

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:
	: Case No. 2014-1814
Plaintiff-Appellee,	:
	: On Appeal from the
v.	: Montgomery County Court of Appeals,
	: 2d Appellate District,
ADRIAN L. HAND, JR.,	: Case No. 25840
	:
Defendant-Appellant.	:

REPLY BRIEF OF APPELLANT ADRIAN L. HAND, JR.

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STATEMENT OF THE CASE AND FACTS

Adrian L. Hand, Jr. relies on the Statement of the Case and Facts in his merit brief.

ARGUMENT IN SUPPORT OF PROPOSITION OF LAW

The use of a prior juvenile adjudication to enhance an adult sentence violates a defendant's right to due process as guaranteed by the Fourteenth Amendment to the United States Constitution and Article I, Section 16 of the Ohio Constitution, and the right to trial by jury as guaranteed by the Sixth Amendment to the United States Constitution and Article I, Section 5 of the Ohio Constitution.

The history underlying *Apprendi v. New Jersey* and its exception for convictions is long, and the Ohio Attorney General, writing as amicus curiae, elucidates that history in detail. Amicus Brief at 14-15; *see* 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). However, the history recounted by amicus does not give proper attention to an equally important history: that of juvenile justice. The *Apprendi* prior-conviction exception developed in a time when juveniles could still be executed. *See Roper v. Simmons*, 543 U.S. 551, 578, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005). And neither the State nor amicus discuss *Gault*, *Graham*, and *Miller*, all of which helped define the modern landscape of juvenile justice. *See generally In re Gault*, 387 U.S. 1, 87 S.Ct. 1428, 18 L.Ed.2d 527 (1967); *Graham v. Florida*, 560 U.S. 48, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010); *Miller v. Alabama*, ___ U.S. ___, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012).

This omission undermines the State and amicus's position. This Court has recognized that the historical purpose of the juvenile system is critical, holding that the juvenile system has always been designed to "promote[] rehabilitation by allowing the juvenile to move into adulthood without the baggage of youthful mistakes." *In re C.P.*, 131 Ohio St.3d 513, 2012-Ohio-1446, 967 N.E.2d 729, ¶ 67. Amicus's reliance on the "traditional" treatment of prior-

conviction evidence, dating back to 1825, ignores both this Court's and the United States Supreme Court's positions on the purpose of the juvenile system, betraying a misunderstanding of how juvenile-delinquency proceedings work in the modern era.

Fundamentally, the State and amicus both fail to recognize that Mr. Hand's position is two-fold. First, the technical due-process protections that underlie the *Apprendi* exception, particularly the right to a jury, are not present for juvenile adjudications, so the *Apprendi* exception cannot apply. But second, and unexplored by the State or by amicus, there is a fundamental difference between juvenile adjudications and adult convictions, rendering the application of the *Apprendi* exception nonsensical. Juvenile adjudications are not meant to be permanent. *Gault* at 24. They are not meant to impact someone's life as an adult. *Id.* They are meant to rehabilitate, not to punish. *C.P.* at ¶ 84. They are civil proceedings, not criminal proceedings. *Schall v. Martin*, 467 U.S. 253, 263, 104 S.Ct. 2403, 81 L.Ed.2d 207 (1984); *In re Anderson*, 92 Ohio St.3d 63, 748 N.E.2d 67 (2001), syllabus. In short, because juvenile adjudications are so different from adult convictions, the due-process concepts that allow for the *Apprendi* prior-conviction exception do not allow for the same exception regarding juvenile adjudications.

Juveniles do not have the right to counsel, and both the State and amicus properly recognize that this is the result of the difference between juveniles and adults. State's Brief at 6; Amicus Brief at 19. In *McKeiver v. Pennsylvania*, the United States Supreme Court explained that requiring a jury in juvenile proceedings would wrongly emphasize the criminal aspects of a juvenile adjudication, including fact-finding, to the detriment of the individualized attention and sympathy a juvenile adjudication requires. 403 U.S. 528, 550, 91 S.Ct. 1976, 29 L.Ed.2d 647 (1971). It is not because juvenile adjudications somehow produce more reliable fact-finding, as

amicus asserts. Amicus Brief at 18. The importance of rehabilitation and individualized attention override the emphasis on fact-finding in juvenile proceedings. *See McKeiver* at 547 (reasoning that a jury might strengthen the fact-finding function of a juvenile court, but not greatly, and might work to the detriment of such proceedings instead).

It is true that reliability of the prior conviction is a traditional touchstone when considering the application of the *Apprendi* exception. State’s Brief at 7; Amicus Brief at 17. But reliability of the juvenile adjudication is only part of the picture. The State and amicus do not duly consider the unequivocal statement in *Gault* that juvenile indiscretions should be “buried in the graveyard of the forgotten past,” where they cannot affect a juvenile’s life once he has grown up. *Gault* at 24. Reliability aside, the lack of a jury in juvenile proceedings is evidence of the larger concern that animates Mr. Hand’s argument: juvenile proceedings are simply not designed with the same consequences in mind as an adult conviction.

Ohio Evidence Rule 609 demonstrates this distaste for using juvenile actions in later adult proceedings. That rule allows the State to present a defendant’s prior felony convictions against him if he testifies. Evid.R. 609. But the rule explicitly bars the use of juvenile adjudications for this purpose. Evid.R. 609(D). This mirrors the federal rule on the same subject. Fed.R.Evid. 609(D). While Ohio’s Evid.R. 609(D) includes an exception for admission under statutory provisions, this rule recognizes that juvenile adjudications are fundamentally different from adult convictions, and the application of general rules to juvenile adjudications must be undertaken carefully and with an eye toward exclusion.

Further, amicus’s assertion that any remedy would hurt Mr. Hand and defendants like him is misplaced. Amicus asserts that the remedy available to Mr. Hand is having the fact of his prior conviction put to the factfinder during his trial—evidence that might prejudice the

proceedings against him. Amicus Brief at 8. In fact, any use of Mr. Hand's prior juvenile conduct to punish him later in life would undermine the purposes of the juvenile justice system. As explained above, Evid.R. 609, a rule designed to allow for impeachment with prior convictions, disallows the use of such evidence if the acts occurred when the defendant was a juvenile. Evid.R. 609(D). Such a bar serves the goals of the juvenile-justice system and protects the due-process rights of someone accused of a crime. Mr. Hand does not seek to challenge the constitutionality of his prior juvenile proceedings, as amicus asserts. Amicus Brief at 9. He seeks to have his juvenile adjudication seen for what it is: a civil proceeding, long finished, that cannot haunt him now that he is an adult.

Finally, the State and amicus both recognize that there is a deep divide among Ohio's courts, other state courts, and federal courts as to whether juvenile adjudications fall under the *Apprendi* exception. State's Brief at 5-6; Amicus Brief at 6. However, scholarship on this subject is less divided, as explained by the dissent in the court below. *See State v. Hand*, 2d Dist. Montgomery No. 25840, 2014-Ohio-3838, ¶ 11 (Donovan, J., dissenting) (listing scholarly articles disfavoring using juvenile adjudications as adult-sentencing enhancements). Much of the case law regarding the *Apprendi* exception reflects traditional, pre-*Graham* and pre-*Miller* attitudes. But these articles reflect a more modern understanding of the juvenile-justice system. This Court has not addressed the question of whether a juvenile conviction can constitutionally be used to enhance an adult sentence after *Graham* and *Miller*. *See State v. Bode*, ___ Ohio St.3d ___, 2015-Ohio-1519, ___ N.E.2d ___ (assuming without analysis that a juvenile adjudication can enhance an adult sentence and holding that a prior juvenile adjudication must be counseled to be used for this purpose). This Court should reverse to assure that Ohio courts apply *Apprendi* in a

way that comports with the modern conception of the purposes of the juvenile-justice system and protects Ohio's youths after they become adults.

CONCLUSION

Juvenile adjudications are fundamentally different from adult convictions. In addition to the lack of due-process safeguards in juvenile proceedings, the differences between adults and juveniles have serious consequences in sentencing, as explained in *Graham* and *Miller*. The court below did not consider the recent developments in those cases in allowing juvenile adjudications to be used as convictions under *Apprendi*, and the case law upon which the appellate court relied reflects neither the current understanding of juvenile justice nor the purposes of Ohio's juvenile-justice system. This Court should reverse the decision below and remand for resentencing.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing **REPLY BRIEF OF APPELLANT ADRIAN L. HAND, JR.** was forwarded by regular U.S. Mail to Andrew T. French, Assistant Montgomery County Prosecutor, 301 W. Third Street, 5th Floor Courts Building, P.O. Box 972, Dayton, Ohio 45402; and to Eric E. Murphy, State Solicitor, Peter T. Reed, Deputy Solicitor, Ohio Attorney General, 30 East Broad Street, 17th Floor, Columbus, Ohio 43215, this 17th day of August, 2015.

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