense.

The fact of prior conviction is an exception under *Apprendi* because a prior conviction is not an element of the crime charged, not because, as Hand suggests, prior proceedings are

conducted "through a proper trial by jury" (App. Br. at 5). As a matter of precedent and history, recidivism is not an element of the offense and there is no basis to consider a prior juvenile conviction to be an element of the offense. And as a matter of practice, Ohio's statute follows this tradition and does not treat Hand's juvenile delinquency as an element of the offense.

A jury determination is only required for the "element[s] of the crime with which [a defendant] is charged." *Apprendi*, 530 U.S. at 477 (quoting *United States v. Gaudin*, 515 U.S. 506, 510 (1995)); *Willan*, 2015-Ohio-1475 ¶ 13; *see also In re Winship*, 397 U.S. 358, 364 (1970). The "historical foundation" of this principle "extends down centuries into the common law." *Apprendi*, 530 U.S. at 477 (citing 2 J. Story, Commentaries on the Constitution of the United States 540-541 (4th ed. 1873); 4 W. Blackstone, Commentaries on the Laws of England 343 (1769)). This principle governs the scope of *Apprendi*'s recidivism exception: while a recidivism enhancement increases the penalty of a crime, it is not, as a matter of history and practice, an element of the crime.

As a matter of historic practice, the U.S. Supreme Court has repeated held that the fact of recidivism is not an element of the offense. *Apprendi*, 530 U.S. at 487 (describing the recidivism exception as an "exceptional departure from the historic practice" underlying *Apprendi*). "Recidivism laws 'have a long tradition in this country that dates back to colonial times' and currently are in effect in all 50 States." *Almendarez-Torres*, 523 U.S. at 243 (1998) (quoting *Parke*, 506 U.S. at 26). Corresponding to that tradition, the Supreme Court has "stressed the history of treating recidivism" differently than other facts, explaining that "with perhaps one exception Congress ha[s] never clearly made prior conviction an offense element where the offense conduct, in the absence of recidivism, was independently unlawful." *Jones v. United States*, 526 U.S. 227, 235 (1999); *Almendarez-Torres*, 523 U.S. at 243-44; *Graham*, 224 U.S. at

624 (1912). That is, there is a long tradition *both* of increasing penalties based on recidivism, and of *not* treating recidivism as an element of the offense. *Almendarez-Torres*, 523 U.S. at 243 ("the sentencing factor at issue here—recidivism—is a traditional, if not the most traditional, basis for a sentencing court's increasing an offender's sentence").

The fact of recidivism is not an element of the offense because it "goes to the punishment only, and therefore it may be subsequently decided." *Graham*, 224 U.S. at 629; *see also Almendarez-Torres*, 523 U.S. at 244 (explaining "the fact that recidivism 'does not relate to the commission of the offense'") (citation omitted). Indeed, recidivism is so far removed from the primary offense that it can be raised for the first time *after* conviction. *Oyler v. Boles*, 368 U.S. 448, 452 (1962) (citing *Graham*, 224 U.S. at 625)). When raised after conviction, "[t]here is no occasion for an indictment" because by then "the inquiry is not into the commission of an offense" at all—that inquiry is over because the fact of recidivism is not part of that inquiry. *Graham*, 224 U.S. at 627.

This background shows that *Apprendi* does not apply here, because Ohio's statute does not make a prior juvenile delinquency an element of the offense. This Court has held that "where the existence of a prior conviction enhances the penalty for a subsequent offense, but does not elevate the degree thereof, the prior conviction is not an essential element of the subsequent offense." *Allen*, 29 Ohio St. 3d at 55. Under *Allen*, the present statute is indistinguishable from prior recidivism statutes. Hand's prior juvenile offense enhances only the penalty, not the degree, of his subsequent offense, and so is not an element of that offense. *Id.* It follows that Ohio's statute falls within *Apprendi*'s recidivism exception, and a jury finding is not required.

This syllogism is a simple one. The scope of *Apprendi*'s recidivism exception is determined by whether the prior conviction or delinquency is an element of the offense. Ohio's recidivism statute follows a longstanding practice of *not* treating a prior conviction or delinquency as an element of the offense. Therefore, *Apprendi*'s recidivism exception applies, and adopting Hand's contrary argument "would mark an abrupt departure from a longstanding tradition." *Almendarez-Torres*, 523 U.S. at 244.

2. Historically, courts treated the fact of recidivism differently from other facts.

Hand's position is not only contrary to the express holding and reasoning of the Supreme Court in *Apprendi* and of this Court in *Allen*, it is also contrary to the Supreme Court's commitment to following historic practice in Sixth Amendment cases in order to safeguard the jury's traditional role. *See Ice*, 555 U.S. at 163. *Apprendi* looked to historic practice to determine whether the Sixth Amendment requires certain facts to be presented to the jury, and subsequent cases analyzing the scope of the doctrine have made clear that any extension of *Apprendi* must also be thoroughly grounded in historic practice. *See Apprendi*, 530 U.S. at 477-481, 490 (basing its holding on "our cases [and] . . . the history upon which they rely"); *see also Alleyne*, 133 S.Ct. at 2158-59 (relying on an analysis of historic practice); *Ice*, 555 U.S. at 163 ("the Court has not extended the *Apprendi* and *Blakely* line of decisions beyond . . . the historic grounding for the decisions"). A brief overview of historic approaches to recidivism evidence shows that Hand's position is not constitutionally required.

The oldest approach, taken in Britain, eventually presented the recidivism question to the jury, but not until after the jury convicted the defendant of the current offense. *Spencer*, 385 U.S. at 567. Jury trials were held in two stages, the first to determine guilt, and the second to hear recidivism evidence. *Id*. Until the second stage, even the *allegation* of recidivism was carefully hidden from the jury. *Id*. This approach is clearly at odds with applying *Apprendi* here

and presenting evidence of recidivism to the jury at trial. Indeed, the British Previous Conviction Act of 1836 made it *unlawful* for the court to prove recidivism during trial because of the risk of prejudice. *See* Archbold's Pleading and Evidence in Criminal Cases (1867) at 891. The British two-stage trial was largely abandoned in the colonies and has "never been" constitutionally compelled. *Spencer*, 385 U.S. at 568.

Another approach, challenged in *Spencer*, required proof of past conviction alongside proof of the current allegations, just as Hand suggests now. *Id*. at 567. Although the Court recognized the inherent risk of prejudice in this approach, it held that such a system was not constitutionally forbidden. *Id.* at 565-67; *but see id.* at 570, 574 (Warren, J., dissenting in part and concurring in part). But among States taking this approach, many left the factfinding to the judge instead of the jury. *See id*. at 566 & n.11 (majority op.) ("The method for determining prior convictions varies also between jurisdictions affording a jury trial on this issue . . . and those leaving that question to the court." "Texas juries have had authority to impose punishment since 1846, but in all but 11 States this power is held by the judge.").

Perhaps most illuminating is the approach upheld in *Graham*, which not only did not treat recidivism as an element of the offense, but even allowed a prosecutor to "tack on" the recidivism enhancement in an entirely separate proceeding held months after the conviction. *See Graham*, 224 U.S. at 617 (upholding recidivism enhancement imposed five months after underlying conviction). This grew out of the practical problem of identity discussed earlier: in the absence of photography, DNA, and shared records, charging prosecutors had no way of knowing that a defendant from another jurisdiction was a repeat offender. When the prosecutor found out (often once the offender entered prison and was recognized as a former convict, *id*. at 626), the court would extend the sentence. Several States took this approach. *See, e.g.*, *In re*

Ross, 19 Mass. 165 (Mass. 1824) (discussing 1817 statute); *State v. Smith*, 42 S.C.L. 460 (S.C. 1832); *Commonwealth v. Bryant*, 4 Va. 465 (Va. 1825) (applying 1819 statute).

These examples undermine Hand's argument for expanding *Apprendi* for two reasons. First, they show that the fact of a prior conviction is treated differently than other facts that increase a defendant's sentence because of the strong likelihood that such evidence will prejudice the defendant if it is presented to the jury (*see supra* Part A). This different treatment has the practical effect described in the previous section: most facts are elements of the offense; the fact of recidivism is not.

Second, the range of historic approaches shows that no one approach is constitutionally required. *See Parke*, 506 U.S. at 28 ("'Tolerance for a spectrum of state procedures dealing with [recidivism] is especially appropriate' given . . . the diversity of approaches that States have developed for addressing it.") (quoting *Spencer*, 385 U.S. at 566); *c.f. Ice*, 555 U.S. at 164 (citing the "variety of approaches" taken by the states to concurrent sentencing decisions as evidence that *Apprendi* did not apply). Many historic practices were flatly contrary to Hand's position: courts expressly prohibited the presentation of recidivism evidence to juries alongside evidence of the crime itself, left the fact of recidivism up to judges, and did not treat recidivism as an element of the crime by expressly providing for it to be decided separately. These divergent and contrary approaches to recidivism evidence undermine Hand's argument that the constitution compels his position.

3. Even if *Apprendi*'s recidivism exception is about reliable fact-finding, prior juvenile delinquencies still fall within its scope

Contrary to all of this, Hand asserts a handful of arguments that are soundly refuted by the State's merit brief and the discussion below. In general, Hand argues (along with the Ninth Circuit) that *Apprendi*'s recidivism exception is about reliable factfinding in the prior proceeding

(App. Br. at 1-2), and that prior juvenile proceedings do not satisfy due process concerns about reliability because they do not allow for a jury trial. In support of this, Hand makes several illusions to getting "the worst of both worlds" (no jury trial but an adult recidivism enhancement) and the divergent goals of the juvenile and adult justice systems. (*Id*. at 8-11.) As explained in the previous subsections, the scope of *Apprendi*'s recidivism exception is determined by historical practice, which did not treat recidivism as an element of the current offense, and did not require the fact of recidivism to be presented to a jury. But even if the exception were about reliable factfinding in the prior proceeding, Hand's prior juvenile proceeding still falls within the scope of the exception. A jury trial right is not required in juvenile proceedings, a jury is not needed to ensure reliable factfinding, and such proceedings properly consider the rehabilitative policy goals of the juvenile system.

It cannot be true, as Hand asserts, that a juvenile adjudication has not "passed the gauntlet of procedural safeguards" "required by due process" to ensure reliable factfinding *simply* because it "has never been presented to a jury." (App. Br. at 1-2.) A jury is not available in a number of different types of proceedings. *See McKeiver v. Pennsylvania*, 403 U.S. 528, 543 (1971). It should go without saying that bench trials are no less fair, accurate, and reliable than jury trials as a matter of due process. *Id*. ("We would not assert . . . that every criminal trial—or any particular trial—held before a judge alone is unfair or that a defendant may never be as fairly treated by a judge as he would be by a jury.") (quotation marks and citation omitted). For these reasons, the United States Supreme Court long ago rejected the reliability arguments that Hand now asserts. *Id*. ("one cannot say that in our legal system the jury is a necessary component of accurate factfinding"); *In re Agler*, 19 Ohio St. 2d 70, 77-78 (1969). Indeed, given the individualized process afforded by the juvenile system, Hand's juvenile proceeding arguably

produced *more* reliable factfinding. *See, e.g.*, *Ryle*, 842 N.E.2d at 322 ("the U.S. Supreme Court has rejected the claim that the Fourteenth and Sixth Amendments mandate jury trials in juvenile matters, holding that the special ideal of the juvenile courts produces fair, equitable, and reliable results") (citation omitted).

This shows why *Tighe* was wrongly decided. The Ninth Circuit held in *Tighe* that *Apprendi*'s recidivism exception was contingent on the presence of Due Process procedural safeguards in the prior proceeding. *See Tighe*, 266 F.3d at 1194; *comp. Apprendi*, 530 U.S. at 488 ("the certainty that procedural safeguards attached to any 'fact' of prior conviction" mitigates due process concerns). Even if *Tighe* read *Apprendi* correctly, it is absolutely incorrect to suggest that constitutionally reliable factfinding requires a jury trial. Rather, the "procedural safeguards" that "mitigate" due process concerns in adult proceedings are also present in the juvenile context. The "main concern" of Due Process is "whether the prior conviction's procedural safeguards ensured a reliable result, not that there had to be a right to a jury trial." *Ryle*, 842 N.E.2d at 323; *see also McKeiver*, 403 U.S. at 543. Juveniles are constitutionally guaranteed those procedural safeguards—"notice, counsel, confrontation, cross-examination, and standard of proof," *id.*—just like other defendants.

Put another way, even if Hand could re-litigate his prior offense now, there still would be no constitutional right to trial by jury, even though that offense is now used as a recidivism enhancement. *Id.* at 545; *Agler*, 19 Ohio St. 2d at 77-78 ("indictment or trial by jury are not requisite in delinquency proceedings, either as matters of constitutional guarantees or sound public policy"). There are many reasons for that conclusion; most prominently, a jury trial in juvenile proceedings would hamstring "the juvenile court's assumed ability to function in a unique manner" to advance rehabilitative goals. *McKeiver*, 403 U.S. at 547. The juvenile

system is set up to provide delinquents like Hand with the resources and incentives he needs *so that* he does not recidivate. *Id*. Despite access to those resources and incentives, Hand still chose to commit additional offenses.

This rehabilitative reason for not holding juvenile jury trials rebuts Hand's remaining arguments. First, it shows that Hand is wrong to suggest that the State has served him a "bait-and-switch" that resulted in the worst of both worlds, as if he were unfairly denied his jury right as a juvenile but then given an adult recidivism enhancement instead of a juvenile sentence. (App. Br. at 8-9.) He had no right to a jury trial as a juvenile in order to protect the preferential treatment he received, treatment aimed to make it less likely that he would recidivate as an adult. Hand nonetheless chose to commit additional offenses. So it was not a bait-and-switch: that Hand received prior preferential treatment is not an argument for additional special treatment now.

Second, it refutes Hand's suggestion that this precedent is outdated because the U.S. Supreme Court has recently "held that children are different from adults and should be treated differently." (App. Br. at 11.) *McKeiver* found no juvenile jury right precisely to protect the courts' ability to treat juveniles differently, reasoning that a jury trial would "remake the juvenile proceeding into a fully adversary [sic] process and . . . put an effective end to what has been the idealistic prospect of an intimate, informal protective proceeding." *McKeiver*, 403 U.S. at 545. Any argument for a right to a juvenile jury trial now threatens to bring about the same perverse outcome. Hand is no longer a juvenile and should not be treated like one.

CONCLUSION

For the foregoing reasons, this Court should affirm the Second District's judgment.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief of *Amicus Curiae* Ohio Attorney General Michael DeWine in Support of Appellant was served on July 28, 2015, by U.S. mail on the following:

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