The Use of Prior Convictions After *Apprendi*

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TABLE OF CONTENTS

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INTRODUCTION

Assume that defendant Jones has been convicted of a criminal offense or has pleaded guilty to the offense; the maximum punishment under the applicable statute is twenty years imprisonment. The prosecution argues that Jones should be subject to the possibility of an extra ten years imprisonment based on a statutory provision that enhances the maximum authorized punishment for an offender who has a prior conviction. Jones contests that he has sustained the prior conviction named by the prosecution — perhaps by claiming he is not the person who was previously convicted or that the record of conviction is inaccurate or inauthentic. Some state courts, based on state statutory or constitutional guarantees, would grant Jones the right to a jury trial on the existence of the prior conviction, with a requirement of proof beyond a reasonable doubt.[1] With respect to the federal Constitution, however, the prevailing view in the state and federal courts is that the Sixth Amendment[2] does not guarantee a jury trial on the existence of the prior conviction, nor do the Due Process Clauses of the Fifth[3] or Fourteenth Amendments[4] guarantee a standard of proof beyond a reasonable doubt on whether the defendant incurred the prior conviction.[5]

Alternatively, assume that defendant Sule has been convicted or has pleaded guilty to the same offense. The prosecution asks that Sule be subject to the same sentence enhancement, based on a prior juvenile adjudication of delinquency,[6] which the enhancement statute treats as a conviction.[7] Sule does not contest the existence of the prior delinquency

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[1] *See infra* note 115 and accompanying text.

[2] U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury. . . ."). The Supreme Court has applied the Sixth Amendment right to jury trial to state courts, stating that "[b]ecause we believe that trial by jury in criminal cases is fundamental to the American scheme of justice, we hold that the Fourteenth Amendment guarantees a right of jury trial in all criminal cases which — were they to be tried in a federal court — would come within the Sixth Amendment's guarantee." Duncan v. Louisiana, 391 U.S. 145, 149 (1968).

[3] U.S. CONST. amend. V ("No person shall be . . . deprived of life, liberty, or property, without due process of law. . . .").

[4] U.S. CONST. amend. XIV, § 1 ("nor shall any State deprive any person of life, liberty, or property, without due process of law").

[5] *See infra* notes 120-24 and accompanying text.

[6] In a juvenile court, the state may charge the juvenile with conduct that would be criminal if committed by an adult. The juvenile found to have engaged in such conduct typically is "adjudicated" rather than "found guilty" and is termed a "delinquent" rather than a "criminal." *See* LESLIE J. HARRIS & LEE E. TEITELBAUM, CHILDREN, PARENTS, AND THE LAW 317 (2002); *infra* notes 195-96 and accompanying text.

[7] For example, in the Armed Career Criminal Act, Congress has specified that juvenile

adjudication, but argues that because the juvenile tribunal did not afford a right to a jury trial, the delinquency adjudication may not be the basis of an enhancement beyond the statutory maximum for the subsequent offense. Courts have split on whether the Constitution prohibits the use of a prior juvenile delinquency adjudication in this way.[8] A similar challenge might be made by a defendant whose prior conviction was produced by a different nonjury tribunal, such as a military court or an ordinary court of law in which the defendant had no right to a jury trial because the offense was deemed "petty."[9] Moreover, a defendant who was convicted in a tribunal in a foreign country might argue that the foreign conviction may not be used to enhance a penalty beyond the statutory maximum for a subsequent offense in the United States because the foreign tribunal did not afford a jury trial or did not use the "beyond a reasonable doubt" standard for guilt.[10]

Laws that enhance the statutory maximums for underlying offenses based on prior convictions have long been common.[11] In recent years, legislatures have enacted what have been called "two-strikes" or "three-

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delinquency adjudications involving violent felonies qualify as "convictions" under the statute for purposes of sentence enhancement. 18 U.S.C. § 924(e)(2)(C) (2002). *See also* 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, 1187 nn.240-41 (2003) (detailing incidence of statutes and sentencing guidelines that treat juvenile adjudications as equivalent to convictions for sentencing enhancement purposes).

[8] *See infra* notes 209-25 and accompanying text.

[9] The Supreme Court has held that petty offenses do not fall within the ambit of the Sixth Amendment right to jury trial. *See* Lewis v. United States, 518 U.S. 322, 327-30 (1996) (holding no Sixth Amendment right to jury trial of multiple petty offenses); Duncan v. Louisiana, 391 U.S. 145, 159 (1968) (interpreting right to jury trial as covering only serious offenses, not petty ones); District of Columbia v. Clawans, 300 U.S. 617, 624 (1937) (same); Schick v. United States, 195 U.S. 65, 68-69 (1904) (same).

[10] *Cf.* United States v. Kole, 164 F.3d 164, 174 (3d Cir. 1998) (opining that prior conviction in Philippines could be used to trigger mandatory minimum for U.S. crime even though court in Philippines did not afford right to jury trial), *cert. denied*, 526 U.S. 1079 (1999).

[11] *See, e.g.*, IDAHO CODE § 37-2739(a) (Michie 2002) (increasing available penalty for second felony offender to twice allowable sentence for underlying offense); IND. CODE ANN. § 35-50-2-14(3) (West 1998 & Supp. 2003) (allowing sentence of twice maximum for underlying offense if convicted defendant has one (1) prior felony sexual offense); IOWA CODE ANN. § 901A.2(a) (West 1994 & Supp. 2003) (requiring any person with prior sexually predatory conviction to serve twice maximum sentence for underlying offense); LA. REV. STAT. ANN. § 529.1(A)(1)(a) (West 1992 & Supp. 2001) (increasing available sentence for any person with prior felony conviction to twice maximum for underlying offense); *see also* Michael G. Turner et al., *"Three Strikes and You're Out" Legislation: A National Assessment*, 59-SEP. FED. PROBATION 16, 17 (1995) (stating that repeat offender laws date back to sixteenth century England and colonial America).

strikes" statutes, imposing long prison sentences, including life imprisonment, following an offender's second or third felony conviction.[12] The Supreme Court repeatedly has approved such recidivism statutes.[13] In 2003, the Court rejected a defendant's argument that his sentence under California's three-strikes statute violated the Eighth Amendment prohibition of cruel and unusual punishment.[14]

With the stakes so high, it is important to consider the process that must attend the use of a prior conviction to enhance the statutory maximum for a subsequent offense. In determining how prior convictions may be used in this context, lower courts have focused mainly on two Supreme Court decisions: *Almendarez-Torres v. United States*[15] and *Apprendi v. New Jersey*.[16] In *Almendarez-Torres*, the Supreme Court rejected the defendant's argument that a prior conviction used to enhance a statutory maximum should be treated as an "element" of the offense, with the accompanying constitutional guarantees that the prosecution must state the element in the indictment, prove the element to a jury, and prove the element beyond a reasonable doubt.[17] Although the precise question before the Court was whether the government

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[12] *See, e.g.*, GA. CODE ANN. § 17-10-7(b)(2) (1996) (mandating life imprisonment upon second serious violent felony conviction); S.C. CODE ANN. § 17-25-45(A) (1995) (Law. Co-op. 1995) (mandating life imprisonment upon second felony conviction); WASH. REV. CODE ANN. § 9.92.090 (West 1992) (enacting first "three strikes" statute in United States); JOHN CLARK ET AL., *"THREE STRIKES AND YOU'RE OUT": A REVIEW OF STATE LEGISLATION*, U.S. DEP'T OF JUSTICE, NAT'L INSTIT. OF JUSTICE (Sept. 1997) (cataloguing that between 1993 and 1995, twenty-four states and federal government enacted "three strikes" laws); *see also* Martha Kimes, Note, *The Effect of Foreign Convictions Under American Repeat Offender Statutes: A Case Against the Use of Foreign Crimes in Determining Habitual Criminal Status*, 35 COLUM. J. TRANSNAT'L L. 503, 503-04 & nn.3-9 (1997) (citing additional statutes).

[13] *See, e.g.*, Witte v. United States, 515 U.S. 389, 400 (1995) ("In repeatedly upholding such recidivism statutes, we have rejected double jeopardy challenges because the enhanced punishment imposed for the later offense . . . [is] 'a stiffened penalty for the latest crime, which is considered to be an aggravated offense because a repetitive one.'" (quoting Gryger v. Burke, 334 U.S. 728, 732 (1948))); Rummel v. Estelle, 445 U.S. 263 (1980) (holding that state's sentencing of three-time offender to life in prison with possibility of parole did not violate Eighth and Fourteenth Amendments); Oyler v. Boles, 368 U.S. 448, 451 (1962) ("[T]he constitutionality of the practice of inflicting severer criminal penalties upon habitual offenders is no longer open to serious challenge."). *But see* Solem v. Helm, 463 U.S. 277, 279 (1983) (holding that Eighth Amendment prohibited "a life sentence without possibility of parole for a seventh nonviolent felony").

[14] Ewing v. California, 538 U.S. 11 (2003) (upholding against Eighth Amendment challenge sentence of at least 25 years imprisonment for violation of California three-strikes law, CAL. PENAL CODE ANN. § 667, when sentence-triggering criminal conduct was theft of three golf clubs priced at total of $1,197).

[15] 523 U.S. 224 (1998).

[16] 530 U.S. 466 (2000).

[17] *See infra* Part I.B.

should have stated the prior conviction in the indictment, the majority opinion contained broad language that the fact of a prior conviction is a "traditional sentencing factor" rather than an element of the offense.[18]

In *Apprendi*, the Court was concerned less with the possible distinction between sentencing factors and elements of the offense, and more with the *effect* that a fact would have on the maximum penalty facing the defendant. Addressing the procedural guarantees that attach to a fact that enhances a statutory maximum, the Court announced the general rule that: "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."[19] The *Apprendi* Court distinguished *Almendarez-Torres* as not involving the burden of proof or the right to jury trial, and it cast doubt on the continuing validity of *Almendarez-Torres*.

An extensive scholarly commentary has developed since the *Apprendi* decision,[20] some critical of *Apprendi*, some critical of *Almendarez-Torres*, and some critical of *McMillan v. Pennsylvania*,[21] a pre-*Apprendi* decision that permits judges to find by a preponderance of the evidence any sentencing facts that bear on punishment *within* a statutory maximum.[22] The Supreme Court recently reaffirmed *McMillan* in a post-*Apprendi* decision, *Harris v. United States*.[23] I have previously criticized *McMillan*, arguing that the Sixth Amendment right to jury trial applies to offense-related facts that directly affect the possible sentence.[24] My purpose in this article, however, is to use the core rationales of the Supreme Court decisions as a basis for discerning whether the reasonable doubt

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[18] *See infra* Part I.B.

[19] *Apprendi*, 530 U.S. at 490.

[20] *See, e.g.*, Stephanos Bibas, *Judicial Fact-Finding and Sentence Enhancements in a World of Guilty Pleas*, 110 YALE L.J. 1097 (2001); Joseph L. Hoffmann, Apprendi v. New Jersey: *Back to the Future?*, 38 AM. CRIM. L. REV. 255 (2001); Kyron Huigens, *Solving the* Apprendi *Puzzle*, 90 GEO. L.J. 387 (2002); Nancy J. King & Susan R. Klein, Apprendi *and Plea Bargaining*, 54 STAN. L. REV. 295 (2001); Nancy J. King & Susan R. Klein, *Essential Elements*, 54 VAND. L. REV. 1467 (2001) [hereinafter King & Klein, *Essential Elements*]; Stephen A. Saltzburg, *Due Process, History, and* Apprendi v. New Jersey, 38 AM. CRIM. L. REV. 243 (2001).

[21] 477 U.S. 79 (1986).

[22] *Id.* at 80-81.

[23] 536 U.S. 545 (2002). *Harris* reaffirmed the rule announced in *McMillan* that sentencing facts affecting a penalty within the statutory maximum need not be found by a jury or be proven beyond a reasonable doubt. *See infra* notes 50-52 and accompanying text.

[24] *See* Colleen P. Murphy, *Integrating the Constitutional Authority of Civil and Criminal Juries*, 61 GEO. WASH. L. REV. 723 (1993) [hereinafter Murphy, *Integrating Constitutional Authority*]; Colleen P. Murphy, *Jury Factfinding of Offense-Related Sentencing Facts*, 5 FED. SENT. RPT. 41 (1992).

standard and the right to jury trial apply to the use of prior convictions to enhance statutory maximums.

This article will examine two settings: first, the process for determining whether the defendant incurred the prior conviction stated by the prosecution; and second, the process that must have been afforded by the tribunal that rendered the prior judgment.[25] With respect to court determination of the existence of a prior conviction, I argue that the Constitution guarantees proof beyond a reasonable doubt and a right to jury trial. With respect to the process resulting in a prior judgment, I suggest that due process requires that the prior tribunal have afforded the reasonable doubt standard in order for the judgment to be eligible to enhance the statutory maximum for a subsequent criminal offense. This requirement would invalidate the use of foreign convictions[26] in which the tribunal employed a standard of proof that was not equivalent to the reasonable doubt standard. The requirement would also invalidate the use of civil judgments that were based on a lesser standard of proof.[27]

On the issue of whether a jury trial must have been afforded in the prior tribunal, I contend that when the conviction was produced by a military tribunal or an ordinary court of law in a petty offense case, the conviction may be used to enhance the statutory maximum for a subsequent offense. Because the Supreme Court has deemed factfinding by such nonjury tribunals reliable enough to impose punishment,[28] such factfinding should also be deemed sufficient to establish that the

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[25] *Cf.* Brief for the United States on Petition for a Writ of Certiorari, Smalley v. United States, 294 F.3d 1030 (8th Cir. 2002) (No. 02-6693):

> The issue of whether a judge may impose an enhanced term of imprisonment, based on the judge's finding at sentencing that the defendant was previously convicted of a criminal offense, encompasses two subsidiary questions. The first is whether the prior conviction may be accepted as a reliable adjudication of guilt of a criminal offense, and used to increase the current sentence, without further factual inquiry into the defendant's actual conduct that formed the basis for the earlier conviction. The second is whether the judge rather than the jury at the second proceeding may be authorized to find that the prior judgment was actually entered against the defendant, even where the effect of that finding is to impose a sentence greater than the statutory maximum that would otherwise be available.

Id. at 9-10.

[26] Throughout this article, I use the term "foreign convictions" to refer to convictions rendered in a foreign country.

[27] For example, some courts have upheld the use of civil findings that resulted in a driver's license forfeiture to enhance criminal penalties for subsequent DWI offenses. *See infra* note 181.

[28] *See infra* notes 237-39 and accompanying text.

defendant committed the prior offense for purposes of enhancing punishment for a later offense. I suggest also that when a foreign tribunal produced the conviction at issue, a jury trial need not have been afforded, although the U.S. court that sentences for the subsequent offense should determine whether the overall process in the foreign tribunal was fundamentally fair.[29] By contrast, I argue that nonjury adjudications of juvenile delinquency should not be eligible to enhance the punishment for a subsequent adult offense, because therapeutic treatment and rehabilitation, rather than punishment, are the theoretical goals of a separate juvenile justice system.[30]

This article does not address the situation of a prior conviction that is treated by the legislature to be an element of the offense, such as with a felon-in-possession-of-a-firearm statute, because the constitutional guarantees surrounding the proof of "elements" are well established.[31] Nor does this article restate criticisms of the *McMillan* doctrine that allows judges to find by a preponderance of the evidence facts (including the fact of a prior conviction) that affect sentencing within the statutory range for the underlying offense.[32] Accepting *McMillan*, reaffirmed in *Harris*, as the current law, I focus solely on the use of prior convictions that enhance statutory maximums.

The article is organized as follows: Part I discusses the relevant Supreme Court decisions and describes the jury trial and burden of proof rules that have developed in those decisions. Part II examines the constitutional guarantees for a defendant who wishes to contest the existence of a prior conviction. It demonstrates that lower courts typically have misread *Almendarez-Torres* and *Apprendi* on this matter, and it argues that both the logic of *Apprendi* and considerations distinct to the right to jury trial and the burden of proof indicate that the Constitution guarantees jury determination, beyond a reasonable doubt, of the existence of a prior conviction. Part III then turns to the process that must have been afforded in the prior tribunal in order for a judgment rendered by the prior tribunal to form the basis of a sentence

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[29] *See infra* notes 246-47 and accompanying text.

[30] *See infra* Part III.B.1.

[31] When a prior conviction is an element of an offense, the defendant has a right to a jury trial and the right to proof beyond a reasonable doubt. *See* Almendarez-Torres v. United States, 523 U.S. 224, 239 (1998) (citing Supreme Court decisions setting forth constitutional requirements that attach to "elements" of crimes).

[32] Accordingly, this article does not address the situation of a prior conviction placing the defendant in a higher sentencing range under sentencing guidelines, but still within the statutory maximum for the underlying offense.

enhancement for a subsequent offense.

I. RELEVANT SUPREME COURT DECISIONS

In a system of indeterminate sentencing in the ordinary courts of law — in which the judge has great discretion to select a sentence within a broad statutory range — a relatively clear demarcation exists between the judge's and jury's roles.[33] With respect to "serious" criminal offenses, the Constitution guarantees that the jury decides guilt or innocence at trial;[34] the judge may decide the sanction in a separate sentencing proceeding.[35] A relatively clear demarcation also exists between trial and sentencing as to the applicable standard of proof. At trial, due process requires that guilt or innocence be proven "beyond a reasonable doubt";[36] at sentencing, courts traditionally have been able to find facts without "constitutionally imposed burdens of proof."[37]

Challenging these traditional demarcations are "mandatory minimum" statutes, sentencing guidelines, and sentence enhancement statutes that affect the possible punishment for an underlying offense. Often under these statutes and guidelines, enumerated facts related to the offense or the offender control the sentence. Constitutional questions have therefore arisen as to whether such facts must be charged in the

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[33] *See, e.g.*, Feld, *supra* note 7, at 1116-19 (discussing judge's role in system of indeterminate sentencing).

[34] The Supreme Court has held that the Sixth Amendment right to jury trial applies only to "serious offenses," not to "petty offenses." *See, e.g.*, Duncan v. Louisiana, 391 U.S. 145, 159 (1968); District of Columbia v. Clawans, 300 U.S. 617, 624 (1937); Schick v. United States, 195 U.S. 65, 68-69 (1904) (stating that "there is no constitutional requirement of a jury" for petty offenses). It has created a presumption that an offense is petty if the maximum authorized term of incarceration is no greater than six months. The defendant has the burden of showing that any additional statutory penalties are so severe that the offense should be considered serious. Blanton v. North Las Vegas, 489 U.S. 538 (1989). For further discussion of the Supreme Court's doctrine on the entitlement to criminal jury trial, see Colleen P. Murphy, *The Narrowing of the Entitlement to Criminal Jury Trial*, 1997 WIS. L. REV. 133 (1997).

[35] *See, e.g.*, Williams v. New York, 337 U.S. 241, 246, 251 (1949) (noting "wide discretion" and "broad discretionary power" of sentencing judge); Feld, *supra* note 7, at 1116-19. In the sentencing history of the United States, legislatures, parole boards, and judges have exercised varying control over specific sentences. *See* MARVIN E. FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER 3-49 (1973).

[36] *See, e.g., In re* Winship, 397 U.S. 358, 364 (1970) ("[T]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.").

[37] McMillan v. Pennsylvania, 477 U.S. 85, 92 n.8 (1986); *see id.* at 91 ("Sentencing courts have traditionally heard evidence and found facts without any prescribed burden of proof at all." (citing Williams v. New York, 337 U.S. 241 (1949))).

indictment (if in federal court), the standard of proof that applies to these facts, and the extent to which jury determination of these facts is guaranteed.

This part briefly discusses the major Supreme Court cases to address these questions — *McMillan*, *Almendarez-Torres*, and *Apprendi* — with particular focus on the Court's approach to the prior conviction topic.[38] I then cull from these decisions the rules that the Supreme Court thus far has articulated pertaining to the burden of proof and the right to jury trial.

A. McMillan v. Pennsylvania

In *McMillan v. Pennsylvania*,[39] the Supreme Court first distinguished between elements of the offense and sentencing factors in deciding whether a defendant has the right to a jury trial and the right to proof beyond a reasonable doubt on a fact that bears on punishment.[40] The Court upheld the Pennsylvania Mandatory Minimum Sentencing Act, which requires a minimum sentence for defendants convicted of one of several offenses committed while in visible possession of a firearm.[41] The statute provides that after the defendant is found guilty of one of the enumerated offenses, the judge determines, by a preponderance of the evidence, whether the defendant visibly possessed a firearm.[42]

The Supreme Court faced two questions in *McMillan*: first, whether the statute violated the Due Process Clause of the Fourteenth Amendment because the state did not have to prove visible possession of a firearm beyond a reasonable doubt; and second, whether the statute deprived defendants of the Sixth Amendment right to a jury trial on the issue of visible possession. In responding to the due process challenge, the Supreme Court distinguished elements of the offense from sentencing factors and found that the state carries the burden of proof beyond a reasonable doubt only on elements of the offense.[43] The Court emphasized that the state has substantial leeway in defining the elements of a criminal offense and concluded that Pennsylvania had the prerogative to consider visible possession of a firearm to be a sentencing

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[38] For more extended treatment of the cases, see articles cited *supra* notes 20 & 24.

[39] 477 U.S. 79 (1986).

[40] *Id.* at 85-93.

[41] 42 PA. CONS. STAT. § 9712(a) (1982).

[42] *Id.* § 9712(b).

[43] *McMillan*, 477 U.S. at 87-91.

factor rather than an element of the offense.[44]

While visible possession of a firearm in *McMillan* triggered a mandatory *minimum* sentence, the Pennsylvania statute did not expose defendants who visibly possessed a firearm to a greater statutory *maximum* for the underlying offense.[45] In distinguishing some of its prior due process doctrine, the Court noted that the Pennsylvania statute did not "alter[] the maximum penalty for the crime committed."[46] Moreover, the *McMillan* Court commented that petitioners' argument that visible possession was an element of the offense would have had "at least more superficial appeal if a finding of visible possession exposed them to greater or additional punishment."[47]

The Supreme Court gave cursory treatment to the Sixth Amendment challenge, proclaiming that "there is no Sixth Amendment right to jury sentencing, even where the sentence turns on specific findings of fact."[48] The *McMillan* Court stated that because visible possession of a firearm is a sentencing factor, the jury right does not apply.[49]

Two years after the *Apprendi* decision, in *Harris v. United States*,[50] a five-justice majority reaffirmed the *McMillan* rule that a judge may find by a preponderance of the evidence sentencing factors that trigger a mandatory minimum.[51] The case involved a fact related to the commission of the underlying offense, and none of the opinions commented directly on the question of prior convictions.[52]

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[44] *Id.*

[45] *Id.* at 88.

[46] *Id.* at 87-88.

[47] *Id.* at 88.

[48] *Id.* at 93 (citing Spaziano v. Florida, 468 U.S. 447, 459 (1984)).

[49] *Id.* In holding that the Sixth Amendment does not guarantee jury determination of offense-related facts, *McMillan* is a significant extension beyond *Spaziano*, 468 U.S. 447, which upheld a state statute that permitted the judge in a capital case to override the jury's recommendation of life imprisonment and instead impose the death penalty. *Spaziano* did not address whether the jury should decide offense-related facts that are part of the larger question of the appropriate punishment to be imposed on an individual.

[50] 536 U.S. 545 (2002).

[51] In *Harris*, four members of the Court — Chief Justice Rehnquist, and Justices Kennedy, O'Connor, and Scalia — agreed that *McMillan* and *Harris* on the one hand, and *Apprendi* on the other, could be reconciled based on the distinction between imposing a mandatory minimum and enhancing a statutory maximum. *Id.* at 549-68. Justice Breyer did not agree that *Apprendi* could be distinguished from *Harris* "in terms of logic," but he concurred in the judgment because he refused to accept the ruling in *Apprendi*. *Id.* at 569-72 (Breyer, J., concurring).

[52] In an opinion for four dissenters, Justice Thomas reiterated a rule that he advocated in *Apprendi* that when a fact exposes a defendant to greater punishment than that otherwise legally prescribed, that fact is an element of a separate legal offense. *Id.* at 579 (Thomas, J.,

B. Almendarez-Torres v. United States

In *Almendarez-Torres v. United States*,[53] the Supreme Court addressed precisely the type of situation it had mentioned abstractly twelve years earlier in *McMillan*: one in which a fact found at sentencing exposed the defendant "to greater or additional punishment."[54] In *Almendarez-Torres*, the existence of a prior conviction increased the statutory maximum for the subsequent offense by eighteen years. A majority of five justices held, however, that this did not mean that the Constitution requires that the fact of a prior conviction be treated as an element of the offense that must be charged in the indictment. As in *McMillan*, the Court drew a sharp distinction between sentencing factors and elements of the offense in terms of constitutional protections.[55]

The defendant was convicted of violating a federal statute that made it illegal for a deported alien to return to the United States.[56] The maximum prison term for such a violation was two years.[57] If, however, the initial deportation was subsequent to a conviction of an aggravated felony, the maximum prison term increased to twenty years.[58] The indictment charged the defendant with illegal reentry, but it did not mention any prior convictions.[59] The defendant pleaded guilty to illegal reentry and admitted that his earlier deportation had occurred pursuant to three convictions for aggravated felonies.[60] At sentencing, the defendant argued that the prior convictions were elements of the "illegal reentry" offense, and because the convictions had not been set forth in the indictment, they could not be used to enhance his sentence.[61] The district court rejected the argument and sentenced him to a prison term of more than seven years.[62]

The Supreme Court, in an opinion authored by Justice Breyer and joined by Chief Justice Rehnquist and Justices O'Connor, Kennedy, and Thomas, found that Congress intended in the illegal reentry statute to make the fact of prior convictions a sentencing factor rather than an

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dissenting).

[53] 523 U.S. 224 (1998).

[54] *Id.* at 245.

[55] *Id.* at 239-47.

[56] 8 U.S.C. § 1326(a) (2003).

[57] *Id.*

[58] *Id.* § 1326(b)(2).

[59] *Almendarez-Torres*, 523 U.S. at 227.

[60] *Id.* at 227-28.

[61] *Id.* at 227.

[62] *Id.*

element of the offense.[63] The majority then held that the Constitution did not require that the fact be treated as an element, carrying with it the requirement of notice in the indictment.[64] The majority relied heavily on its characterization of recidivism as "a traditional, if not the most traditional, basis for a sentencing court's increasing an offender's sentence."[65] Moreover, the majority commented that "the relevant statutory provisions do not change a pre-existing definition of a well-established crime" nor is there any indication that "Congress intended to 'evade' the Constitution, either by 'presuming' guilt or 'restructuring' the elements of an offense."[66]

The Supreme Court distanced itself from its comment in *McMillan* that there would be "more superficial appeal" to treating a fact as an element of the offense if the fact exposed the defendant to greater punishment than would otherwise be authorized by statute.[67] The majority opined that "the risk of unfairness to a particular defendant is no less, and may well be greater, when a mandatory minimum sentence, rather than a permissive maximum sentence, is at issue."[68]

Despite the broad language in *Almendarez-Torres* rejecting the defendant's constitutional argument that the prior convictions be treated as elements, the precise question before the Court was only whether the convictions should have been charged in the indictment. Because the defendant had admitted his prior convictions, the *Almendarez-Torres* Court had no occasion to decide whether a defendant charged with violation of the statute might have a right to a jury determination, beyond a reasonable doubt, of whether he or she had a prior conviction as defined by the statute.[69]

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[63] *Id.* at 228-39.

[64] *Id.* at 239-47.

[65] *Id.* at 243.

[66] *Id.* at 246.

[67] *Id.* at 245.

[68] *Id.*

[69] The majority noted that because Almendarez-Torres admitted his recidivism at the time he pleaded guilty, "we express no view on whether some heightened standard of proof might apply to sentencing determinations which bear significantly on the severity of sentence." *Id.* at 248. The Court referenced *United States v. Watts*, 519 U.S. 148, 156 & n.2 (1997) (per curiam), which had "acknowledge[d] a divergence of opinion among the Circuits as to whether, in extreme circumstances, relevant conduct that would dramatically increase the sentence must be based on clear and convincing evidence." *Id.* at 156.

The dissent, authored by Justice Scalia, and joined by Justices Stevens, Souter, and Ginsburg, argued that the statute should be interpreted to make recidivism an element of the offense, so as to avoid difficult constitutional questions.[70] While purporting to refrain from passing judgment on whether the Constitution requires that recidivism under some circumstances be treated as an element of the offense, the dissent attacked the majority's constitutional analysis. Among other things, the dissent charged the majority with misreading *McMillan* by discounting that "the determinative element in our validation of the Pennsylvania statute [in *McMillan*] was the fact that it merely limited the sentencing judge's discretion within the range of penalty already available, *rather than* substantially increasing the available sentence."[71] Moreover, the dissent asserted that "there is no rational basis for *making* recidivism an exception" to a general rule that a fact that increases maximum permissible punishment must be found by a jury beyond a reasonable doubt.[72] The dissent also cited "traditional practice" in which the prosecution must prove recidivism to a jury beyond a reasonable doubt.[73]

While *Almendarez-Torres* addressed whether the Constitution requires a prior conviction, which would raise a statutory maximum, to be included in a federal indictment, subsequent Supreme Court cases have commented on whether the indictment must state other facts that would raise the statutory maximum. The Court has indicated in *Apprendi* and other decisions that if a fact (other than the fact of a prior conviction) would raise the statutory maximum for a crime, it must be charged in the indictment.[74]

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[70] *Almendarez-Torres*, 523 U.S. at 248-55, 260-71. The dissent cited the well-established principle that "[W]here a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter." *Id.* at 250 (quoting United States *ex rel.* Attorney General v. Delaware & Hudson Co., 213 U.S. 366, 408 (1909)).

[71] *Id.* at 256 (Scalia, J., dissenting).

[72] *Id.* at 257-58.

[73] *Id.* at 259-60.

[74] *See* United States v. Cotton, 535 U.S. 625, 627 (2002) ("In federal prosecutions, such facts must . . . be charged in the indictment."); Apprendi v. New Jersey, 530 U.S. 466, 476 (2000) ("[U]nder the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." (quoting Jones v. United States, 526 U.S. 237, 243 n.6 (1999))).

C. Apprendi v. New Jersey

In *Apprendi v. New Jersey*,[75] the Supreme Court considered whether a fact that increases the maximum penalty for a state crime must be determined by a jury on the basis of proof beyond a reasonable doubt. The defendant there pleaded guilty to several offenses, including a state firearm offense punishable by up to ten years in prison. The trial judge then held an evidentiary hearing to determine whether the defendant had committed the firearm offense with a racially biased purpose; a finding of such purpose would expose the defendant to an enhanced sentence of up to twenty years imprisonment under the New Jersey hate crime law.[76] The judge found, by a preponderance of the evidence, the presence of racial animus and sentenced the defendant to an enhanced term of imprisonment.[77]

The Supreme Court majority opinion, authored by Justice Stevens and joined by Justices Scalia, Souter, Thomas, and Ginsburg, invalidated the defendant's sentence, holding that the Constitution guaranteed the defendant the right to have a jury determine whether racial bias existed beyond a reasonable doubt.[78] *Apprendi* stated that its holding was "foreshadowed" by *Jones v. United States*,[79] a case decided the year before.

In *Jones*, the Supreme Court interpreted a federal carjacking statute as creating three separate offenses rather than a single offense with three possible maximum penalties.[80] The *Jones* Court explained that to construe the statute otherwise would raise constitutional doubt about whether a defendant subject to increased penalties under the statute would be denied due process and jury trial rights.[81] In a footnote, the *Jones* Court commented that its prior cases "suggest" the principle that "under the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantee of the Sixth Amendment, any fact (other than a prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt."[82]

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[75] 530 U.S. 466 (2000).

[76] *Id.* at 470.

[77] *Id.* at 470-71.

[78] *Id.* at 491-97.

[79] 526 U.S. 227 (1999), *cited in Apprendi*, 530 U.S. at 476.

[80] *Jones*, 526 U.S. at 229-39.

[81] *Id.* at 239-52.

[82] *Id.* at 243 n.6 (1999), *quoted in Apprendi*, 530 U.S. at 476.

Citing the above-quoted language from *Jones*, the Supreme Court in *Apprendi* ruled that when state statutes are involved, the Fourteenth Amendment guarantees the same rights to a defendant, with the exception of notice in the indictment.[83] Using the prefatory language "[o]ther than the fact of a prior conviction," the Court stated that the reasonable doubt and jury trial guarantees apply to "any fact that increases the penalty for a crime beyond the prescribed statutory maximum."[84]

The Court's conclusion in *Apprendi* turned largely on the notion that a fact that would raise the maximum authorized punishment exposes the defendant to an additional loss of liberty and a greater stigma than if the defendant were found only to have committed the underlying offense; thus, the procedural protections afforded the defendant on the enhancement fact should be no less than those afforded on the elements of the underlying offense.[85] The majority wrote:

> If a defendant faces punishment beyond that provided by statute when an offense is committed under certain circumstances but not others, it is obvious that both the loss of liberty and the stigma attaching to the offense are heightened; it necessarily follows that the defendant should not — at the moment the State is put to proof of those circumstances — be deprived of protections that have, until that point, unquestionably attached.[86]

Apprendi also recounted historical evidence that led the Court to characterize as a "novelty" a legislative scheme "that removes the jury from the determination of a fact that, if found, exposes the criminal defendant to a penalty *exceeding* the maximum he would receive if punished according to the facts reflected in the jury verdict alone."[87]

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[83] *Apprendi*, 530 U.S. at 476. The majority did not address the omission of an allegation of racial basis in Apprendi's indictment because the Fourteenth Amendment has not been held to incorporate against the states the Fifth Amendment right to a presentment or grand jury indictment. *Id.* at 477 n.3.

[84] *Id.* at 490. The Supreme Court extended the *Apprendi* rule to the capital context in *Ring v. Arizona*, 536 U.S. 584 (2002). Without discussing the question of prior convictions, *Ring* held that both capital and non-capital defendants "are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment." *Id.* at 589.

[85] *Apprendi*, 530 U.S. at 483-84.

[86] *Id.* at 484.

[87] *Id.* at 482-83. The Court noted the "historic link between verdict and judgment and the consistent limitation on judges' discretion to operate within the limits of the legal penalties provided." *Id.* at 482.

In reaching its holding, the *Apprendi* Court minimized the significance of a distinction between elements of the offense and sentencing factors. The Court asserted: "Despite what appears to us the clear 'elemental' nature of the factor here, the relevant inquiry is one not of form, but of effect — does the required finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict?"[88] Noting that *McMillan* indicated that serious constitutional questions would be raised if a judge could determine, by a preponderance of the evidence, a fact that altered the maximum penalty for a crime, *Apprendi* asserted that it was limiting the holding of *McMillan* to cases that did not involve the possibility of a sentence greater than "the statutory maximum for the offense established by the jury's verdict."[89] It described the distinction drawn in *McMillan* between sentencing factors and elements of the offense as "constitutionally novel and elusive,"[90] but commented that the term "sentencing factor" may appropriately label a fact that "supports a specific sentence *within the range* authorized by the jury's finding that the defendant is guilty of a particular offense."[91] This language implies approval of the *McMillan* holding that a judge may find such facts by a preponderance of the evidence. In sum, *Apprendi* indicates that, with the possible exception of the fact of a prior conviction, when a fact would raise the statutory maximum for the underlying offense, the legislature's designation of the fact as a sentencing factor is irrelevant to determining the federal constitutional guarantees that apply.

Having set forth its general rule on facts that raise a statutory maximum, the *Apprendi* majority sought to distinguish *Almendarez-Torres*.[92] It noted that recidivism is not related to the commission of the underlying offense, whereas racially biased purpose is.[93] Moreover, the majority observed that because Almendarez-Torres had admitted his prior convictions, no issues pertaining to the right to jury trial or the standard of proof were before the *Almendarez-Torres* Court.[94]

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[88] *Id.* at 494 (footnote omitted). The Court also commented that "when the term 'sentence enhancement' is used to describe an increase beyond the maximum authorized statutory sentence, it is the functional equivalent of an element of a greater offense than the one covered by the jury's guilty verdict." *Id.* at 494 n.19.

[89] *Id.* at 486-87 & 487 n.13.

[90] *Id.* at 494.

[91] *Id.* at 494 n.19.

[92] *Id.* at 496, 488. The majority described *Almendarez-Torres* as "represent[ing] at best an exceptional departure from the historic practice that we have described." *Id.* at 487.

[93] *Id.* at 495-96.

[94] *Id.* at 488.

Of particular significance to our topic is how *Apprendi* described the process afforded Almendarez-Torres in the prosecution of his prior convictions for aggravated felonies. *Apprendi* assumed a "certainty that procedural safeguards attached to any 'fact' of prior conviction" in *Almendarez-Torres*.[95] *Apprendi* commented that this "certainty," combined with the fact that Almendarez-Torres had admitted the prior convictions, "mitigated the due process concerns otherwise implicated in allowing a judge to determine a 'fact' increasing punishment beyond the maximum of the statutory range."[96] The *Apprendi* majority did not specify in this portion of the opinion the "procedural safeguards" to which it alluded. Later in the opinion, however, the majority again distinguished *Almendarez-Torres*, asserting that:

> 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 reasonable doubt*, and allowing the judge to find the required fact under a lesser standard of proof.[97]

This language suggests that an open question remains as to whether a prior conviction obtained without affording these rights may properly be used to enhance the statutory maximum for a subsequent offense.

Apprendi went beyond distinguishing *Almendarez-Torres* and directly cast doubt on the continuing validity of the decision. While noting that it "need not revisit" *Almendarez-Torres* because *Apprendi* did not involve the question of enhancement based on recidivism, the Court commented that "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."[98]

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[95] *Id.* at 488 (stating that prior convictions were "entered pursuant to proceedings with substantial procedural safeguards of their own").

[96] *Id.*

[97] *Id.* at 496 (emphasis added); *see also* Jones v. United States, 526 U.S. 227, 249 (1999) (commenting that "unlike virtually any other consideration used to enlarge the possible penalty for an offense... a prior conviction must itself have been established through procedures satisfying the fair notice, reasonable doubt, and jury trial guarantees.").

[98] *Apprendi*, 530 U.S. at 489-90; *see also id.* at 489 n.15 (referring to reasons set forth in Justice Scalia's dissent in *Almendarez-Torres* and asserting that majority opinion in *Almendarez-Torres* had "virtually ignored" the "pedigree of the pleading requirement" that an "'indictment must contain an allegation of every fact which is legally essential to the punishment to be inflicted'") (citations omitted).

The extended discussion in *Apprendi* qualifying *Almendarez-Torres* suggests that the "other than the fact of a prior conviction" language in *Apprendi* is read too broadly if interpreted to create an exception to the general rule that any fact that increases the statutory maximum is subject to the jury trial and reasonable doubt guarantees.[99] Read in context, the language seems merely to acknowledge that the issue of prior convictions was not before the *Apprendi* Court.[100]

Justice Thomas, who had joined the majority opinion in *Almendarez-Torres*, wrote a concurring opinion in *Apprendi* in which he argued that *Almendarez-Torres* and *McMillan* were wrongly decided.[101] Relying extensively on history, Justice Thomas advocated a broad rule that would treat any fact that is by law a basis for imposing or increasing punishment to be an element of the offense, with all the attendant procedural consequences.[102] Justice Scalia joined in advocating such a rule.[103] Of *Almendarez-Torres*, Justice Thomas wrote: "one of the chief errors [of the case] . . . an error to which I succumbed, was to attempt to discern whether a particular fact is traditionally (or typically) a basis for a sentencing court to increase an offender's sentence."[104] Rather than focusing on "sentencing factors," Justice Thomas asserted, a court should inquire into whether the fact (including the fact of a prior conviction) is a

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[99] Many lower courts have read the "other than the fact of a prior conviction" language to have created an exception to the general rule in *Apprendi*. *See infra* notes 120-24 and accompanying text.

[100] *See Jones*, 526 U.S. at 249 (referring to "*possible* constitutional distinctiveness" between recidivism and other facts that increase statutory maximum in distinguishing *Almendarez-Torres* from constitutional issues raised in *Jones*).

[101] *Apprendi*, 530 U.S. at 518-22.

[102] *Id.* at 499-519 (Thomas, J., concurring). Justice Thomas also cited a tradition of treating recidivism as an element of the offense. *Id.* at 501-12, 521. Justice Scalia joined Parts I and II of Justice Thomas's opinion, which discussed history and advocated a broad rule that would treat any fact that by law imposed or enhanced punishment as an element, but he did not join Part III, which directly suggested that *McMillan* and *Almendarez-Torres* were wrongly decided. *Id.* at 499.

[103] *Id.* at 499; *see also* Ring v. Arizona, 536 U.S. 584, 610 (2002) (Scalia, J., concurring) ("I believe that the fundamental meaning of the jury-trial guarantee of the Sixth Amendment is that all facts essential to imposition of the level of punishment that the defendant receives — whether the statute calls them elements of the offense, sentencing factors, or Mary Jane — must be found by the jury beyond a reasonable doubt."). Notwithstanding Justice Scalia's assertions in *Almendarez-Torres* and *Ring* that facts essential to imposition of the level of punishment should trigger the right to jury determination beyond a reasonable doubt, he joined the plurality opinion in *Harris v. United States*, 536 U.S. 545, 556-68 (2002), which reaffirmed the *McMillan* rule that a judge may find by a preponderance of the evidence a fact that triggers a mandatory minimum.

[104] *Apprendi*, 530 U.S. at 520.

basis for imposing or increasing punishment.[105]

Applying *Apprendi* two years later in a death penalty case, *Ring v. Arizona*,[106] the Supreme Court invalidated a portion of the Arizona death penalty scheme.[107] Arizona law provided that after a defendant was found guilty of first-degree murder, the trial judge, rather than the jury, would determine whether statutory aggravating factors existed that would enable imposition of the death penalty.[108] The Court held that this scheme violated the Sixth Amendment, citing *Apprendi* for the rule that defendants "are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment."[109]

Nothing in either *Apprendi* or *Ring* specifies *when* jury determination beyond a reasonable doubt of a fact that would raise the statutory maximum must occur. That is, the cases do not require that the enhancement fact be tried at the same time as the underlying offense. Thus, it would seem that legislatures or courts may provide either that the enhancement fact be tried at the same time as the underlying offense or that the enhancement fact be determined afterwards.[110] Indeed, legislatures, particularly in the death penalty context, have commonly separated the trial of the underlying offense from consideration of facts that would raise the possible punishment.[111]

The Court has granted certiorari in a case raising additional *Apprendi* issues. *Blakely v. Washington*[112] involves a state sentencing scheme that requires the existence of aggravating factors to depart upward from statutorily imposed sentencing guidelines.[113] State law permits these

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[105] *Id.* at 522-23.

[106] 536 U.S. 584.

[107] *Id.*

[108] *Id.* at 588.

[109] *Id.* at 589.

[110] *But see* Alan C. Michaels, *Trial Rights at Sentencing*, 81 N.C. L. REV. 1771, 1814 n.175 (2003) ("*Apprendi* is properly understood as forbidding certain determinations from being left to sentencing, rather than as requiring a jury at sentencing."); *id.* at 1834 n.298 ("The Court's conclusion [in *Apprendi*] was not, however, that the burden of proof beyond a reasonable doubt applies at sentencing — raising the burden of proof would not have saved the statute — but rather that the fact in question was an element of the offense that had to be proven at trial.").

[111] In death penalty cases, the Supreme Court has interpreted the Eighth Amendment to require that the class of death-eligible persons be narrowed in a predictable manner. *See, e.g.*, Stringer v. Black, 503 U.S. 222, 232-34 (1992) (citing cases). This narrowing function may be performed "at either the sentencing phase of the trial or the guilt phase." *Id.* (citing Lowenfield v. Phelps, 484 U.S. 231, 244-45 (1988)).

[112] Blakely v. Wash., 47 P.3d 149 (Wash. 2002), *cert. granted*, 72 U.S.L.W. 3280 U.S. Oct. 20, 2003) (No. 02-1632).

[113] WASH. REV. CODE § 9.94A.120(1), (2) (2000); State v. Gore, 21 P.3d 262, 276 (Wash.

aggravating factors to be found by a judge under a preponderance of the evidence standard,[114] and the defendant is arguing that this scheme violates the principles of *Apprendi*.

Under current Supreme Court doctrine, it seems safe to say that any fact (with the possible exception of the fact of a prior conviction) that raises a statutory maximum must be found by a jury, with proof beyond a reasonable doubt. Moreover, any fact that triggers a mandatory minimum may be found by a judge by a preponderance of the evidence as long as the statutory maximum for the offense remains the same. Within these rules and the rationales that produced them, the remainder of this article will address the procedural requirements for using prior convictions to raise the statutory maximum for a subsequent offense.

II. DETERMINING THE EXISTENCE OF A PRIOR CONVICTION

In light of the Supreme Court's recent decisions, it is important to consider whether a defendant is entitled under the federal Constitution to a jury trial and the reasonable doubt standard in contesting the existence of a prior conviction.[115] A defendant might contest the existence of a prior conviction by arguing that the defendant is not the person who was previously convicted or that the records of the prior conviction are inauthentic or inaccurate. Although genuine dispute about whether the defendant incurred the prior conviction claimed by the prosecution may be relatively infrequent in the domestic context, the existence of a prior conviction produced by a foreign tribunal may be subject to significant factual uncertainty.[116] For example, aliases might be

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2001).

[114] WASH. REV. CODE § 9.94A.370(2) (2000).

[115] *Cf.* IND. CODE ANN. § 35-50-2-8 (West 1998 & Supp. 2002) (providing that after convicting defendant, jury determines if state has proved beyond reasonable doubt that defendant had accumulated two prior unrelated felony convictions); MASS. GEN. LAWS ANN. Ch. 278, § 11A (West 1998) (stating that defendant "shall be entitled to a trial by jury of the issue of conviction of a prior offense, subject to all of the provisions of law governing criminal trials"); N.C. GEN. STAT. § 14-7.5 (2001) (providing that once defendant is found guilty of principal felony, issue of recidivism shall be presented to same jury); S.D. CODIFIED LAWS § 22-7-12 (Michie 1998) ("The defendant shall. . . be informed of his right to a trial by jury on the issue of whether he is the same person as alleged in the habitual criminal information."); W. VA. CODE ANN. § 61-11-19 (Michie 2000) (providing for jury determination of identity with respect to records of conviction and sentence).

[116] In many cases, the fact of a prior conviction will be not be in dispute, presumably because it is a matter of public record and identity is not at issue. *See, e.g., Almendarez-Torres*, 523 U.S. 224, 235 (1998) (referring to fact of prior conviction as "almost never contested"). Justice Scalia in *Almendarez-Torres*, however, disagreed with the majority's assertion that the facts of prior convictions are "almost never contested," citing

involved or the foreign criminal justice system may not have used methods that would confirm identity, such as fingerprinting or DNA matching.[117]

In this part, I argue that the logic of *Apprendi* extends to the proof of prior convictions; that is, a defendant has the right to proof beyond a reasonable doubt and the right to a jury trial on the existence of a prior conviction when a prior conviction would raise the statutory maximum for a subsequent offense. I also discuss the reasonable doubt standard and the right to jury trial separately, for the two guarantees have distinct rationales that would support their application to proof of a prior conviction.

A. *Applying the Logic of* Apprendi

At least one federal appellate court before *Almendarez-Torres* determined that when a prior conviction would raise the statutory maximum for a subsequent offense, the defendant has a federal constitutional right to a jury determination of whether the defendant is the same person who incurred the prior conviction.[118] After *Almendarez-Torres* and *Apprendi*, one federal appellate court, without mentioning those cases, wrote in passing of the government's "burden to prove [the defendant's] prior conviction beyond a reasonable doubt" for sentencing enhancement purposes.[119] Other courts after *Almendarez-Torres* and *Apprendi*, however, have held that the Constitution does not guarantee that a jury determine whether the defendant was previously convicted or that the prior conviction be proven beyond a reasonable doubt.[120] These

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prosecutions of unlawful entry into the United States as contexts when prior foreign convictions often might be contested. *Id.* at 268-69 (Scalia, J., dissenting).

[117] *See, e.g., id.* (Scalia J, dissenting) (discussing problem of identifying illegal alien felons who may have used aliases).

[118] Carroll v. Boles, 347 F.2d 96, 98 (4th Cir. 1965).

[119] United States v. Acosta, 287 F.3d 1034, 1038 (11th Cir. 2002), *cert. denied*, 537 U.S. 926 (2002) (involving sentencing enhancement under 28 U.S.C. § 841(b)(1)(A) (2002)).

[120] *See, e.g.*, United States v. Aparco-Centeno, 280 F.3d 1084 (6th Cir. 2002), *cert. denied*, 536 U.S. 948 (2002) (holding that prior conviction used to enhance sentence need not be proven beyond reasonable doubt); United States v. Davis, 260 F.3d 965 (8th Cir. 2001), *cert. denied*, 534 U.S. 1107 (2002) (concluding it was proper that judge find according to preponderance of evidence that defendant had prior convictions); People v. Epps, 18 P.3d 2, 3 (Cal. 2001) (stating that "[t]he right, if any, to a jury trial of prior conviction allegations derives from [state law] not from the state or federal Constitution" and citing *Apprendi*); People v. Garcia, 132 Cal. Rptr. 2d 694 (Cal. Ct. App. 2003) (holding that defendant had no constitutional right to jury determination of whether defendant had been previously convicted); People v. Belmares, 130 Cal. Rptr. 2d 400, 406 (Cal. Ct. App. 2003) (stating that defendant "had no constitutional right to a jury trial on his identity as the person" named

lower court opinions often contain fleeting recitations of the "other than the fact of a prior conviction" language in *Apprendi*.[121] As suggested earlier, the surrounding discussion in *Apprendi* indicates that this language did not necessarily carve out an exception to the general rule on facts that raise a statutory maximum.[122] Moreover, the lower court cases commonly assert that requiring jury trial or proof beyond a reasonable doubt would contradict *Almendarez-Torres*. The lower courts either infer that *Almendarez-Torres* covered the burden of proof and jury trial issues,[123] or they specifically (and mistakenly) characterize *Almendarez-Torres* as having *held* that a prior conviction need not be determined by a jury nor proven beyond a reasonable doubt.[124]

Contrary to the assumptions of these lower courts, neither *Almendarez-Torres* nor *Apprendi* answered whether the Constitution requires a jury trial and proof beyond a reasonable doubt on the existence of a prior conviction. Recall that *Almendarez-Torres* involved a defendant who pleaded guilty to the underlying offense and who admitted his prior convictions. Thus, the case did not address the situation presented in these lower court decisions of a defendant contesting the existence of a prior conviction. *Almendarez-Torres* did not have occasion to address the burden of proof and the right to jury trial — the Court had before it only whether the prior convictions should have been charged in the indictment.

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in packet of certified prison records); People v. Smith, 788 N.E.2d 1204 (Ill. App. Ct. 2003) (holding that defendant did not have right to trial by jury on existence of prior conviction); State v. Wheeler, 34 P.3d 799 (Wash. 2001), *cert. denied*, 535 U.S. 996 (2002) (concluding that state was not required to prove defendant's recidivism to jury beyond reasonable doubt).

[121] *See, e.g.*, *Aparco-Centeno*, 280 F.3d at 1088; *Davis*, 260 F.3d at 969; *Belmares*, 130 Cal. Rptr. at 406; *Smith*, 788 N.E.2d at 1207; *Wheeler*, 34 P.3d at 802.

[122] *See supra* notes 92-100 and accompanying text.

[123] *See, e.g.*, United States v. Pacheco-Zepeda, 234 F.3d 411, 414 (9th Cir. 2001), *cert. denied*, 532 U.S. 966 (2001) ("*Almendarez-Torres* is dispositive here. The district court was entitled to consider any prior aggravated felony convictions . . . even though such conduct had not been charged in the indictment, presented to a jury, and proved beyond a reasonable doubt."); United States v. Salery, 119 F. Supp. 2d 1268, 1273 (M.D. Ala. 2000) (rejecting defendant's argument that prior felony drug convictions should have been submitted to jury because "the court is bound by Supreme Court precedent.").

[124] *See, e.g.*, United States v. Arellano-Rivera, 244 F.3d 1119, 1122 (9th Cir. 2001), *cert. denied*, 535 U.S. 976 (2002) (characterizing *Almendarez-Torres* as holding "that prior convictions need not be proven beyond a reasonable doubt"); United States v. Brough, 243 F.3d 1078, 1081 (7th Cir. 2001), *cert. denied*, 534 U.S. 889 (2001) (stating that *Apprendi* did "not overrule the holding of [*Almendarez-Torres*] that penalty enhancements based on recidivism need not be established beyond a reasonable doubt").

Jones and *Apprendi* both read *Almendarez-Torres* as confined to the question of indictment.[125] In *Jones*, the Supreme Court stated that *Almendarez-Torres* was "not dispositive" of the constitutional questions discussed in *Jones*, in part because "we are concerned with the Sixth Amendment right to jury trial and not alone the rights to indictment and notice as claimed by Almendarez-Torres."[126] *Apprendi* stated that "no question concerning the right to a jury trial or the standard of proof that would apply to a contested issue of fact was before the Court" in *Almendarez-Torres*.[127] Thus, it is incorrect for courts to assume that *Almendarez-Torres*, *Jones*, or *Apprendi* directly address whether a defendant contesting the existence of a prior conviction is entitled to a jury determination or to proof beyond a reasonable doubt.

Although it has not confronted whether the jury right and the reasonable doubt standard apply to the fact of a prior conviction that would raise a statutory maximum, the Supreme Court has specified some procedural rights that the Constitution guarantees a defendant with respect to allegations of recidivism. The Court has indicated that the Due Process Clauses guarantee notice and an opportunity to be heard on whether the defendant sustained a prior conviction.[128] It has also held that a defendant has the right to counsel on an habitual criminal charge.[129] Elaborating on these guarantees, the Court has stated: "Due process, in other words, requires that [the defendant] be present with counsel, have an opportunity to be heard, be confronted with witnesses against him, have the right to cross-examine, and to offer

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[125] *See* Apprendi v. New Jersey, 530 U.S. 466, 488 (2000) (noting that "the specific question decided in [*Almendarez-Torres*] concerned the sufficiency of indictment."); Jones v. United States, 526 U.S. 227, 248 (1999) (stating that "the precise holding" of *Almendarez-Torres* was that "recidivism increasing the maximum penalty" need not be charged in the indictment). *But see* Almendarez-Torres v. United States, 523 U.S. 224, 269 (1998) (Scalia, J., dissenting) (describing import of majority decision as "taking [the factual issue of a prior conviction] away from the jury in all cases").

[126] *Jones*, 526 U.S. at 248-49; *see also id.* at 249 (stating that "*Almendarez-Torres* cannot... be read to resolve the due process and Sixth Amendment questions" that would be raised if federal carjacking statute were not interpreted to provide for three separate offenses).

[127] *Apprendi*, 530 U.S. at 488.

[128] Oyler v. Boles, 368 U.S. 448, 452 (1962) (holding that due process did not require that notice of recidivism charge be given prior to trial on substantive offense when recidivism charge would be tried separately, but stating that "[n]evertheless, a defendant must receive reasonable notice and an opportunity to be heard relative to the recidivist charge."); *cf.* Specht v. Patterson, 386 U.S. 605, 610 (1967) (citing Supreme Court cases indicating that defendant must receive reasonable notice and opportunity to be heard on recidivism issue).

[129] *See* Chewning v. Cunningham, 368 U.S. 443 (1962); Reynolds v. Cochran, 365 U.S. 525 (1961); Chandler v. Fretag, 348 U.S. 3 (1954).

evidence of his own."[130] Let us now consider whether the reasonable doubt standard and the right to jury trial also apply.

Focusing on the rationale for the *Apprendi* holding suggests that there is much to support the principle that any fact (*including* the fact of a prior conviction) that enhances a sentence beyond a statutory maximum must be submitted to a jury and proven beyond a reasonable doubt.[131] In *Apprendi*, it was the additional loss of liberty and greater stigma presented by an increase beyond the statutory maximum that triggered the rights to proof beyond a reasonable doubt and to a jury determination of the disputed fact.[132] A prior conviction that permits a sentence beyond the statutory maximum for the underlying offense threatens the same consequences.[133] Thus, the concerns about liberty and stigma offered to justify the *Apprendi* holding apply whether the contested fact involves conduct related to the underlying offense or involves whether the defendant sustained a prior conviction.

In addition, *Apprendi* emphasized that "at the moment that the State is put to proof of those circumstances" that would expose the defendant to a greater loss of liberty and heightened stigma, the defendant should not "be deprived of protections that have, until that point, unquestionably attached."[134] This concern about denying the defendant a right to jury determination of a fact beyond a reasonable doubt at a time when additional punishment is threatened seems to apply equally when the "circumstance" is that of a prior conviction. Based on the logic of *Apprendi*, the defendant should be afforded the right to a jury trial on the existence of a prior conviction, and that prior conviction should be proven beyond a reasonable doubt.[135] The majority in *Apprendi* perhaps

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[130] *Specht*, 386 U.S. at 610.

[131] *Cf.* King & Klein, *Essential Elements*, *supra* note 20, at 1479-80 (commenting that one way to reconcile *Apprendi* with *Almendarez-Torres* is for Supreme Court to "conclude that when a prior conviction triggers a higher maximum sentence, an accused has the right to insist that the government prove the prior offense beyond a reasonable doubt to a jury, but no right to insist that the prior offense be alleged in the original indictment. In other words, the Court could interpret the Constitution to require the government to treat recidivism as an element for some purposes (jury and burden of proof) but not others (indictment).").

[132] *See supra* notes 85-86 and accompanying text.

[133] A defendant faces an additional loss of liberty when a prior conviction would trigger enhanced punishment for the subsequent offense. Moreover, the stigma attaching to the subsequent offense is heightened. *See, e.g.*, Witte v. United States, 515 U.S. 389, 400 (1985) (characterizing subsequent offense as "'an aggravated offense because a repetitive one'" (citation omitted)).

[134] Apprendi v. New Jersey, 530 U.S. 466, 484 (2000).

[135] If the existence of a prior conviction must be submitted to a jury and proven beyond

hinted at such when it stated that "it is arguable ... that a logical application of our reasoning today should apply if the recidivist issue were contested."[136]

Of course, the reasoning in *Apprendi* arose in the context of a disputed fact that was related to the underlying offense. The question thus is whether the fact of a prior conviction is so different from an offense-related fact that the logic of *Apprendi* should not apply. The majority in *Almendarez-Torres* suggested that recidivism historically has been treated differently in terms of procedures, but the dissent in *Almendarez-Torres* and Justice Thomas's opinion in *Apprendi* contested that assertion.[137]

One might argue that an offense-related fact and the fact of a prior conviction differ substantially because of the amount of process that has already attached to each fact. With respect to a prior conviction, the defendant was afforded substantial process in the case that produced the conviction — in a U.S. tribunal, the government would have had the duty to prove the offense beyond a reasonable doubt, and the defendant may also have had a right to jury trial. With respect to a fact that is related to the offense for which the defendant is now being prosecuted,

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a reasonable doubt, a further question might arise. Must the jury determine whether the prior conviction "counts" under the governing statute? Consider the federal Armed Career Criminal Act (ACCA), which enhances penalties based on three prior convictions for a "violent felony" or a "serious drug offense" that were "committed on occasions different from one another." 18 U.S.C. § 924(e)(1) (2000 & Supp. 2003). After *Apprendi*, some defendants have challenged their sentences under the Act because a jury did not determine whether the prior convictions involved a "violent" felony or whether the prior convictions were for offenses committed on different occasions. *See, e.g.*, United States v. Richardson, 313 F.3d 121, 126-27 (3d Cir. 2002) (not reaching question whether judge or jury should determine whether defendant's juvenile adjudication was violent felony for purposes of ACCA); United States v. Morris, 293 F.3d 1010, 1011-13 (7th Cir. 2002), *cert. denied*, 537 U.S. 987 (2002) (relying on *Almendarez-Torres* in rejecting defendant's argument that sentence enhancement violated *Apprendi* because jury was never presented with issue of whether convictions were "committed on occasions different from one another" under ACCA).

The courts consistently have treated as questions of law whether a felony was violent or whether certain offenses were committed on different occasions. *See, e.g.*, Taylor v. United States, 495 U.S. 575, 602 (1990) (stating that in determining whether prior felony is violent under section 924(e)(B)(ii), sentencing court should "look only to the fact of conviction and the statutory definition of the prior offense"); United States v. Wilkerson, 286 F.3d 1324, 1325 (11th Cir. 2002), *cert. denied*, 537 U.S. 892 (2002) (characterizing trial judge's determination of whether felony was "violent" as question of law to be reviewed de novo); United States v. Phillips, 149 F.3d. 1026, 1030 (9th Cir. 1998), *cert. denied*, 526 U.S. 1052 (1999) (characterizing trial judge's determination of whether offenses were committed on different occasions as question of law to be determined de novo). If appropriately characterized as questions of law, these questions would not implicate the burden of proof or the jury's constitutional province.

[136] *Apprendi*, 530 U.S. at 489.

[137] *See supra* note 73 and accompanying text.

however, the defendant has not yet received this kind of process. One might read the "other than the fact of a prior conviction" language in *Apprendi* as implicitly recognizing this difference. The offense-related fact that increases a statutory maximum must be proven beyond a reasonable doubt, and the defendant has the right to a jury determination of that fact; in contrast, the prior conviction that increases a statutory maximum may be determined by a judge by a preponderance of the evidence because the defendant already received substantial process resulting in the prior conviction. Such a reading of *Apprendi*, however, does not contradict the proposition advocated here — that the reasonable doubt and jury trial guarantees should apply to the factual question of *whether the defendant incurred the prior conviction* alleged by the prosecution. This factual question does not contemplate reconsideration of whether the defendant should have been previously convicted.

In both historical and contemporary practice, many recidivist statutes that enhance statutory maximums have treated the fact of a prior conviction as equivalent to an offense-related fact in terms of the procedures afforded; these statutes lend support to the notion that an offense-related fact and the fact of a prior conviction are similar enough in their impact on the defendant to warrant the same procedural guarantees.[138] Moreover, when possible enhancement of a statutory maximum is *not* involved — for example, when the defendant faces a mandatory minimum within the statutory range for the underlying offense — factfinding by a judge by a preponderance of the evidence is constitutionally adequate under *McMillan* and *Harris* for both prior convictions and facts related to the offense.[139] Thus, it is not obvious that proof of a prior conviction is so different from proof of an offense-related fact that the rationale of *Apprendi* should be inapplicable.

As described earlier, *Apprendi* cast doubt on the continuing validity of the *Almendarez-Torres* holding that a prior conviction need not be alleged in the indictment in order for the prior conviction to serve as a sentence enhancement.[140] Even assuming that *Almendarez-Torres* survives *Apprendi*, its holding is reconcilable with the suggestion here that a defendant is entitled to contest the existence of a prior conviction before

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[138] *See supra* note 115.

[139] The Supreme Court has acknowledged "a divergence of opinion among the Circuits as to whether, in extreme circumstances, relevant conduct that would dramatically increase the sentence must be based on clear and convincing evidence," but it has not resolved the issue. United States v. Watts, 519 U.S. 148, 156 (1997).

[140] *See supra* note 98.

a jury that must find proof beyond a reasonable doubt. The defendant arguably does not need notice in the indictment of the fact of a prior conviction.[141] If the defendant has indeed sustained a prior conviction, defense counsel should make the defendant aware of the possibility of enhancement of penalties under the governing law. Moreover, at some point, as the Supreme Court has held, due process requires that the prosecution give the defendant "reasonable notice" of its intention to seek a penalty enhancement based on a prior conviction.[142] Due process also guarantees that the defendant must have an opportunity to be heard on the existence of the prior conviction.[143] For the defendant who contends that he or she is not the person previously convicted, or who otherwise wishes to contest the fact of the prior conviction, this "opportunity to be heard" could include the right to jury determination of the contested fact and the right to have the fact proven beyond a reasonable doubt. The factfinding could occur after conviction or after a plea of guilty.[144]

Although *Apprendi* linked the reasonable doubt and jury trial guarantees, in many circumstances, the two are not coextensive. The right to criminal jury trial may exist with respect to a fact that need only be proven by a preponderance of the evidence (such as with a defendant's burden of proof on the affirmative defense of insanity).[145] Conversely, the reasonable doubt standard may apply even though no

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[141] *Cf.* Brief for the United States as Amicus Curiae at 10-11, Smalley v. United States, 294 F.3d 1030 (8th Cir. 2002) (No. 02-6693) ("Principles of notice and fundamental fairness do not require that prior convictions be alleged in the indictment or found by a jury in order for the defendant to be sentenced to a longer term as a recidivist. A defendant cannot claim surprise concerning the fact of a prior conviction, because he previously underwent the criminal process that led to the judgment.").

[142] *See supra* note 128 and accompanying text.

[143] *See id.*

[144] It is common for the fact of a prior conviction to be determined by a jury after a finding of guilt on the subsequent offense. *See, e.g.*, IND. CODE ANN. § 35-50-2-8 (West 1998 & Supp. 2002) (providing that after convicting defendant, jury determines if state has proved beyond reasonable doubt that defendant had accumulated two prior unrelated felony convictions); N.C. GEN. STAT. § 14-7.5 (2001) (providing that once defendant is found guilty of principal felony, issue of recidivism shall be presented to same jury); Spencer v. Texas, 385 U.S. 554, 567 (1967) (describing English rule, under which indictment alleges both substantive offense and prior conviction, but jury is not charged on prior conviction until after it convicts defendant of substantive offense); *see also* Almendarez-Torres v. United States, 523 U.S. 224, 268-69 (1998) (Scalia, J., dissenting) ("I doubt whether 'infection' of the jury with knowledge of the prior crime is a serious problem.... If it is a problem, however, there are legislative and even judicial means for dealing with it....").

[145] *See* Patterson v. New York, 432 U.S. 197, 206 (1977) ("[O]nce the facts constituting a crime are established beyond a reasonable doubt ... the State may refuse to sustain the affirmative defense of insanity unless demonstrated by a preponderance of the evidence.").

right to jury trial exists (such as in a juvenile court proceeding, the trial of a petty offense in an ordinary court of law, or the trial of a criminal offense in a military court). Thus, in the next two sections, I discuss considerations that are distinct to the burden of proof and the right to jury trial.

B. Considerations Distinct to the Burden of Proof

With respect to the burden of proof that should apply to the existence of a prior conviction, it is instructive to consider some of the Supreme Court's statements on due process and the reasonable doubt standard. The Court has stated that "the [reasonable doubt] standard symbolizes the significance that our society attaches to the criminal sanction and thus to liberty itself."[146] The Court has written of the "transcending value" that a criminal defendant has in his liberty and has asserted that the "margin of error is reduced" by using proof beyond a reasonable doubt.[147] Further, the Court has commented that: "[Use] of the reasonable-doubt standard is indispensable to command the respect and confidence of the community in application of the criminal law. It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned."[148]

The *McMillan* Court, in finding that a sentencing factor triggering a mandatory minimum could be determined by a preponderance of the evidence, distinguished this line of authority. *McMillan* noted that sentencing takes place only after the defendant has been found guilty

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[146] Jackson v. Virginia, 443 U.S. 307, 315 (1979) (citing *In re* Winship, 397 U.S. 358, 372 (1970) (Harlan, J., concurring)).

[147] Speiser v. Randall, 357 U.S. 513, 525-26 (1958) ("Where one party has at stake an interest of transcending value — as a criminal defendant his liberty — this margin of error is reduced as to him by the process of placing on the other party the burden of . . . persuading the factfinder at the conclusion of the trial of his guilt beyond a reasonable doubt."); *see also* Addington v. Texas, 441 U.S. 418, 423-24 (1979) ("In a criminal case . . . the interests of the defendant are of such magnitude that historically and without any explicit constitutional requirement they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment. In the administration of criminal justice, our society imposes almost the entire risk of error upon itself. This is accomplished by requiring under the Due Process Clause that the state prove the guilt of an accused beyond a reasonable doubt.").

[148] *Winship*, 397 U.S. 358, 364 (1970); *see also id.* at 370 (Harlan, J., concurring) (asserting that function of standard of proof is to "instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication").

beyond a reasonable doubt.[149] Upon a conviction, the defendant "has been constitutionally deprived of his liberty to the extent that the State may confine him."[150] This reasoning in *McMillan* is inapplicable, however, when a fact would enhance the defendant's possible punishment beyond the statutory maximum for the underlying offense. In such a circumstance, a finding of guilt beyond a reasonable doubt of the underlying offense would not alone authorize the deprivation of liberty sought by the prosecution.

Based on the Supreme Court's many statements about the constitutional need for proof beyond a reasonable doubt because of what is at stake for the defendant and for society, the existence of a prior conviction that would raise a statutory maximum should be found beyond a reasonable doubt. This proposition can be reconciled with *McMillan* and *Harris*. In those cases, the defendant was not exposed to the possibility of imprisonment beyond the statutory maximum. When a factfinder finds the defendant guilty of an offense beyond a reasonable doubt, the defendant becomes exposed to a loss of liberty up to the statutory maximum. A lesser standard of proof arguably is adequate to protect the interests of the defendant and of society in proper sentencing within the statutory limit. But when the defendant is subject to additional punishment, society should not be "in doubt" as to whether the defendant indeed sustained a prior conviction. Nor should the defendant be subject to the significant "margin of error" inherent in the preponderance of the evidence standard.

In most cases, requiring proof beyond a reasonable doubt of the existence of a prior conviction should not be more onerous than proof by a preponderance of the evidence. The facts often will be clear from the paper record and, if necessary, from scientific means of identifying the defendant as the same person who incurred the prior conviction (such as fingerprinting or DNA matching). In this respect, proof of a prior conviction differs from proof of enhancement facts that depend on testimony. The reasonable doubt standard applied to the fact of a prior conviction would reduce the risk of an erroneous deprivation of liberty without unduly burdening the prosecution.

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[149] McMillan v. Pennsylvania, 477 U.S. 85, 86 (1986).

[150] *Id.* at 92 n.8 (quoting Meachum v. Fano, 427 U.S. 215, 224 (1976)); *see also id.* at 83.

C. Considerations Distinct to the Right to Jury Trial

Even if one were to assume that the reasonable doubt standard need not apply to proof of the existence of a prior conviction, considerations beyond the liberty and stigma rationale of *Apprendi* support the right to have a jury determine whether the defendant incurred a prior conviction that would raise the statutory maximum for a subsequent offense. Apparent in the language of *Apprendi* itself is an isolated focus on the jury right. Recall that the Court remarked on "the novelty" of removing from the jury the determination of a fact that would expose the defendant to a penalty higher than that which would have been possible based on the verdict alone.[151] The backdrop to that comment was the Court's assertion that history demonstrated a strong link between jury verdict and judgment.[152]

Another consideration pertains to the core questions that juries historically have entertained — what happened and who did it? The question of whether the defendant is the "person who did it" is a core question often present in both civil and criminal cases.[153] For example, in a tort suit for damages, the litigants have a constitutional right to have a jury determine whether the defendant is indeed the person who committed the tort.[154] The standard of proof, of course, is a preponderance of the evidence. It seems anomalous that the core question of whether the defendant is the "person who did it" — i.e., the person who incurred the prior conviction — would be beyond the scope of the jury trial right in the criminal context simply because a prior conviction is labeled a traditional sentencing factor.[155] The concerns about government oppression that motivated the Framers to enshrine a right to criminal jury trial are as present when the question is whether

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[151] Apprendi v. New Jersey, 530 U.S. 466, 482-83 (2000); *see supra* note 87 and accompanying text.

[152] *Apprendi*, 530 U.S. at 478-84.

[153] *See, e.g.*, Almendarez-Torres v. United States, 523 U.S. 266, 268 (1998) (Scalia, J., dissenting) (claiming that Court's assertion that fact of prior conviction is "almost never contested" is erroneous, particularly in unlawful-entry cases where issues of identity are common).

[154] In a suit seeking purely equitable relief, typically an injunction, the Seventh Amendment does not guarantee a right to jury trial. *See* Granfinanciera v. Nordberg, 492 U.S. 33, 42 (1989) (noting that only "legal" actions are jury triable of right under Seventh Amendment).

[155] Perhaps because the question of "who did it" is one that seems to be at the core of the jury's functions, many states have juries, not judges, determine whether the defendant incurred a prior conviction for purposes of sentencing enhancement. *See supra* note 115 and accompanying text.

the defendant suffered a prior conviction as when the question is whether the defendant committed the offense for which he or she has been charged.[156] The question of proper identity would seem to be at the core of the jury's functions of factfinding and protecting against governmental overreaching.

This line of reasoning seemingly would apply with equal force whether the existence of the prior conviction would raise a statutory maximum or would trigger a mandatory minimum within a statutory range.[157] Accordingly, perhaps one of the rules of *McMillan* and *Harris* — that the Sixth Amendment does not guarantee jury determination of facts bearing on sentence when those facts would trigger a mandatory minimum but not raise the statutory maximum for an offense — should be modified so as to exclude the fact of a prior conviction. However, one might argue that when a defendant's sentence for a subsequent offense may be enhanced *within* a statutory range based on a prior conviction, the jury's functions of factfinding and protecting against governmental overreaching will have already been afforded the defendant. Whether the defendant pleaded guilty or opted for a jury trial and was convicted, the judgment will have exposed the defendant to a potential sentence at the statutory maximum for the offense.[158] Nevertheless, the argument remains that the jury right should extend to determining the existence of a prior conviction when that fact would *raise* a statutory maximum.

Granting a right to jury trial on the existence of a prior conviction arguably will produce inefficiency in the system and the possibility of nullification.[159] With documentary evidence (records of conviction, fingerprints, etc.), genuine factual disputes about the existence of a prior conviction will be more the exception than the rule. Nonetheless, several states with recidivist statutes grant the right to jury trial on the existence

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[156] *Cf.* Oyler v. Boles, 368 U.S. 448, 461 (1962) (Douglas, J., dissenting) ("The charge of being an habitual offender is as effectively refuted by proof that there was no prior conviction . . . as by proof that the accused is not the person charged with the new offense.").

[157] As noted earlier, several states confer statutory rights to jury determination of the existence of a prior conviction, even when the prior conviction would enhance the sentence within the statutory maximum. *See supra* note 115 and accompanying text.

[158] Formal sentencing guidelines, however, may alter the notion that a verdict or plea of guilty exposes the defendant to punishment at the statutory maximum for the offense.

[159] *See, e.g.*, People v. Epps, 18 P.3d 2, 4 (Cal. 2001) (referencing statute that withdrew from jury question of whether defendant was person who had incurred prior conviction and describing supporters of statute as asserting that "evidence on [identity] was generally conclusive, and the trial court could expeditiously try the issue without a jury" and that "jury trials of [the existence of a prior conviction] were burdensome and expensive for the court system, as well as aggravating for jurors.").

of a prior conviction.[160] These states thus have made the judgment that the possibility of inefficiency or nullification is outweighed by the benefits of jury trial. California presents a counterexample. Three years after California passed its "three-strikes" law, the legislature revised a preexisting statute that granted a right to jury trial on the existence of a prior conviction. Under the revised statute, the judge, not the jury, generally is to decide the question of identity — i.e., whether the defendant is the person who suffered the prior conviction.[161] Any other issues pertaining to whether the defendant sustained a prior conviction (such as the authenticity or accuracy of conviction records) are left for the jury.[162] The legislative history of the amendment expressly indicated that saving court time was the reason for permitting the judge to decide the question of identity.[163]

Concerns about the possible inefficiency of jury trial on the existence of a prior conviction may be mitigated by the reality that many defendants will waive their jury right as part of a deal with the prosecution or so as not to predispose the sentencing judge unfavorably.[164] Moreover, trials that do occur on the existence of prior convictions typically will be short.[165] The prosecution will introduce

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[160] *See supra* note 115 and accompanying text.

[161] CAL. PENAL. CODE § 1025(c) (West 2003). The statute makes exceptions if the prior conviction is alleged in order to determine the existence of special circumstances in a murder conviction or if the prior conviction is alleged as an element of a charged prior offense. *Id.* § 1025(d).

[162] *Id.* § 1025(b) & (c); *Epps*, 18 P.3d at 2 (holding that amended statutes governing trial of prior conviction allegations leave questions as to authenticity, accuracy, or sufficiency of conviction records for jury determination).

[163] CALIFORNIA COMMITTEE ANALYSIS STATEMENT, ASSEMBLY COMMITTEE ON PUBLIC SAFETY BILL NO. SB 1146 (1997) (including statement of bill sponsor asserting problem of cash-strapped state courts and statement of Public Safety Committee: "[I]t appears that the identity of the person suffering the prior conviction is the most common issue (and often the only issue) in a jury trial on a prior conviction. Therefore, there is reason to believe that this bill will significantly reduce the number of such jury trials.").

[164] *See, e.g.*, CALIFORNIA COMMITTEE ANALYSIS, StateNet, Senate Floor BILL NO. SB 1146 (1997) (reporting argument of California Attorneys for Criminal Justice that: "Defendants rarely choose to exercise [the right to jury trial on the existence of a prior conviction]; in the vast majority of cases where priors are an issue, the defendant either stipulates to the existence of the prior conviction or agrees to a court trial on the question. In those cases where the defendant does exercise his right to a jury trial, it is often where there is some serious question regarding the prior and where the consequences are great — for example, under three-strikes, a potential life sentence may hang on the question of the prior conviction.").

[165] *See, e.g., id.* (reporting argument of California Attorneys for Criminal Justice against amending statute providing for jury trial that "a trial on priors is generally quite brief, half a day or less, so these trials are not a large burden on the courts.").

documents establishing the existence of a prior conviction, such as the judgment of conviction.[166] Courts have held that this evidence creates a presumption that the defendant is the person that incurred the prior conviction; the defendant must then put on some evidence in rebuttal.[167] In many cases, the defendant, whom the police will have linked to the prior conviction because of fingerprints or other evidence,[168] will not be able to meet this burden, and it will take little time to move from

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[166] *See, e.g.*, Old Chief v. United States, 519 U.S. 172, 174 (1997) (stating that government can prove existence of prior conviction — an element of offense under 18 U.S.C. § 922(g)(1) — by introducing record of judgment or similar evidence identifying previous offense); United States v. Chavaria-Angel, 323 F.3d 1172, 1174-76 (9th Cir. 2003) (deciding that prior conviction can be proved by uncertified court records but reiterating that "in this circuit, district courts may not rely exclusively on the charging documents or the presentence report as evidence of a prior conviction."); United States v. Matthews, 240 F.3d 806 (9th Cir. 2001) (explaining that sentencing court may not rely solely on classification of predicate offenses in disputed presentence report); United States v. Gilliam, 167 F.3d 628, 641 (D.C. Cir. 1999) (stating that "the district court did not err in accepting the presentence report as meeting the government's burden to prove that [defendant] had two predicate convictions under federal 'three-strikes' statute."); United States v. Hudspeth, 42 F.3d 1015, 1019 n.6 (7th Cir. 1994) (noting that "[a] certified record of conviction or a presentence investigation report, if not challenged, will normally satisfy" government's burden of proving prior conviction); People v. Epps, 18 P.3d 2, 7 (Cal. 2001) ("[O]fficial government records clearly describing a prior conviction presumptively establish that the conviction in fact occurred, assuming those records meet the threshold requirements of admissibility." (citing CAL. EVID. CODE § 664 (West 2000) ("It is presumed that official duty has been regularly performed."))).

The prosecution may also introduce fingerprint evidence or DNA-matching to link the defendant to the person who incurred the prior conviction. *See, e.g.*, People v. Hall, 485 N.E.2d 1379, 1381 (Ill. App. 1986) (noting that State had introduced certified copies of defendant's prior convictions and corroborating fingerprints).

[167] *See, e.g., Gilliam*, 167 F.3d at 640-41 (finding that evidentiary hearing not required to prove two prior predicate convictions under federal three-strikes statute unless "defendant tenders evidence to deny the seriousness of the former convictions or to deny that the prior convictions pertained to him or her" (quoting United States v. Oberle, 136 F.3d 1414, 1424 (10th Cir.1998))); United States v. Phillips, 149 F.3d 1026, 1033 (9th Cir. 1998) (stating that government met its burden of proving prior convictions by submitting "certified records of conviction and other clearly reliable evidence" and that "burden then shifted to [defendant] to challenge the government's evidence"); *Epps*, 18 P.3d at 7 (stating "that official government records clearly describing a prior conviction presumptively establish that the conviction in fact occurred. . . . Some evidence must rebut this presumption before the authenticity, accuracy, or sufficiency of the prior conviction records can be called into question."); *cf.* United States v. Flowers, 29 F.3d 530, 535 (10th Cir. 1994) ("[I]f a defendant believes that one of the prior convictions that the government seeks to use as a predicate conviction under § 922(g)(1) [felon-in-possession statute] does not meet the legal definitional requirements of 921(a)(2), it will be up to the defendant to challenge the admissibility of such conviction. Any such challenge must be made with specificity.").

[168] *See* JOHN H. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1635(a) (1974) (stating that because of fingerprint information, "the police authorities are enabled to inform the prosecuting officer that the now accused has already been convicted in some other state for one or more other offense.").

introduction of documents to decision. If, however, the defendant has some evidence rebutting identity or the accuracy, authenticity, or sufficiency of the documents introduced by the prosecution, the trial appropriately will be longer.

On the issue of nullification, it may be that some defendants, especially those facing a tough "three-strikes" sentence, may want to have a jury trial on the existence of a prior conviction, in the hope that the jury will seek to lessen the harsh effects of the law by finding that the defendant did not incur a prior conviction.[169] Carefully phrased jury instructions informing the jury of its role may partially address this concern.[170] That juries might at times nullify, however, is consistent with the role that juries historically have performed in softening the harsh effects of the law.[171]

In sum, when the fact of a prior conviction would increase the statutory maximum for a subsequent offense, there is little basis for exempting that fact from rights to jury determination and proof beyond a reasonable doubt. To the contrary, the emphasis in *Apprendi* on the additional loss of liberty and greater stigma presented by an increase beyond the statutory maximum, and the *Apprendi* concern that a defendant not be deprived of the jury trial and reasonable doubt guarantees when additional punishment is threatened, indicate that these constitutional guarantees should extend to proof of the existence of a prior conviction. The Supreme Court's statements about the constitutional necessity of the reasonable doubt standard to reduce the margin of error with respect to deprivations of liberty, and the values underlying the right to jury trial, also support this conclusion.

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[169] *See, e.g., Epps*, 18 P.3d at 7 ("One might argue that defendants facing stiff three strike sentences will be likely to raise these questions in every case, whether or not they have merit, simply hoping for the possibility of jury nullification.").

[170] *Id.* ("In a typical case, the prosecutor and the court can explain to the jury that, though the evidence is uncontroverted, the law nevertheless entitles the defendant to a jury verdict. The jury would then better understand its role. The court, however, should be careful not to direct a verdict, which would be inconsistent with the defendant's right to a jury trial.").

[171] *See, e.g.*, Murphy, *Integrating Constitutional Authority*, *supra* note 24, at 782-84 (discussing how eighteenth-century English juries often found facts against weight of evidence to mitigate harsh sanctions).

III. THE PROCESS RESULTING IN A PRIOR CONVICTION OR DELINQUENCY ADJUDICATION

Having argued that the jury trial and reasonable doubt guarantees apply when a defendant contests the existence of a prior conviction, I now address the distinct topic of whether these processes must have been guaranteed in a prior tribunal for a judgment rendered by that tribunal to qualify as an enhancement fact under the Constitution. Specifically, if the tribunal that produced the prior judgment was not constitutionally or statutorily required to afford a jury trial or proof beyond a reasonable doubt, the question arises whether the judgment may be used to raise the statutory maximum for a subsequent offense.

When *Apprendi* and *Jones* distinguished the use of a prior conviction from the use of other facts to enhance a sentence beyond a statutory maximum, they assumed a model in which the prior conviction is based on the prosecution of an adult in an ordinary court of law for a serious offense, one in which the defendant is entitled to proof beyond a reasonable doubt and a jury trial.[172] The model described by the Court in *Apprendi* and *Jones* does not cover the circumstance of a prior conviction that was produced under a standard less exacting than the reasonable doubt standard.[173] Nor does the model contemplate an adjudication in which no right to jury trial exists, such as a proceeding in a military court, a juvenile court, an ordinary court of law in which the defendant is charged with a petty offense, or a nonjury foreign tribunal.

Assuming that the defendant was afforded all applicable constitutional and statutory rights in the prior proceeding,[174] the issue

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[172] *See* Apprendi v. New Jersey, 530 U.S. 466, 496 (2000) (writing 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"); Jones v. United States, 526 U.S. 227, 249 (1999) ("[A] prior conviction, unlike any other factor used to enhance a sentence, must itself have been established through procedures satisfying the fair notice, reasonable doubt, and jury trial guarantees.").

[173] *See* sources cited *supra* note 172.

[174] The Supreme Court has indicated that a prior conviction may not be used to enhance a sentence beyond the statutory maximum for the subsequent offense if the prior conviction was obtained in violation of the defendant's right to counsel. *See, e.g.*, Burgett v. Texas, 389 U.S. 109, 115 (1967) (excluding prior felony conviction for sentence enhancement beyond statutory maximum because prior conviction was obtained without assistance of counsel and without express waiver of right to counsel); *cf.* United States v. Tucker, 404 U.S. 443, 447-49 (1972) (remanding for reconsideration of defendant's sentence because original "sentence [was] founded at least in part upon misinformation of constitutional magnitude" — evidence of prior convictions obtained in violation of constitutional right to counsel). Denial of the right to counsel is "a unique constitutional defect" and a defendant at sentencing may collaterally attack a prior conviction on this basis if the prior conviction

remains whether the prior conviction may be used later to enhance the sentence for a subsequent offense. Although the process might have been appropriate in the prior proceeding that resulted in the conviction, it is a different question whether the process afforded in the prior tribunal is adequate for another purpose — that of enhancing the sentence for a subsequent offense. This part considers first the burden of proof that must have applied in the prior proceeding and then turns to whether a judgment produced by a nonjury tribunal may enhance a sentence for a subsequent offense.

A. The Burden of Proof

As discussed earlier, the Supreme Court has indicated that because of the stigma and potential loss of liberty that accompany a criminal conviction, the reasonable doubt standard is necessary to maximize the reliability of a decision to convict.[175] A legislature that authorized an increase in the statutory maximum for an offense based on the existence of a prior conviction may have done so because of the desire to subject a repeat offender to greater punishment than a first-time offender. The repeat offender is deemed more culpable than the first-time offender.[176] In this circumstance, the reliability of the prior conviction is extremely important. More severe punishment should be available only for those defendants who actually committed the prior offense.

Accordingly, it would seem that due process requires that a prior judgment may raise the statutory maximum for a subsequent offense only if the prior judgment was obtained in a tribunal that employed the

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is to be used for sentence enhancement. Custis v. United States, 511 U.S. 485, 493-96 (1994). The Supreme Court has indicated that beyond the right to counsel context, and absent statutory authorization permitting collateral attack on the validity of a prior conviction that will be used to enhance a sentence for a subsequent federal offense, a defendant in a federal sentencing proceeding may not collaterally attack the constitutionality or other validity of previous state convictions that are used to enhance his sentence. *Id.* at 487-97; *see also* Daniels v. United States, 532 U.S. 374, 384 (2001) (holding that after enhanced federal sentence has been imposed under Armed Career Criminal Act, defendant generally may not use 28 U.S.C. § 2255 — providing postconviction remedy for federal prisoners — to challenge collaterally prior state conviction on which enhanced sentence was based). If, however, the defendant is still "in custody" for purpose of the state conviction, he may attack his state sentence in state court or through federal habeas corpus review, and, if successful, apply for reopening of his federal sentence. *Custis*, 511 U.S. at 497.

[175] *See supra* notes 146-48 and accompanying text.

[176] *See e.g.*, Graham v. West Virginia, 224 U.S. 616, 623 (1912) ("The propriety of inflicting severer punishment upon old offenders has long been recognized in this country and in England.... [T]he repetition of criminal conduct aggravates their guilt and justifies heavier penalties when they are again convicted.").

standard of proof beyond a reasonable doubt.[177] Such a rule would not change much of existing practice in courts in the United States with respect to sentence enhancement. The Supreme Court has held that the reasonable doubt standard is constitutionally required in all criminal proceedings in the ordinary courts of law, regardless whether the offense is serious or petty.[178] It has also held that the reasonable doubt standard applies to adjudications of delinquency when a juvenile is charged with violation of a criminal law.[179] The Rules for Courts-Martial provide that proof of guilt in military prosecutions must be beyond a reasonable doubt.[180]

A rule requiring proof beyond a reasonable doubt in the prior proceeding would mean that a civil adjudication conducted under a lesser standard of proof could not be used to enhance a sentence beyond the statutory maximum for a subsequent criminal offense.[181] Moreover, such a rule would make it necessary, but not necessarily sufficient, for a prior foreign conviction to have been rendered under a standard equivalent to "beyond a reasonable doubt."[182]

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[177] *Cf.* Saltzburg, *supra* note 20, at 251-52 (advocating in part that "facts that increase sentences [more than one year] must be proved beyond a reasonable doubt to the trial judge at sentencing" regardless "whether the increase is due to a sentencing guideline or a mandatory minimum or a sentencing factor.").

[178] *See, e.g.*, Jackson v. Virginia, 443 U.S. 307, 315-16 (1979); *In re* Winship, 397 U.S. 358, 364 (1970) ("[W]e explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.").

[179] *Winship*, 397 U.S. at 365-68 .

[180] MANUAL FOR COURTS-MARTIAL UNITED STATES, R.C.M. § 918(c) (2000) ("A finding of guilty of any offense may be reached only when the factfinder is satisfied that guilt has been proved beyond a reasonable doubt.").

[181] Some courts have upheld the use of civil findings that resulted in a driver's license forfeiture to enhance penalties in subsequent criminal proceedings for driving while intoxicated. *See, e.g.*, Schindler v. Clerk of Circuit Court, 715 F.2d 341 (7th Cir. 1983) (upholding use of civil license forfeiture in DWI case to enhance penalties for subsequent DWI offenses), *cert. denied*, 465 U.S. 1068 (1984); State v. Dumas, 587 N.W.2d 299 (Minn. Ct. App. 1998) (upholding use of civil license forfeiture to enhance penalties for subsequent DWI offenses).

[182] Courts often examine all the procedures afforded in a foreign tribunal to determine whether the proceeding was "fundamentally fair" and therefore worthy of recognition in a criminal proceeding in the United States. *See, e.g.*, United States v. Kole, 164 F.3d 164 (3d Cir. 1998) (reviewing procedures afforded in court in Philippines that previously convicted defendant and concluding that prior conviction could be used to trigger mandatory minimum sentence under federal law); United States v. Small, 183 F. Supp. 2d 755 (W.D. Penn. 2002) (reviewing procedures afforded in court in Japan that previously convicted defendant and concluding that prior conviction could be used to establish element of offense under federal felon-in-possession statute — that defendant was convicted felon). *See generally* Alex Glashausser, Note, *The Treatment of Foreign Country Convictions as*

A legislature might authorize a sentence enhancement beyond the statutory maximum for a subsequent offense not because of the greater culpability of a repeat offender but because a defendant who has been previously convicted — whether the conviction was warranted or not — should be "on guard" not to commit another offense. Consider 18 U.S.C. App. § 1202(a)(1), which prohibits a convicted felon from "receiving, possessing, or transporting in commerce or affecting commerce . . . any firearm" and makes violation of the statute punishable by a fine and up to two years imprisonment.[183] In a case involving this statute, *Lewis v. United States*,[184] the Supreme Court stated that "[t]he federal gun laws . . . focus not on reliability, but on the mere fact of conviction, or even indictment, in order to keep firearms away from potentially dangerous persons."[185] Based on this interpretation of legislative intent, the Court upheld the use of an uncounseled felony conviction to draw the defendant within the ambit of the statute even though the prior conviction was unconstitutionally obtained because the defendant was not afforded the right to counsel.[186]

Lewis, however, did not involve a situation in which the legislature had authorized the use of a prior conviction to raise the statutory maximum for a subsequent offense. Indeed, the Court noted in *Lewis* that enforcement under the statute of the "essentially civil disability [of prohibiting convicted felons from possessing or dealing in firearms] through a criminal sanction does *not* 'support guilt or enhance punishment' on the basis of a conviction that is unreliable."[187]

Thus, *Lewis* is not inconsistent with the argument here that a conviction may not enhance the statutory maximum for a subsequent offense if the conviction was rendered by a tribunal that employs a standard of proof less than "beyond a reasonable doubt." When a deprivation of liberty beyond the statutory maximum for a subsequent

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Predicates for Sentence Enhancement Under Recidivist Statutes, 44 DUKE L.J. 134, 158-61 (1994) (discussing courts' use of "fundamental fairness" test); Kimes, *supra* note 12, at 515-18 (same).

[183] 18 U.S.C. App. § 1202 (a)(1) (2002).

[184] 445 U.S. 55 (1980).

[185] *Id.* at 67.

[186] *Id.* The Supreme Court has held that the Sixth Amendment guarantees a right to counsel for all felonies. *See, e.g.*, Mempa v. Rhay, 389 U.S. 128, 134 (1967); *see infra* note 249 and accompanying text.

[187] Lewis v. United States, 445 U.S. 55, 67 (1980) (quoting Burgett v. Texas, 389 U.S. 109, 115 (1967)). The Court contrasted the situation in *Lewis* to that in *Burgett*, which precluded the use of a prior felony conviction to enhance a sentence beyond the statutory maximum for a subsequent offense because the prior conviction was obtained without the assistance of counsel and without express waiver of the right to counsel. *Id.*

offense could be triggered by the existence of a prior conviction — regardless of the legislature's motivation for the sentence enhancement — the reasonable doubt standard must have been guaranteed in the prior tribunal.

B. Nonjury Proceedings

Let us now consider whether the absence of a right to jury trial in a prior proceeding would invalidate using the conviction or adjudication of juvenile delinquency obtained in those proceedings as a sentence enhancement. The Supreme Court has held that the Sixth Amendment right to jury trial does not apply to either military courts[188] or juvenile courts.[189] Moreover, the Court has held that petty offenses — those punishable by six months imprisonment or less — do not fall within the ambit of the Sixth Amendment,[190] even when the defendant is charged with multiple petty offenses subjecting the defendant to possible imprisonment of many years.[191]

Eleven years before *Apprendi*, the Supreme Court acknowledged an issue as to whether a prior conviction rendered in a proceeding not affording the right to jury trial may be used to enhance penalties for a subsequent offense.[192] Because the petitioners in the case before the Court were first-time DUI offenders, the Court stated that it would "not consider whether a repeat offender facing enhanced penalties may state a constitutional claim because of the absence of a jury trial in a prior DUI prosecution."[193]

After *Apprendi*, prior adjudications by juvenile courts have been the most common context for lower court exploration of whether the result of a nonjury proceeding may be used to enhance a sentence for a subsequent offense beyond the statutory maximum.[194] I thus will consider juvenile courts first and then examine other nonjury tribunals.

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[188] *See, e.g.*, Reid v. Covert, 354 U.S. 1, 37 n.68 (1957); Whelchel v. McDonald, 340 U.S. 122, 127 (1950); *Ex parte* Quirin, 317 U.S. 1, 40-41 (1942).

[189] McKeiver v. Pennsylvania, 403 U.S. 528, 543-50 (1971).

[190] The Supreme Court has held that the Sixth Amendment right to a jury trial applies only to "serious offenses," not to "petty offenses." *See infra* note 238 and accompanying text.

[191] *See* Lewis v. United States, 518 U.S. 322, 327-30 (1996) (holding no Sixth Amendment right to jury trial for multiple petty offenses).

[192] Blanton v. City of North Las Vegas, 489 U.S. 538, 545 n.12 (1989).

[193] *Id.*

[194] *See generally* Feld, *supra* note 7, at 1195-1214 (discussing post-*Apprendi* cases on whether juvenile adjudication may be used to enhance sentence for subsequent offense).

1. Juvenile Courts

In a juvenile court, the state may charge the juvenile with violation of a criminal law. In common parlance, however, the juvenile found to have violated a criminal law is "adjudicated" rather than "found guilty" and is termed a "delinquent" rather than a "criminal."[195] These terms are rooted in the ideal that juvenile courts pursue the goals of therapeutic intervention and rehabilitation rather than punishment.[196]

Relying largely on this ideal of rehabilitation rather than punishment for juveniles, the Supreme Court in a 1971 decision, *McKeiver v. Pennsylvania*,[197] held that the federal Constitution does not guarantee a jury trial in juvenile courts.[198] The plurality opinion in *McKeiver* assumed that a jury trial might interfere with the benevolent objectives of the juvenile court system, by bringing increased adversariness, formality, and delay to the proceedings.[199] It commented that jury trial would possibly "put an effective end to what has been the idealistic prospect of an intimate, informal protective proceeding."[200] The plurality also asserted that "[t]he imposition of the jury trial on the juvenile court system would not strengthen greatly, if at all, the fact-finding function, and would, contrarily, provide an attrition of the juvenile court's assumed ability to function in a unique manner."[201] Thus, the "unique" functioning of the juvenile judge was perceived to override any possible gains in the quality of factfinding that might be achieved by jury trial. Moreover, the plurality assumed that imposing the right to jury trial would impede experimentation in the states as to how best to achieve the rehabilitation goals of the juvenile justice system.[202]

Abundant scholarly commentary on *McKeiver* has criticized its reasoning and holding.[203] With many statutes and sentencing guidelines treating adjudications of delinquency as equivalent to criminal convictions for purposes of sentencing enhancement,[204] concerns have

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[195] *See* HARRIS & TEITELBAUM, *supra* note 6, at 317.

[196] *See id.* at 317-18.

[197] 403 U.S. 528 (1971).

[198] Justice Blackmun wrote the plurality opinion in *McKeiver*, joined by three other justices. *Id.* at 545-57. In total, six justices agreed that the Constitution does not guarantee a right to jury trial in juvenile courts. *Id.* at 545-57.

[199] *Id.* at 550.

[200] *Id.* at 545.

[201] *Id.* at 547.

[202] *Id.*

[203] *See* Feld, *supra* note 7, at 1115 n.144 (citing numerous articles criticizing *McKeiver*).

[204] *See* sources cited *supra* note 7 and accompanying text.

heightened about the absence of a right to jury trial in juvenile courts.[205]

Given the *McKeiver* Court's reasons for interpreting the Constitution as not guaranteeing jury trials in juvenile courts, several commentators have argued that a juvenile adjudication should not be eligible to enhance the punishment for a subsequent adult offense.[206] As Professor Barry Feld, in a recently published article, states: "It seems contradictory and fundamentally unfair to provide youths with fewer procedural safeguards in the name of rehabilitation and then to use convictions and sentences obtained for treatment purposes to punish them more severely as adults."[207] Between *McKeiver* and *Apprendi*, however, courts routinely upheld against constitutional challenge the use of juvenile adjudications of delinquency to enhance sentences for subsequent adult offenses.[208] The question now is whether *Apprendi* should be read to invalidate this use.

Post-*Apprendi* courts are divided over whether a nonjury adjudication of delinquency may be used to increase the statutory maximum for a subsequent offense.[209] The two leading federal appellate cases both

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[205] *See, e.g.*, David Dormont, Note, *For the Good of the Adult: An Examination of the Constitutionality of Using Prior Juvenile Adjudications to Enhance Adult Sentences*, 75 MINN. L. REV. 1769, 1793-94 (1991); Feld, *supra* note 7, at 1190 (asserting that "[s]tates' expanded uses of juveniles' prior records to enhance the sentences of young adult offenders raise troubling issues in light of the quality of procedural justice by which juvenile courts originally obtained those convictions" and referencing fact that "the vast majority of states deny juveniles access to a jury trial."); Sara E. Kropf, Note, *Overturning* McKeiver v. Pennsylvania: *The Unconstitutionality of Using Prior Convictions to Enhance Adult Sentences Under the Sentencing Guidelines*, 87 GEO. L.J. 2149 (1990).

[206] *See, e.g.*, Dormont, *supra* note 205, at 1791-94; Feld, *supra* note 7; Lise Forquer, Comment, *California's Three Strikes Law — Should a Juvenile Adjudication Be a Ball or a Strike?*, 32 SAN DIEGO L. REV. 1297, 1330-31 (1995); Kropf, *supra* note 205.

[207] Feld, *supra* note 7, at 1193-94; *see also id.* at 1199 (noting "illogic of allowing convictions obtained with fewer procedural safeguards in order to provide treatment subsequently to be used to extend punishment"). Professor Feld advocates the overruling of *McKeiver v. Pennsylvania*, in which the Supreme Court held that the constitutional entitlement to criminal jury trial does not extend to juvenile adjudications. *Id.* at 1135-61, 1184-1214.

[208] *See, e.g.*, United States v. Williams, 891 F.2d 212 (9th Cir. 1989); People v. Fowler, 84 Cal. Rptr. 2d 874 (Cal. Ct. App. 1999); State v. Little, 423 N.W.2d 722, 724-25 (Minn. Ct. App. 1988); *see also* Barry C. Feld, *Violent Youth and Public Policy: A Case Study of Juvenile Justice Law Reform*, 79 MINN. L. REV. 965, 1063 n.434 (1995).

[209] *Compare* United States v. Tighe, 266 F.3d 1187, 1194-95 (9th Cir. 2001) (holding that use of defendant's prior nonjury juvenile adjudication to enhance sentence under Armed Career Criminal Act violates *Apprendi*), *and* State v. Brown, 853 So.2d 8, 16 (La. Ct. App. 2003) (holding that "prior juvenile adjudications that resulted absent a jury trial are constitutionally inadequate . . . for purposes of subsequent sentence enhancement."), *with* United States v. Smalley, 294 F.3d 1030, 1033 (8th Cir. 2002), *cert. denied*, 537 U.S. 1114 (2003) (holding that use of defendant's prior nonjury juvenile adjudication to enhance sentence

involve the federal Armed Career Criminal Act (ACCA).[210] Under the Act, a defendant convicted of being a felon in possession of a firearm is subject to a maximum sentence of ten years.[211] If, however, the convicted felon is found to have three previous convictions for a violent felony or a serious drug offense, the ACCA mandates a minimum sentence of fifteen years.[212] Congress has specified that juvenile delinquency adjudications involving violent felonies qualify as "convictions" under the ACCA.[213]

The Ninth Circuit in *United States v. Tighe*[214] held that use of a defendant's prior nonjury delinquency adjudication to enhance a sentence under the ACCA violates *Apprendi*. The court quoted the language in *Apprendi* that referred to prior convictions as having been "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,"[215] and it cited similar language in *Jones*.[216] The Ninth Circuit read this language as meaning that "the 'prior conviction' exception to the *Apprendi* general rule must be limited to prior convictions that were themselves obtained through proceedings that included the right to a jury trial and proof beyond a reasonable doubt."[217]

By contrast, the Eighth Circuit in *United States v. Smalley*[218] found that a nonjury delinquency adjudication may be used to enhance a sentence under the ACCA.[219] Rejecting the Ninth Circuit's reading of *Apprendi* and *Jones*, the Eighth Circuit asserted that "it is incorrect to assume that it

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under ACCA does not violate *Apprendi*), *and* People v. Smith, 1 Cal. Rptr. 3d 901, 905 (Cal. Ct. App. 2003) (permitting nonjury juvenile adjudication of delinquency to be used to trigger "three strikes law" for subsequent criminal offense), *and* People v. Bowden, 125 Cal. Rptr. 2d 513, 516 (Cal. Ct. App. 2002) (same).

[210] *Tighe*, 266 F.3d 1187; *Smalley*, 294 F.3d 1030.

[211] 18 U.S.C. § 924(a)(2) (2000 & Supp. 2003).

[212] *Id.* § 924(e)(1).

[213] *Id.* § 924(e)(2)(C).

[214] 266 F.3d 1187.

[215] *Id.* at 1194 (quoting Apprendi v. New Jersey, 530 U.S. 466, 496 (2000)).

[216] *Id.* at 1193 ("Unlike virtually any other consideration used to enlarge the possible penalty for an offense. . . *a prior conviction must itself have been established through procedures satisfying the fair notice, reasonable doubt and jury trial guarantees.*" (quoting Jones v. United States, 526 U.S. 227, 249 (1999) (emphasis added by Ninth Circuit)).

[217] *Id.* at 1194. *But see id.* at 1200 (Brunetti, J., dissenting) ("[T]he 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. For adults, this would indeed include the right to a jury trial. For juveniles, it does not.").

[218] 294 F.3d 1030 (8th Cir. 2002), *cert. denied* 537 U.S. 1114 (2003).

[219] *Id.* at 1033.

is not only sufficient but necessary" that an adjudication have afforded a right to jury trial and proof beyond a reasonable doubt for the adjudication to qualify for the *Apprendi* "prior conviction" exemption.[220] Instead, the Eighth Circuit asserted that the inquiry should be whether "juvenile adjudications, like adult convictions, are so reliable" that they can be used to enhance a sentence beyond the statutory maximum.[221] In discussing whether juvenile adjudications have the sufficient reliability to form the basis of a sentence enhancement, the Eighth Circuit observed that the Supreme Court has held that the Constitution guarantees juvenile defendants the right to notice, the right to counsel, the right to confront and cross-examine witnesses, and the privilege against self-incrimination.[222] Moreover, the Eighth Circuit noted that due process requires that the juvenile judge apply the beyond a reasonable doubt standard in determining whether the juvenile violated a criminal law.[223] The court concluded that "these safeguards are more than sufficient to ensure the reliability that *Apprendi* requires."[224] Buttressing this conclusion, the Eighth Circuit wrote, was the fact that several courts, including the Ninth Circuit, have deemed juvenile adjudications reliable enough to enhance a defendant's sentence within a prescribed statutory range.[225]

Smalley petitioned the Supreme Court for a writ of certiorari.[226] The United States argued in its brief responding to the petition that the Supreme Court should grant certiorari because of the circuit split over whether prior nonjury adjudications of delinquency may, consistently with *Apprendi*, be used to enhance a sentence above the statutory maximum.[227] The United States also asserted that if the Supreme Court granted certiorari in *Smalley*, the Court should consider whether *Almendarez-Torres* should be reaffirmed or overruled.[228] The Supreme Court denied the petition for certiorari in *Smalley*[229] and a petition in a similar state case in which the Court had requested the views of the

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[220] *Id.* at 1032.

[221] *Id.* at 1033.

[222] *Id.* (citing *In re* Winship, 397 U.S. 358, 368 (1970)).

[223] *Id.* (citing *Winship*, 397 U.S. at 368).

[224] *Id.* at 1033.

[225] *Id.*

[226] Smalley v. United States, 537 U.S. 1114 (2003) (denying certiorari).

[227] Brief for the United States on Petition for a Writ of Certiorari, *Smalley*, 294 F.3d 1030 (8th Cir. 2002) (No. 02-6693).

[228] *Id.* at 14.

[229] *Smalley*, 537 U.S. 1114.

federal government.[230]

The Ninth Circuit, in barring the use of a nonjury juvenile adjudication of delinquency to enhance the statutory maximum for a subsequent adult offense, has the better interpretation of *Apprendi*. In distinguishing a previous conviction from other facts that might increase the statutory maximum for an offense, the Supreme Court in both *Jones* and *Apprendi* stressed that a defendant previously convicted would have been afforded a panoply of procedural guarantees, including the reasonable doubt standard and the right to jury trial, on the facts supporting the prior conviction.[231] Implicit in this emphasis is the Court's concern for whether a fact that would enhance a statutory maximum has been determined under procedures that maximize reliability.

As suggested earlier, *McKeiver* seemed to give a higher priority to the juvenile court judge being able to function in a "unique" manner in pursuit of rehabilitation goals than to reliability in factfinding. Although determination by a juvenile court judge that the juvenile has engaged in criminal conduct may be considered sufficiently reliable when the theoretical aim is rehabilitation of the juvenile, it is an unwarranted leap to conclude that a nonjury finding of criminal conduct is sufficiently reliable to support the imposition of additional criminal punishment for a subsequent adult offense.[232]

Professor Feld argues that in addition to the absence of a right to jury trial, juvenile court proceedings commonly have other attributes suggesting that adjudications of delinquency do not meet the reliability requirements of *Apprendi*. He notes the frequent absence of counsel for juveniles during the proceedings[233] and that "the factual ambiguity of

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[230] State v. Hitt, 42 P.3d 732 (Kan. 2002) ("The Solicitor General is invited to file a brief in this case expressing the views of the United States."), *cert. denied*, 537 U.S. 968 (2003). The United States argued in its amicus brief in *Hitt* that the "petition for a writ of certiorari should be held pending the disposition of the petition for a writ of certiorari" in *Smalley*. Brief for the United States as Amicus Curiae, Hitt v. Kansas, 537 U.S. 968 (No. 01-10864). The United States asserted that *Hitt* involved some uncertain state law issues and that *Smalley* was a better case for the Supreme Court to review.

[231] *See supra* notes 95-97 and accompanying text.

[232] *See* Feld, *supra* note 7, at 1169 ("*Apprendi* exempted the 'fact of a prior conviction' from its holding because of the Court's confidence in the quality of the criminal justice system to produce reliable convictions. The right to a jury trial was the fundamental constitutional predicate. The differences between the quality, validity, and reliability of delinquency adjudications compared with criminal convictions call into question the legitimacy of including them within *Apprendi*'s exception.").

[233] Feld, *supra* note 7, at 1170 ("The informality of delinquency proceedings enables juvenile courts in many jurisdictions to adjudicate juveniles without the presence of assistance of an attorney which further prejudices the accuracy and reliability of the fact-finding process."); *id.* at 1194 ("[T]he denial of a right to a jury trial and the questionable

delinquency adjudications" can make it difficult for a later court to determine the precise criminal conduct that was attributed to the juvenile.[234] Feld argues that the result of lesser procedural protections in juvenile courts is that "a substantial number of delinquency adjudications occur that would not result in criminal convictions or pleas if defendants received all procedural safeguards."[235]

Given these procedural attributes of the juvenile court system and the theoretical ideal that the juvenile system does not punish, but rather attempts rehabilitation, delinquency adjudications should not be eligible to raise the statutory maximum for a subsequent adult offense. To the extent that juvenile proceedings may in reality have become punitive in nature, one might question the legitimacy of a separate court system in which juveniles are not afforded the same constitutional rights — including the right to a jury trial — that an adult defendant would have in an ordinary court of law. As long as a separate nonjury juvenile system is maintained with the theoretical goal of rehabilitation rather than punishment, however, a prior adjudication of delinquency should not serve as a basis for enhancing beyond the statutory maximum a sentence for a subsequent adult offense. *Jones* and *Apprendi* specifically referenced prior "convictions" that were obtained in proceedings in which a right to jury trial was guaranteed;[236] the circumstances attending nonjury juvenile "adjudications" suggest that *Jones* and *Apprendi* should not be interpreted to permit an increase in a statutory maximum based on a prior delinquency finding.

2. Other Nonjury Tribunals

Let us now examine nonjury proceedings in which the purpose is unambiguously that of criminal prosecution and punishment — as opposed to the benevolent and therapeutic purposes that theoretically attend a juvenile adjudication. Convictions in foreign courts may have been produced without a jury trial akin to the U.S. model. On the domestic side, a criminal conviction may be produced by a military

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waivers of and delivery of effective legal services call into question the quality of delinquency convictions."); *id.* at 1169-91 (discussing in detail issues surrounding counsel for juveniles).

[234] *Id.* at 1185-86 ("In addition, the factual ambiguity of delinquency adjudications sometimes makes it difficult for criminal courts to determine for what offense the juvenile court actually convicted a youth when it uses those convictions for sentence enhancements or other collateral purposes.").

[235] *Id.* at 1190.

[236] *See supra* notes 95-97 and accompanying text.

tribunal or an ordinary court of law in a "petty offense" case. The Supreme Court has held that the constitutional right to jury trial does not apply to military courts because juries were not available in military courts when the Constitution was adopted, and because military tribunals "in the natural course of events are usually called upon to function under conditions precluding resort" to "a trial by a jury of the vicinage where the crime was committed."[237] Relying also on historical practice, the Court has held that the constitutional right to jury trial applies only to serious offenses, not petty offenses.[238] Moreover, the Court has commented that "the possible consequences to defendants from convictions for petty offenses have been thought insufficient to outweigh the benefits to efficient law enforcement and simplified judicial administration resulting from the availability of speedy and inexpensive nonjury adjudications."[239]

The question is whether a conviction produced in these various nonjury proceedings may be used to raise the statutory maximum for a subsequent offense. The Supreme Court has stated that "[w]e would not assert. . . that every criminal 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."[240] As examples of fair determination of guilt by a nonjury tribunal, the Court has cited adjudication by military courts[241] and the trial of petty criminal offenses by judges.[242] Certainly, substantial loss of liberty can be at stake in these nonjury proceedings. A defendant charged with multiple petty offenses could be subject to possible imprisonment of many years;[243] a military tribunal may impose

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[237] *See Ex parte* Quirin, 317 U.S. 1, 40-41 (1942).

[238] *See, e.g.*, Duncan v. Louisiana, 391 U.S. 145, 159 (1968); District of Columbia v. Clawans, 300 U.S. 617, 624 (1937); Schick v. United States, 195 U.S. 65, 68-69 (1904) (stating that "there is no constitutional requirement of a jury" for petty offenses, and claiming that constitutional language must be read in light of common law); Callan v. Wilson, 127 U.S. 540, 555 (1888) ("[T]here is a class of petty or minor offenses . . . not of the class or grade triable at common law by a jury . . . [that] may, under the authority of Congress, be tried by the court and without a jury.").

[239] *Duncan*, 391 U.S. at 160.

[240] *Id.* at 158.

[241] McKeiver v. Pennsylvania, 403 U.S. 528, 543-50 (1971) (stating that "we have been content to pursue other ways for determining facts" and giving as example that jury trial generally is not used in military trials).

[242] *Duncan*, 391 U.S. at 158 (stating that "we hold no constitutional doubts about . . . prosecuting petty crimes without extending a right to jury trial" after commenting that not every criminal trial held before judge alone is unfair.).

[243] For example, in Lewis v. United States, 518 U.S. 322 (1996), the Supreme Court held that the Sixth Amendment does not guarantee a jury trial to a defendant charged with multiple "petty" offenses. *Id.* at 326-30. An offense presumptively is petty if the maximum

punishment as severe as death.[244] Nonetheless, the factfinding processes in these nonjury tribunals are deemed sufficiently reliable to support criminal punishment.

With these nonjury tribunals entitled under the Constitution to impose punishment, there is cause to read more flexibly the language in *Jones* and *Apprendi* that assumed a model of prior convictions rendered in a proceeding in which a jury trial was guaranteed. Indeed, courts after *Apprendi* have upheld sentence enhancements based on prior petty offense and military convictions.[245] If the prior nonjury proceeding has complied with applicable statutory and constitutional requirements, and the purpose of the proceeding was to punish criminal conduct, then a conviction produced in such a proceeding should be considered sufficiently reliable to qualify as an enhancement fact. Similarly, a jury trial arguably need not have been available in a foreign tribunal for a conviction produced by that tribunal to be used for sentence enhancement.[246] As a matter of due process, however, the sentencing court should evaluate the foreign proceedings for fundamental fairness to ensure that the factfinding process was sufficiently reliable to support a finding of guilt.[247]

In other contexts, the Supreme Court has upheld the binding nature of prior judgments in subsequent litigation or prosecution, even when the procedures afforded in the prior proceeding were less exacting than those required in the subsequent case. Consider the case law surrounding the right to counsel and the use of prior convictions to enhance sentences. The Supreme Court has asserted that under the Sixth Amendment, "absent a knowing and intelligent waiver, no person may

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term of imprisonment authorized for the offense does not exceed six months. Blanton v. City of North Las Vegas, 489 U.S. 538, 543 (1989). Thus, under *Lewis*, a criminal defendant may be sentenced to many years in prison, without the benefit of a jury trial, as long as the defendant is charged with offenses that are punishable individually by no more than six months imprisonment.

[244] *See, e.g.*, 10 U.S.C. § 918 (2004) (authorizing death as possible penalty for murder committed by member of armed services).

[245] *See, e.g.*, People v. Cramer, 2003 Cal. App. Unpub. LEXIS 11756 (Cal. Ct. App. 2003) (concluding that *Apprendi* does not bar use of petty offense conviction rendered by nonjury court to enhance punishment for subsequent offense); *cf.* People v. Natkie, 2002 Mich. App. LEXIS 2327 (Mich. Ct. App. 2002) (upholding against state and federal constitutional challenge use of conviction pursuant to military court martial to enhance punishment for subsequent civilian offense).

[246] *Cf.* United States v. Kole, 164 F.3d 164 (3d Cir. 1998) (opining that prior conviction in Philippines could be used to trigger mandatory minimum for U.S. crime even though court in Philippines did not afford right to jury trial), *cert. denied* 526 U.S. 1079 (1999).

[247] *See supra* note 182 and accompanying text.

be imprisoned for any offense, whether classified as petty, misdemeanor, or felony unless he was represented by counsel."[248] Moreover, the Amendment guarantees a right to appointed counsel for all felonies, regardless of the punishment actually imposed.[249] By contrast, the Court held in *Scott v. Illinois*[250] that a defendant in a misdemeanor case does not have a constitutional right to counsel when no sentence of imprisonment is imposed. After *Scott*, the Supreme Court in *Nichols v. United States*[251] approved the use of an uncounseled misdemeanor conviction that was valid under *Scott* to enhance the sentence under the Federal Sentencing Guidelines for a subsequent offense, even though the subsequent offense was a felony and triggered a right to counsel.[252] In the civil context, the Supreme Court has held that the determination of a factual issue in a proceeding in which no constitutional right to jury trial existed may be preclusive in a subsequent case in which the litigants ordinarily would have the right to jury determination of that issue.[253]

These precedents support the notion that when a defendant has been afforded all the constitutional and statutory protections that are due in a particular type of proceeding, findings produced during the proceeding may be binding in a subsequent case, even if more exacting procedures are guaranteed in that later case. Drawing on these precedents, it would seem that a criminal conviction produced by a nonjury court (be it a military court, foreign tribunal, or ordinary court of law in a petty offense case) should be eligible to enhance the statutory maximum for a subsequent offense, even when the defendant would be entitled to a jury trial on the subsequent offense.

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[248] Argersinger v. Hamlin, 407 U.S. 25, 37 (1972).

[249] *See, e.g.*, Mempa v. Rhay, 389 U.S. 128, 134 (1967) (stating that *Gideon v. Wainwright*, 372 U.S. 335 (1963), held that Sixth Amendment as applied through Due Process Clause of Fourteenth Amendment was applicable to States and, "accordingly, that there was an absolute right to appointment of counsel in felony cases").

[250] 440 U.S. 367 (1979).

[251] 511 U.S. 738 (1994).

[252] *Id.* Because *Nichols* involved a sentence enhancement within the Federal Sentencing Guidelines, the prior conviction did not raise the possible punishment beyond the statutory maximum for the underlying offense. Relying in part on *McMillan*, the Court in *Nichols* reasoned that if a state need prove prior defendant conduct at sentencing only by a preponderance of the evidence, "it must be constitutionally permissible to consider a prior uncounseled misdemeanor conviction based on the same conduct where that conduct must be proved beyond a reasonable doubt." *Id.* at 748.

[253] Parklane Hosiery Co. v. Shore, 439 U.S. 322, 332-37 (1979) (factual findings in equitable proceeding brought by SEC could be preclusive in shareholders' legal suit for damages).

In part II, I argued that the Sixth Amendment guarantees jury determination of the existence of a prior conviction in an ordinary court of law when the prior conviction will enhance a statutory maximum. This may seem inconsistent with my argument here that a prior conviction may qualify as an enhancement fact even though the conviction was produced by a nonjury tribunal. That conviction of some crimes may be rendered by tribunals in which no constitutional entitlement to jury trial exists, however, is a different issue than whether, in a prosecution in which an entitlement to jury trial does exist, the jury's constitutional authority should include determination of whether the defendant incurred the prior conviction alleged by the prosecution.

In a military tribunal, the special objectives and needs of the proceedings are perceived to override the benefits of jury trial. No such special circumstances are present when the existence of a prior military conviction is questioned in an ordinary court of law adjudicating a subsequent offense. In "petty offense" cases, it is the "non-serious" nature of the possible punishment — i.e., no greater than six months imprisonment per petty offense — combined with the costs and administrative inconvenience of jury trial, that have led the Supreme Court to conclude that a jury trial is not provided by the Constitution. But if the existence of a prior petty offense conviction would raise the statutory maximum for a subsequent offense, and the defendant is entitled under the Sixth Amendment to a jury trial for the subsequent offense because it is punishable by greater than six months imprisonment, then jury determination of the existence of the prior conviction should be guaranteed.[254] The absence of a right to criminal jury trial in foreign legal systems likely will have many explanations, including history and culture; a conviction in such a system may nonetheless be produced through procedures that are geared towards reliable factfinding. Once a defendant previously convicted in a foreign tribunal is in a court in the United States in which an entitlement to jury trial exists, however, the defendant should be entitled to jury determination of the existence of the prior conviction if that conviction

[254] If a subsequent offense is punishable by six months imprisonment or less, some courts will recognize a constitutional right to jury trial when a prior conviction would raise the statutory maximum for the subsequent offense beyond six months imprisonment. *See, e.g.*, People v. Reyes, 509 N.Y.S.2d 748, 750 (N.Y. 1986) (stating that recidivist sentencing statute triggers constitutional right to jury trial because defendant who has recent prior conviction may receive sentence of up to one year imprisonment for crime that otherwise would be punishable by maximum sentence of six months); *cf.* State v. Mitchell, 2002 Conn. Super. LEXIS 2636 (Sup. Ct. Conn. 2002) (concluding that right to jury trial exists under Connecticut statute when repeat offender was subject to jail time).

would raise the statutory maximum for a subsequent offense.

Apprendi left open an important question as to whether a judgment obtained in a tribunal that does not afford a right to jury trial or a right to proof beyond a reasonable doubt may be used later to enhance the statutory maximum for a subsequent offense. I have argued that in order for a judgment to raise the penalty for a subsequent offense, the tribunal that produced the prior judgment must have applied the reasonable doubt standard. Accordingly, neither a civil judgment rendered under a lesser standard of proof, nor a criminal conviction produced by a foreign tribunal that did not apply a standard equivalent to "beyond a reasonable doubt" should be used to enhance a statutory maximum for a later criminal offense. I have argued also that convictions produced by a nonjury tribunal generally may be used to enhance the penalty for a subsequent offense, but that adjudications of juvenile delinquency, produced without affording the juvenile a right to jury trial, may not be a basis for increasing the maximum penalty for a later criminal offense.

CONCLUSION

Many courts have assumed that the Supreme Court answered in the negative whether a defendant, charged with a prior conviction that would increase the penalty for a subsequent offense beyond the prescribed statutory maximum, has the right to a jury trial and to proof beyond a reasonable doubt on the existence of the prior conviction. This article has shown that these courts have misread the Supreme Court's decisions, and it has argued that the reasonable doubt and jury trial guarantees should apply when a defendant, facing an enhanced sentence, contests the existence of a prior conviction.

Courts have given different answers to the separate question of what process must have been afforded in the prior tribunal in order for the prior judgment to be eligible to raise the statutory maximum for a subsequent offense. I have suggested that the prior tribunal must have employed a reasonable doubt standard, but, outside the unique context of juvenile proceedings, the tribunal need not have afforded a right to jury trial. To ignore prior convictions simply because a jury trial was not available in the tribunal that rendered the conviction would undermine legitimate reasons supporting increased punishment for repeat offenders. On the other hand, we should have confidence that the defendant indeed engaged in the conduct that led to the prior conviction if that prior conviction is to raise the possible penalty for a subsequent offense; the reasonable doubt standard minimizes the chance of an

erroneous finding that the defendant engaged in criminal conduct.

One may disagree with the line drawn by the Supreme Court between facts that would raise the penalty for a crime beyond the statutory maximum and facts that would affect the penalty within the statutory range for the offense. However, given that the line has been drawn on the basis of the heightened potential loss of liberty and the heightened stigma that attach to the enhancement of a statutory maximum, the line should be an unwavering one. A dispute over the existence of a prior conviction should trigger the same constitutional guarantees as a dispute over any other fact that would increase the penalty for an offense beyond the statutory maximum.

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