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For the Good of the Adult: An Examination of the Constitutionality of Using Prior Juvenile Adjudications to Enhance Adult Sentences

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Thirteen-year-old Robert Francis Hanley kicked a hole in his grandmother's door after she refused to let him enter her house.[1] As a result, a juvenile court sentenced Hanley to twelve months of probation.[2] Five years later, following a wholly unrelated conviction, a federal court seized on the kicking incident and the corresponding probation to subject the eighteen-year-old Hanley to additional time in prison.[3] The increase in Hanley's sentence was required under United States Sentencing Guidelines (Guidelines) section 4A1.2(d), which compels courts to enhance adult sentences if the adult has prior juvenile convictions.[4]

When courts apply section 4A1.2(d) to enhance adult sentences, they highlight a conflict between the juvenile justice system and the adult criminal system. In criminal proceedings, the United States Supreme Court has held that adults must receive full due process protections.[5] In comparable juvenile proceedings, however, the Court has held that juveniles must

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1. United States v. Hanley, 906 F.2d 1116, 1119-20 (6th Cir.), *cert. denied*, 111 S. Ct. 357 (1990).

2. *Id.* at 1120.

3. *Id.* at 1118-20.

4. UNITED STATES SENTENCING COMMISSION, FEDERAL SENTENCING GUIDELINES MANUAL (1989) [hereinafter U.S.S.G.] § 4A1.2(d) governs the use of "offenses committed prior to age eighteen" in sentence enhancement. *Id.* § 4A1.2 application note 7. The exact text of the section is as follows:

> (d) Offenses Committed Prior to Age Eighteen
>
> (1) If the defendant was convicted as an adult and received a sentence of imprisonment exceeding one year and one month, add 3 points under § 4A1.1(a) for each such sentence.
>
> (2) In any other case,
>
> (A) add 2 points under § 4A1.1(b) for each adult or juvenile sentence to confinement of at least sixty days if the defendant was released from such confinement within five years of his commencement of the instant offense;
>
> (B) add 1 point under § 4A1.1(c) for each adult or juvenile sentence imposed within five years of the defendant's commencement of the instant offense not covered in (A).

Id. § 4A1.2(d).

5. *See infra* note 32 and accompanying text (setting forth the constitutional protections afforded adult criminal defendants).

receive only minimal due process protections.[6] To justify the difference in the due process provided, the Court relies on the different goals of the two systems.[7] Although the criminal system strives to punish adults, the juvenile system focuses on treating juveniles.[8]

Section 4A1.2(d) of the Guidelines links the two systems. Specifically, application of section 4A1.2(d) raises the issue of whether a court may use a defendant's prior juvenile adjudications in which the defendant was denied the right to a jury trial to enhance the defendant's sentence for a subsequent adult conviction. The ultimate resolution of this issue will affect both the rights of juveniles in delinquency proceedings and the length of punishment that courts give adult offenders.

When the Guidelines seek to convert a treatment process into a punitive process, the Guideline's policy and goals come into direct conflict with those of the juvenile system. When courts apply section 4A1.2(d) to enhance an adult sentence, they seize on a juvenile sentence imposed for treatment purposes, without a jury trial, and fundamentally alter the nature of that sentence by using it in the adult criminal system solely to punish recidivism.[9] This transmutation unfairly and unconstitutionally ignores the different protections afforded the juvenile and the different policies that underpin the juvenile justice system.[10]

This Note highlights the constitutional problems caused when courts use prior juvenile sentences to enhance adult sentences. Part I examines the sentence enhancement rules under the United States Sentencing Guidelines; it then outlines adult sentencing protections and the evolution of juvenile due process rights, particularly focusing on a juvenile's right to a jury trial. Part I concludes with a review of section 4A1.2(d), which requires enhancement of adult sentences if the adult has a prior juvenile record. Part II argues that section 4A1.2(d), by requiring courts to use prior juvenile adjudications imposed

6. *See infra* notes 42-66; *see also* Feld, *The Transformation of the Juvenile Court*, 75 MINN. L. REV. 691, 692 (1991) ("[T]he justice routinely afforded juveniles is lower than the minimum insisted upon for adults.").

7. *See infra* notes 43-46, 78 and accompanying text.

8. *See infra* notes 43, 48 and accompanying text.

9. In formulating the Guidelines, the Sentencing Commission was to insure that they "reflect the inappropriateness of imposing a sentence to a term of imprisonment for purposes of rehabilitating the defendant." 28 U.S.C. § 994(k) (1988).

10. This Note will use the term "juvenile justice system" to refer to the laws, statutes, rules, procedures, and court systems that deal with juveniles.

without the protection of a jury trial to enhance an adult sentence, is unconstitutional. In addition, Part II argues that section 4A1.2(d) is inconsistent with congressional intent and explains how providing juveniles with the right to jury trials mitigates this inconsistency. This Note concludes that courts should use prior juvenile adjudications to enhance adult sentences only if the juveniles in those adjudications were afforded the same constitutional rights and protections as similarly situated adults.

I. JUVENILE RIGHTS AND ADULT SENTENCES

A. SENTENCE ENHANCEMENT UNDER THE GUIDELINES

Since November 1987, when a federal court convicts a defendant, the sentencing judge must impose a sentence based on the United States Sentencing Guidelines[11] formulated by the United States Sentencing Commission (Sentencing Commission). The Guidelines attempt to achieve three goals: punishment, general deterrence, and incapacitation.[12] Congress ordered the creation of the Guidelines to prevent the abuses and biases that occurred under the previous system of discretionary sentencing.[13] To eliminate these problems, the Guidelines provide mandatory uniform sentencing throughout the United States.[14] Indeed, Congress intended the Guidelines to ensure that courts treat similarly situated defendants similarly.[15] Consequently, Congress prohibited the Guidelines from

11. U.S.S.G. § 1A2. In 1984, Congress established the United States Sentencing Commission to promulgate sentencing guidelines. 28 U.S.C. § 991 (1988). The Guidelines became effective as of November 1987. Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 HOFSTRA L. REV. 1, 1 (1988). The Supreme Court upheld the constitutionality of the Guidelines in United States v. Mistretta, 109 S. Ct. 647 (1989).

12. United States v. Scroggins, 880 F.2d 1204, 1208 (11th Cir. 1989), *cert. denied*, 110 S. Ct. 1816 (1990). The purposes of the sentencing guidelines are outlined in 18 U.S.C. § 3553(a)(2) (1988).

13. S. REP. NO. 225, 98th Cong., 1st Sess. 52, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 3182, 3235. Congress specifically required that the Guidelines treat the "race, sex, national origin, creed, and socioeconomic status" of the offender as "entirely neutral." 28 U.S.C. § 994(d) (1988).

14. *See* 18 U.S.C. § 3553(a)(6) (1988).

15. S. REP. NO. 225, 98th Cong., 1st Sess. 51, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 3182, 3234. The Congress believed that the imposition of the Guidelines would for the first time assure a consistency in federal sentencing philosophy. *Id.* at 59, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS at 3242. Deviation from the Guidelines is generally prohibited. The Guidelines state:

considering discretionary factors,[16] such as race, sex, or socio-economic status.[17]

The Guidelines seek not only to make the punishment fit the crime,[18] but also to make the punishment fit the offender.[19] Consequently, the Sentencing Commission designed the Guidelines to maintain uniformity in sentencing by requiring sentencing courts first to classify convicted defendants based on their present offense and prior criminal record. Courts must then apply that classification to a preordained sentencing grid.[20] As a result, courts applying the Guidelines punish a defendant with a prior criminal record more severely than a first offender.[21]

> The court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described. In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission.

18 U.S.C. § 3553(b) (1988); *see also* Breyer, *supra* note 11, at 4-5 (listing purposes of the guidelines).

16. The Guidelines do allow for an increase or decrease in a defendant's criminal history score where "reliable information indicates that the criminal history [score] does not adequately reflect" the defendant's criminal history or likelihood of recidivism. "[A] prior arrest record itself," however, may not be considered under this provision. U.S.S.G. § 4A1.3. Any departure from the Guidelines is grounds for appeal. 18 U.S.C. § 3742 (1988).

17. 28 U.S.C. § 994(d) (1988). The age of the defendant may be considered in sentencing only to the extent relevant. *Id.*

18. 18 U.S.C. § 3553(a)(2)(A) (1988).

19. The law requires judges to consider the history and characteristics of the offender when issuing a sentence. S. REP. NO. 225, 98th Cong., 1st Sess. 52, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 3182, 3235.

20. The Guidelines classify the present offense committed into 43 different categories of severity. After a defendant's present offense has been classified, the sentencing judge looks across a table to determine the proper range of sentence based on the defendant's criminal history category. There are six criminal history categories. The categories are as follows: Category I (zero or one criminal history points), Category II (two or three points), Category III (four to six points), Category IV (seven to nine points), Category V (ten to twelve points), and Category VI (thirteen or more points). For example, a defendant who is guilty of committing a level six offense and who has a Category I criminal history score should receive a sentence of zero to six months of imprisonment. Another defendant who commits the same offense, but with a Category VI criminal history score, will receive twelve to eighteen months in prison. U.S.S.G. § 5A.

21. The Guidelines, in the introductory comments on criminal history, state that:

> General deterence of criminal conduct dictates that a clear message be

A defendant's total criminal history score determines the extent to which the court enhances the defendant's sentence.[22] Each prior sentence increases a defendant's criminal history score by one or more points.[23] Points are based not on the severity or nature of the prior offense, however, but on the length of the sentence imposed for that offense.[24] By enhancing sentences in this manner, the Sentencing Commission sought to punish recidivism and to protect the public from future criminal behavior.[25]

The criminal history score includes consideration of juvenile dispositions.[26] Despite acknowledging the possibility for "large disparities" based on the differences in the availability of juvenile records,[27] section 4A1.2(d) of the Guidelines requires courts to add points for each juvenile offense to the criminal history score.[28] Unlike some state guidelines sys-

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> sent to society that repeated criminal behavior will aggravate the need for punishment with each recurrence. To protect the public from further crimes of the particular defendant, the likelihood of recidivism and future criminal behavior must be considered. Repeated criminal behavior is an indicator of a limited likelihood of successful rehabilitation.

U.S.S.G. § 4A introductory commentary; *see* United States v. Scroggins, 880 F.2d 1204, 1209 (11th Cir. 1989), *cert. denied*, 110 S. Ct. 1816 (1990).

22. A criminal history score is computed by adding together the total number of points a defendant has compiled from prior offenses. U.S.S.G. § 4A1.1. The greater a defendant's criminal history score, the more severe his sentence. *See id.*

23. *Id.* All felony offenses are counted along with most misdemeanor and petty offense. Some minor offenses are not counted under certain circumstances. *Id.* § 4A1.2(c).

24. *See id.* § 4A1.1. Three points are added for each prior sentence exceeding one year and a month in length regardless of whether the prior offense was for forgery, drug dealing, or murder. *Id.*

25. "A defendant with a record of prior criminal behavior is more culpable than a first offender and thus deserving of greater punishment." *Id.* § 4A introductory commentary.

In adopting the Guidelines, Congress abandoned the rehabilitative model of criminal sentencing as outmoded. Congress believed it "now quite certain that no one can really detect whether or when a prisoner is rehabilitated." S. REP. NO. 225, 98th Cong., 1st Sess. 38, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 3182, 3221; *see also* United States v. Scroggins, 880 F.2d 1204, 1207-08 (11th Cir. 1989), *cert. denied*, 110 S. Ct. 1816 (1990).

26. *See supra* note 4.

27. U.S.S.G. § 4A1.2 application note 7.

28. *Id.* § 4A1.2(d); *see id.* §§ 4A1.1(a), 4A1.1(b), 4A1.1(c). The Guidelines provide that "[t]o avoid disparities from jurisdiction to jurisdiction in the age at which a defendant is considered a 'juvenile,' [§ 4A1.2(d)] applies to all offenses committed prior to age eighteen." *Id.* § 4A1.2 application note 7. A juvenile sentence may be used to increase the sentence "if the defendant was

tems,[29] the Guidelines place no cap on the number of points an adult may acquire from his juvenile record.[30] Thus, courts must use a prior juvenile adjudication to enhance an adult defendant's sentence, unless the juvenile proceeding was constitutionally infirm.[31]

B. THE CONSTITUTIONALITY OF THE USE OF PRIOR CONVICTIONS

When a defendant in a criminal proceeding is denied constitutional rights, a conviction resulting from that proceeding is invalid[32] and cannot be used later against the defen-

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released from such confinement within five years of his commencement of the instant offense." *Id.* § 4A1.2(d)(2).

If the prior offense was a status offense, it is not included in the calculation of a person's criminal history score. A status offense is an offense that would not be criminal if committed by an adult. *See* Feld, *supra* note 6, at 692. Examples of status offenses are underage drinking, curfew violations, running away from home, associating with immoral persons, and truancy offenses. *Id.*

Other minor violations are also not counted. According to the Guidelines, sentences for the following "offenses and offenses similar to them, by whatever name they are known, are never to be counted: Hitchhiking, Juvenile status offenses and truancy, Loitering, Minor traffic infractions, Public intoxication, Vagrancy." U.S.S.G. § 4A1.2(c)(2).

29. *See, e.g.*, MINN. STAT. ANN. § 244 app. (West Supp. 1991) (Minnesota's Sentencing Guidelines).

30. Congress looked to the Minnesota Sentencing Guidelines as a model in developing the Guidelines. Congress thought that Minnesota had been more successful in sentencing reform than other state or local reform programs. Congress also believed that the Minnesota Guidelines were substantially similar to the federal Guidelines. S. REP. NO. 225, 98th Cong., 1st Sess. 62, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 3182, 3245.

The Minnesota Guidelines recognized the severe problems of the juvenile system and chose to limit the use of prior juvenile convictions. Specifically, Minnesota capped the amount of points that juvenile priors may add to an adult criminal history score, MINN. STAT. ANN. § 244 II.B.4 (West Supp. 1991), reasoning that juvenile court proceedings do not afford the full procedural right available in adult courts, and that different legal procedures and safeguards make the full use of juvenile procedures unfair, *id.* § 244 app. comment II.B.404 (West Supp. 1991).

31. Courts must count each prior sentence that has not been reversed, remanded, or found constitutionally invalid in determining the total criminal history score. U.S.S.G. § 4A1.2 application note 6. *But see* United States v. Eckford, 910 F.2d 216, 220 (5th Cir. 1990) (holding that, under the Guidelines, a criminal defendant's prior uncounseled misdemeanor conviction for which the defendant did not receive a term of imprisonment may be counted in calculating a criminal history score).

32. The Supreme Court has held that the denial of constitutional protections make a conviction invalid. *See, e.g.*, Dickey v. Florida, 398 U.S. 30, 37-38 (1970) (denial of the right to a speedy trial); Duncan v. Louisiana, 391 U.S. 145, 162 (1968) (denial of trial by jury); *In re* Gault, 387 U.S. 1, 33 (1967) (denial of appropriate notice); Pointer v. Texas, 380 U.S. 400, 403-05 (1965) (denial of

dant.[33] In *Burgett v. Texas*,[34] the United States Supreme Court held that if the government obtained a prior conviction in violation of the defendant's right to counsel, a court applying a recidivism statute may not consider that conviction.[35] The *Burgett* Court reasoned that a sentencing court using such a conviction would erode the principle establishing the right to counsel and cause the defendant to suffer twice from the sixth amendment deprivation of counsel.[36]

In *Baldasar v. Illinois*,[37] the Court expanded *Burgett*, holding that courts may not use a *valid* prior uncounseled misdemeanor conviction that did not result in incarceration to enhance a sentence for a later offense.[38] The Court set forth the rationale for its decision in *Baldasar* in three concurrences.[39] Justice Marshall's concurrence provided two bases for

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right to confront and to cross-examine accusers); Malloy v. Hogan, 378 U.S. 1, 8 (1964) (denial of the right against self-incrimination); Carnley v. Cochran, 369 U.S. 506, 517 (1962) (denial of right to counsel).

33. *Cf.* Baldasar v. Illinois, 446 U.S. 222, 230 (1980) (Blackmun, J., concurring); United States v. Tucker, 404 U.S. 443, 449 (1972); U.S.S.G. § 4A1.2 application note 6 ("Convictions which the defendant shows to have been constitutionally invalid may not be counted in the criminal history score.").

34. 389 U.S. 109 (1967).

35. *Id.* at 115. The Court concluded that the admission of a prior criminal conviction that is constitutionally infirm is inherently prejudicial. *Id.*; *see also* United States v. Tucker, 404 U.S. 443, 449 (1972) (permitting a conviction obtained by violating the rights of the defendant to enhance his punishment for a later offense would erode the principles creating the rights).

36. *Burgett*, 389 U.S. at 115.

37. 446 U.S. 222 (1980) (per curiam).

38. *Id.* at 222-24. In United States v. Tucker, 404 U.S. 443 (1972), the Court held that a prior uncounseled felony conviction could not be used to enhance a current sentence. *Id.* at 449. In other circumstances, the Court has upheld convictions for one purpose that would not be valid for all purposes. *See* Scott v. Illinois, 440 U.S. 367, 373-74 (1979) (conviction of defendant without counsel unconstitutional if he were sentenced to prison; however, the same conviction is constitutionally valid if the defendant is not sentenced to prison).

Under *Baldasar*, an uncounseled conviction may not be used for enhancement. *See supra* notes 33-36 and accompanying text. Under *Scott*, however, a person may be found guilty of an offense without the right to the assistance of counsel, but that person may not be sentenced to even a day of incarceration without the right to the assistance of counsel at trial. *Scott*, 440 U.S. at 374.

39. Although *Baldasar* was a per curium decision, Justices Stewart, Marshall, and Blackmun each wrote a separate concurrence. Justice Stewart's concurrence stated that the prison sentence inflicted on Baldasar violated *Scott*, because Baldasar had been sentenced to an increased term of imprisonment "*only* because he had been convicted in a previous prosecution in which he had *not* had the assistance of appointed counsel." 446 U.S. at 224 (Stewart, J., concurring) (emphasis added). Because counsel did not represent Baldasar in his first conviction, Justice Blackmun believed that the conviction was invalid and therefore could not be used to support subsequent enhancement. *Id.*

the decision. First, he stated that the sixth amendment right to counsel is "fundamental and essential to a fair trial."[40] In addition, he argued that convictions that are "invalid for purposes of imposing a sentence of imprisonment" for the original offense remain invalid for enhancing a later sentence of imprisonment under a repeat-offender statute.[41]

C. JUVENILE RIGHTS IN ADJUDICATIONS

The juvenile justice system differs fundamentally from the adult criminal justice system.[42] While the adult system seeks to punish, the juvenile system traditionally seeks to treat.[43] To

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at 230 (Blackmun, J., concurring). Even the *Baldasar* dissenters had no problem with the *Burgett* holding that disallowed sentence enhancement due to constitutionally invalid prior felony conviction. *Id.* at 232-33 (Powell, J., dissenting).

40. *Id.* at 225 (Marshall, J., concurring) (citing Gideon v. Wainwright, 372 U.S. 335, 442 (1963)). *Gideon v. Wainwright* established the right to counsel for indigent criminal defendants. 372 U.S. 335, 342 (1963).

41. *Baldasar*, 446 U.S. at 228 (Marshall, J., concurring). Justice Marshall also expressed concern that misdemeanor convictions might be less reliable than felony convictions, because of inadequate preparation on the part of the defense, the prosecution, and the courts, and because of "assembly-line justice." *Id.* at 228 n.2.

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

43. The modern juvenile justice system traces its origins to the Progressive reform movement in Illinois in 1899. That year, the State of Illinois established the first juvenile court. Act of April 21, 1899, 1899 Ill. Laws 131 (1899). For a history of the juvenile reform movement, see Fox, *Juvenile Justice Reform: An Historical Perspective*, 22 STAN. L. REV. 1187 (1970).

The Progressive reformers sought to create a separate system for juveniles to replace the traditional common law system that did not distinguish between juvenile offenders and adult offenders. *See In re* Gault, 387 U.S. 1, 14-16 (1967). The common law deemed children under the age of seven incapable of committing crimes. *Id.* at 16. Children between the ages of seven and fourteen were rebuttably presumed to be incapable of committing criminal acts. *In re* Gladys R., 1 Cal. 3d 855, 863, 83 Cal. Rptr. 671, 677-78, 464 P.2d 127, 133-34 (1970). The law treated children over fourteen like adults. Feld, *Progressivism and the Control of Youth: The Emergence of the Juvenile System*, in LAW AND SOCIETY: SOCIOLOGICAL PERSPECTIVES ON CRIMINAL LAW 173, 185-86 (1983). Once the court decided the threshold question of whether the child had *mens rea* to commit the criminal act, the proceedings did not vary from adult proceedings. *Id.* A child found guilty would be sentenced as any other convict. *Id.*

Under the Progressive movement reforms, juvenile proceedings ceased being "criminal," but instead became "civil actions." *See Gault*, 387 U.S. at 17. One Texas court summarized the use of terminology in the juvenile system as follows:

> The creators of the juvenile system rejected the adult example as punitive, cruel and nonrehabilitative. This rejection was so extreme that even the vocabulary of the criminal system was discarded and replace by more palatable terminology. Instead of being "arrested,"

this end, the juvenile justice system avoids the strict standards of the adult judicial system by focusing on the individual treatment and rehabilitation of the offender,[44] instead of the offense committed.[45] Because the juvenile system was "for the good of the child,"[46] traditional notions of adult criminal due process and procedure were thought unnecessary, if not detrimental, to cure the juvenile of the "disease of delinquency."[47] To achieve

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> "jailed" and "indicted," juveniles were to be "taken into custody," "detained" and a "petition" was to be filed for further "protection." Terms such as "trial," "criminal," and "imprisonment" were replaced with the softer terms of "hearing," "juvenile delinquent" or "a child in need of supervision," and "commitment." Medical metaphors such as diagnosis, rehabilitation, and counseling accented the new juvenile vocabulary in order to better characterize the type of treatment intended.

Lanes v. State, 767 S.W.2d 789, 791-92 (Tex. Ct. App. 1989).

44. *See* Feld, *supra* note 6, at 695 ("[b]y separating children from adults and providing a rehabilitative alternative to punishment, juvenile courts rejected the jurisprudence of criminal law and its procedural safeguards, such as juries and lawyers").

45. Under the traditional juvenile court approach, the actual crime or offense that the juvenile commits should not affect the severity or length of the court's intervention, because each individual child's needs are different and courts cannot determine those needs in advance merely by looking at the committed offense. Feld, *Criminalizing Juvenile Justice: Rules of Procedure for the Juvenile Court*, 69 MINN. L. REV. 141, 151 (1984).

46. The idea that the state in its role as *parens patriae* is "for the good of the child" is originally a Spartan theory. State *ex rel.* Londerholm v. Owens, 197 Kan. 212, 220, 416 P.2d 259, 267 (1966). Under this theory, the state may exercise its authority to guard and direct the child. *Id.* Early reformers believed a child had a right to be subject to custody, not liberty. *Gault*, 387 U.S. at 17. *See generally* Fox, *supra* note 43, at 1188-1221 (discussing the history of the juvenile reform movement). The Supreme Court has continued to adhere to the notion that juveniles are subject to custody. *Schall*, 467 U.S. at 265 ("the juvenile's liberty interest may, in appropriate circumstances, be subordinated to the State's *'parens patriae* interest in preserving and promoting the welfare of the child' " (quoting Santosky v. Kramer, 455 U.S. 745, 766 (1982))).

The Supreme Court in Kent v. United States, 383 U.S. 541 (1966), stated, however, that "[t]he Juvenile Court is theoretically engaged in determining the needs of the child and of society rather than adjudicating criminal conduct. The objectives are to provide measures of guidance and rehabilitation for the child and protection for society, not to fix criminal responsibility, guilt and punishment." *Id.* at 554.

47. *See* Feld, *supra* note 43, at 181, 185-86 (applying medical metaphors to the criminal justice system encouraged the juvenile court to collect "as much information as possible about the child, since a rational scientific analysis of facts would reveal the proper diagnosis and prescribe the cure").

Juvenile commitment was of an indefinite rather than fixed length because it was impossible to judge in advance how long a juvenile would need treatment. *See* Feld, *supra* note 45, at 151. Other notions unique to the juvenile system also prevailed. The system recognizes confessions by juveniles at court proceedings as the commencement of the juvenile's "therapy." *Gault*,

this goal, juvenile sentences were for an indefinite rather than finite period.[48]

The policies of the juvenile justice system, however, caused juveniles to suffer from "the worst of both worlds."[49] Juveniles adjudicated within the juvenile system received neither the same constitutional protections as adults nor the care and treatment postulated for children.[50]

The juvenile justice process changed in 1967 when the Supreme Court issued its landmark decision *In re Gault*.[51] The *Gault* Court extended to juveniles many, but not all, traditional fifth[52] and sixth[53] amendment constitutional criminal protec-

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387 U.S. at 51. Moreover, the idea that adult due process is detrimental to the treatment of juveniles persists. In United States v. Cuomo, 525 F.2d 1285 (5th Cir. 1976), Judge Wisdom stated that "juvenile delinquency proceedings are intended to be 'intimate, informal, protective and paternalistic.' . . . Therefore, the imposition upon the federal juvenile system of a jury trial right would be the same 'regressive and undesirable step' that a similar imposition would be upon the states." *Id.* at 1292.

48. *See* Feld, *supra* note 6, at 700. The theory behind the juvenile system was to determine the "needs of the child and society rather than adjudicating criminal conduct." *Kent*, 383 U.S. at 554. Guidance and rehabilitation, not responsibility, guilt or punishment, were the objectives of the process. *Id.* Juveniles were to be "treated" and "rehabilitated" as a result of their encounters with the justice system, and the procedures they encountered were to be "clinical" rather than "punitive." Feld, *supra* note 43, at 181, 185-86; *Gault*, 387 U.S. at 15-16. Courts continue to view the juvenile commitment process as rehabilitative and treatment oriented, and not punitive, *In re* Eric J., 159 Cal. Rptr. 317, 321, 601 P.2d 549, 554 (1980), and sentencing in a majority of states is still indefinite in many cases. *See* Feld, *supra* note 6, at 711; Feld, *The Juvenile Court Meets the Principle of Offense: Punishment, Treatment, and the Difference it Makes*, 68 B.U.L. REV. 821, 849 (1988).

49. Kent v. United States, 383 U.S. 541, 556 (1966).

50. *Id.* at 556.

51. 387 U.S. 1 (1967).

52. The fifth amendment provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, . . . nor shall any person be subject for the same offence to be twice in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law . . . .

U.S. CONST. amend. V.

53. The sixth amendment provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

U.S. CONST. amend. VI.

tions.[54] The Court rejected applying a lower standard of rights to juvenile proceedings simply because those proceedings were labelled "civil,"[55] because juvenile commitment, whether labelled "criminal" or "civil," is still incarceration.[56] The *Gault* Court held that the youth of the offender does not justify conviction in a "kangaroo court,"[57] and concluded that the Constitution requires, at a minimum, fourteenth amendment due process[58] procedural regularity in juvenile proceedings.[59]

Despite *Gault* and its progeny,[60] courts still retain great discretion in dealing with juveniles.[61] Unlike adult sentencing,

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54. The Court stated that "neither the Fourteenth Amendment nor the Bill of Rights is for adults alone." *Gault*, 387 U.S. at 13. Specifically, the Court held that juveniles, like adults, have the right to sufficient notice of the charges against them, *id.* at 33, to counsel, *id.* at 41, to confront and cross-examine witnesses, *id.* at 56, and to protect themselves against self-incrimination, *id.* at 55.

55. *Id.* at 50.

56. *Id.*

57. *Id.* at 28. The Court in Schall v. Martin, 467 U.S. 253 (1984), revisited the applicability of the due process clause to juvenile proceedings, stating that "[t]here is no doubt that the Due Process Clause is applicable in juvenile proceedings." *Id.* at 263.

58. *Gault*, 387 U.S. at 41.

59. *Id.* at 27-28.

60. One Texas court summarized the eight main cases defining juvenile rights in the following manner:

> In chronological order these cases established: (1) protections against coerced confessions, *Haley v. Ohio*, [332 U.S. 596 (1948)]; (2) procedural requirements for certification hearings, *Kent v. U.S.*, 383 U.S. 541 [1966]; (3) the rights of notice, counsel confrontation, cross-examination, and protection against self-incrimination, [*In re* Gault, 387 U.S. 1 (1967)]; (4) proof beyond a reasonable doubt, *In re Winship*, [397 U.S. 358 (1970)]; (5) that a jury trial is not required, [McKeiver v. Pennsylvania, 403 U.S. 528 (1971)]; (6) double jeopardy protections, *Breed v. Jones*, 421 U.S. 519 [(1975)]; (7) the validity of pre-trial detention, *Schall v. Martin*, 467 U.S. 253 [(1984)]; and, (8) a diminished Fourth Amendment standard applicable to school searches, *New Jersey v. T.L.O.*, 460 U.S. 325 [(1985)].

Lanes v. State, 767 S.W.2d 789, 794 (Tex. Ct. App. 1989) (citations to state statutes omitted).

61. Juvenile court sentencing rules are distinct from those in adult courts. *See* Feld, *supra* note 48, at 837-38. More sentencing discretion is allowed in juvenile sentencing than in adult sentencing "because of paternalistic assumptions about the ability to rehabilitate children." *Id.* at 880. The juvenile justice system continues to believe in a "rehabilitative" model of sentencing. Although many states have begun to move away from this model and toward the determinative sentencing model, most jurisdictions sentence juveniles for indeterminate periods. *Id.* at 849. When they impose indeterminate sentences, judges often commit the juvenile offenders to the state juvenile corrections agency. *Id.* at 850. These agencies then determine when to release the juvenile. *Id.*

Juvenile courts continue to prefer for individualized decisionmaking and

present offense and prior record are not the sole criteria for punishment in the juvenile context.[62] Instead, judges have a wide range of discretion. They may consider numerous factors, such as race, sex, and other factors reflecting biases[63] that are not considered in adult cases.[64] By using a multi-factor analysis, courts may punish similarly situated offenders differently.[65]

Notwithstanding *Gault*'s promise of procedural regularity,[66] the Court left open the question of how closely it would require the juvenile court to resemble an adult criminal court. In particular, although guaranteeing many sixth amendment protections, the Court did not address whether juvenile offenders had the right to a jury trial.

D. THE RIGHT TO A JURY TRIAL

Because the founders saw the jury as a check on the new nation's criminal justice system,[67] they provided all persons the

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treatment of juveniles. *See* Fink, *Determining the Future Child: Actors on the Juvenile Court Stage*, in 2 FROM CHILDREN TO CITIZENS: THE ROLE OF THE JUVENILE COURT 270, 276 (F. Hartmann ed. 1987) (noting that "the court must consider not merely the interests and circumstances of the present child, family, and community, but also must attempt to envision within the significant limits of the state of the art of prediction the interests and circumstances, as well as the probable effects of particular modes of intervention, upon the *future* child") (emphasis in original). Juvenile dispositions are not fixed, but rather depend on a judge's prediction of the child's future. *Id.*

62. Feld, *supra* note 6, at 711 (one-third of states use the present offense and prior record approach in sentencing juveniles).

63. *See* Feld, *The Right to Counsel in Juvenile Courts: An Empirical Study of When Lawyers Appear and the Difference They Make*, 79 J. CRIM. L. & CRIMINOLOGY 1185, 1252-80 (1989) (race, sex, and pretrial detention all affect juvenile dispositions).

64. Numerous discretionary factors eliminated from consideration in adult sentencing under the Guidelines continue to affect juvenile dispositions. *Compare* 28 U.S.C. § 994(d) (1988) (requiring the elimination of race, sex, national origin, creed, and socioeconomic factors from affecting sentencing under the Guidelines) *with* Feld, *supra* note 63, at 1261-66, 1279-80 (asserting that race and sex affect juvenile sentencing).

65. *See* Feld, *supra* note 48, at 873-74 ("commitment and release decisions [are] so 'individualized' that no factors could explain the differentiation in treatment of youths by an institution"). In addition, with the court's approval, the prosecutor may elect to "waive" the most serious juvenile offenders into the adult system. *See* Feld, *supra* note 6, at 701-08. A juvenile's race also affects the waiver decisions. *Id.* at 704.

66. *See supra* notes 51-59 and accompanying text.

67. THE FEDERALIST No. 83, at 543 (A. Hamilton) (E. Earle ed. 1937) (trial by jury provides protection in criminal proceedings against "[a]rbitrary impeachments, arbitrary methods of prosecuting pretended offenses, and arbitrary punishments upon arbitrary convictions").

right to a jury trial.[68] The Supreme Court has extended the sixth amendment guarantees of trial by jury to defendants in *state* criminal proceedings,[69] finding this right necessary to prevent government oppression.[70] Later, in *Baldwin v. New York*,[71] the Court held that every defendant charged with an offense punishable by more than six months of imprisonment, whether or not labeled "petty," is entitled to a trial by jury.[72]

The Supreme Court, however, has not required that juveniles faced with six months or more of confinement receive jury trials. In *McKeiver v. Pennsylvania*,[73] the Court, in a plurality opinion,[74] refused to extend the juvenile due process

68. *See supra* note 53 and accompanying text. The Court in *Gault* also saw the protection against self-incrimination as necessary for juveniles to prevent government oppression and coercion. *In re* Gault, 387 U.S. 1, 47 (1967).

69. Duncan v. Louisiana, 391 U.S. 145, 149 (1968). Both the Constitution and the Bill of Rights explicitly mention this fundamental right. The Constitution provides two explicit grants of the rights of citizen to a trial by jury: article III, section 2, clause 3 of the Constitution provides that "the trial of all Crimes, except in Cases of Impeachment, shall be by Jury;" and the sixth amendment states that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . ."

70. *Duncan*, 391 U.S. at 155. Although the Court acknowledged that a system of trial by jury has weaknesses and the potential for abuse, *id.* at 156, it nevertheless believed in its importance:

> The guarantees of jury trial in the Federal and State Constitutions reflect a profound judgment about the way in which law should be enforced and justice administered. . . . Those who wrote our constitutions knew from history and experience that it was necessary to protect against unfounded criminal charges brought to eliminate enemies and against judges too responsive to the voice of higher authority. . . . *Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge.* If the defendant preferred the common-sense judgment of a jury to the more tutored but perhaps less sympathetic reaction of the single judge, he was to have it. Beyond this, the jury trial provisions in the Federal and State Constitutions reflect a fundamental decision about the exercise of official power — a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges.

Id. at 155-56 (emphasis added); *see also* Baldwin v. New York, 399 U.S. 66, 72 (1970) ("the primary purpose of the jury is to prevent the possibility of oppression by the Government").

71. 399 U.S. 66 (1970).

72. *Id.* at 69. In all states with indefinite sentencing for juveniles offenses, the authorized sentence for an offense would fall within the *Baldwin* limits. *See id.*

73. 403 U.S. 528 (1971).

74. The Court wrote a total of five opinions in the *McKeiver* decision. No single opinion gathered more than four supporters. Chief Justice Burger, Justice Stewart, and Justice White joined Justice Blackmun's plurality opinion. Justice White, however, also wrote a separate concurrence. Justice Harlan

rights established in *Gault*[75] to include the right to a jury trial in state delinquency proceedings.[76] The *McKeiver* Court held

concurred in judgment, but wrote his own opinion. Justice Brennan concurred in judgment as to McKeiver's appeal, but dissented in the companion case of *In re* Burrus. Justices Douglas, Black and Marshall joined in a common dissent.

75. When a court refuses to extend an adult protection in the juvenile court context, "it must be justified by interests of society, reflected in that unique institution, or of juveniles themselves, of sufficient substance to render tolerable the costs and burdens, . . . which the exception will entail in individual cases." Breed v. Jones, 421 U.S. 519, 534-35 (1975). The *McKeiver* Court retreated from fully applying the due process analysis of *Gault*. Instead, the Court believed its duty was to "ascertain the precise impact of the due process requirement" on juvenile proceedings. *McKeiver*, 403 U.S. at 541 (quoting *In re* Gault, 387 U.S. 1, 13-14 (1967)).

76. The Court did not address the question of whether juveniles have a right to a jury trial in federal delinquency proceedings. In Nieves v. United States, 280 F. Supp. 994 (S.D.N.Y. 1968), decided after *Gault* but before *McKeiver*, a three-judge district court held that

> [a Federal Juvenile Delinquency Act] proceeding which may lead to a juvenile's loss of liberty by incarceration, for purposes of the Sixth Amendment right to trial by jury, is in nature a criminal prosecution, and the constitutionally guaranteed right of a trial by jury in all federal criminal prosecutions must, therefore accompany such a proceeding.

Id. at 1004. Courts considering *Nieves* after *McKeiver* have held that *Nieves* is no longer good law. In United States v. King, 482 F.2d 454 (6th Cir.), *cert. denied*, 414 U.S. 1076 (1973), the Sixth Circuit reasoned that the *McKeiver* Court "regarded the juvenile delinquency law under consideration, which was not significantly different from the federal statute, as not being of a criminal nature so as to invoke all of the protections required in a criminal prosecution." *Id.* at 455. In United States v. Cotton, 446 F.2d 107 (8th Cir. 1971), the Eighth Circuit simply found no difference between state and federal adjudications. The court quoted *McKeiver*, asserting " 'that trial by jury in the juvenile court's adjudicative state is not a constitutional requirement.' " *Id.* at 110. In United States v. Torres, 500 F.2d 944 (2d Cir. 1974), the Second Circuit held that the Federal Juvenile Delinquency Act denying trial by jury "does not violate the Sixth Amendment or Due Process standards of fundamental fairness, and there is no constitutional right to a jury trial in such proceedings." *Id.* at 948. Similarly, in United States v. Duboise, 604 F.2d 648 (10th Cir. 1979), the Tenth Circuit found that the Federal Juvenile Delinquency Act did not permit trial by jury. *Id.* at 648. This court viewed the juvenile proceeding as "a civil rather than a criminal prosecution." *Id.* at 650. Because "adjudication of juvenile delinquency and commitment under the Juvenile Delinquency Act is not a conviction of or sentence for a crime," *id.* at 649-50, the court reasoned that the hearing need only " 'measure up to the essentials of due process and fair treatment,' " *id.* at 651 (quoting *McKeiver*, 403 U.S. at 533-34). The *Duboise* court did provide an alternative to juveniles seeking a jury trial. "The juvenile *status* does not deny the juvenile a jury trial. He can, if he wishes to have it, elect to be tried under the adult procedure which would give him a right to a jury trial." *Id.* at 652 (emphasis in the original). The implication of the Tenth Circuit's ruling is that juveniles do have a sixth amendment right to a trial by jury, but that right is limited to an adult criminal court.

that the Constitution did not require eliminating all differences in the procedural treatment of juveniles.[77] The Court reasoned that juvenile courts "treat" children, instead of punishing them.[78] Thus, denying a juvenile a jury trial did not create a "fundamental unfairness."[79]

As *McKeiver* demonstrated, when a proceeding is not criminal, courts apply a fourteenth amendment "fundamental fairness" standard, rather than a "selective incorporation"[80] standard.[81] To determine which procedural protections a state must provide to meet the "fundamental fairness" standard, courts weigh the state's *parens patriae*[82] interests against the individual's liberty interest.[83] The *McKeiver* Court used the

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

78. "Supervision or confinement is aimed at rehabilitation, not at convincing the juvenile of his error simply by imposing pains and penalties." *Id.* at 552 (White, J., concurring); *see also* Feld, *supra* note 6, at 696 (discussing *McKeiver*).

In Allen v. Illinois, 478 U.S. 364 (1986), the Court similarly concluded that, in the "civil" commitment of an adult in psychiatric facilities, the defendant is not entitled to full due process rights. *Id.* at 368-74. As in *McKeiver*, the state's primary interest in treating the defendant allows for lower constitutional protections. The Court held that the treatment purpose of psychiatric detention and the State's disavowed interest in punishment makes the proceeding civil and not criminal. *Id.* at 370. The *Allen* Court believed that "[t]he state has a legitimate interest under its *parens patriae* powers in providing care to its citizens who are unable because of emotional disorders to care for themselves." *Id.* at 373.

79. The Court has held that the Constitution does not mandate the elimination of all differences between the treatment of juveniles and adults. Schall v. Martin, 467 U.S. 253, 263 (1984). The Court does not apply a strict constitutional due process standard in evaluating juvenile proceedings. Instead, the Court asks whether the given procedure is compatible "with the 'fundamental fairness' demanded by the Due Process Clause." *Id.*

80. The "selective incorporation" standard makes the most of the Bill of Rights' protections applicable to the states via the fourteenth amendment. Duncan v. Louisiana, 391 U.S. 145, 171 (1968) (Black, J., concurring). Selective incorporation applies the specific federal right being incorporated and all of its case law to the states. For a further discussion of selective incorporation, see W. LAFAVE & J. ISRAEL, CRIMINAL PROCEDURE § 2.5 (1985).

81. *McKeiver*, 403 U.S. at 543; *cf.* Allen v. Illinois, 478 U.S. 364 (1986); Addington v. Texas, 441 U.S. 418 (1979).

The Court reserves full sixth amendment protections only for criminal proceedings. Middendorf v. Henry, 425 U.S. 25, 37-38 (1976) (a proceeding that results "in loss of liberty does not *ipso facto* mean that the proceeding is a 'criminal prosecution' for purposes of the Sixth Amendment"). When the state's goal is treatment and not punishment of the individual involved, the Court requires only "fundamental fairness," not full "selective incorporation" procedural protections. *Cf. Allen*, 478 U.S. at 373-75.

82. The state acts as guardian or parent of the juvenile.

83. *See Schall*, 467 U.S. at 265; *see also Allen*, 478 U.S. at 373-74 (focusing on state's interest in treatment rather than punishment).

"fundamental fairness" standard to balance constitutional due process requirements with the nonpunitive objectives of the juvenile court system.[84] Despite noting serious shortcomings in the juvenile justice system,[85] the Court maintained that a jury

84. In *Schall*, the Court stated that in evaluating the constitutionality of the treatment of juveniles, it tries to strike a balance between the "informality" and "flexibility" of juvenile proceedings and the "fundamental fairness" demands of the due process clause. *Schall*, 467 U.S. at 263.

> There is a possibility, at least, that the jury trial, if required as a matter of constitutional precept, will remake the juvenile proceeding into a fully adversary process and will put an effective end to what has been the idealistic prospect of an intimate, informal protective proceeding.

McKeiver, 403 U.S. at 545. The Court believed that the right to a jury trial in juvenile court would not greatly strengthen the factfinding process and, in fact, jury trials could prevent the juvenile court from functioning in its unique manner. *Id.* at 547.

Further, the Court views juvenile incarceration, like incarceration of the mentally ill, as a balancing of the state's interests and the interests of the individual. It also views the period of incarceration as volitional. *Compare McKeiver*, 403 U.S. at 552 (White, J., concurring) (a juvenile court may confine a delinquent until he is age 21, but the confinement will last no longer than it takes the delinquent to demonstrate that he is no longer a risk if returned to his family) *with Allen*, 478 U.S. at 369 (any time the patient can show that he is no longer found to be dangerous, he is to be discharged).

85. The Supreme Court took particular note of shortcomings with juvenile judges. "Too often the juvenile court judge falls far short of that stalwart, protective, and communicating figure the system envisaged." *McKeiver*, 403 U.S. at 544. In an accompanying footnote, the Court pointed out that one-half of all juvenile judges did not have college degrees; one-fifth of all judges had received no college education at all; and one-fifth of the judges were not members of any bar. *Id.* at 544 n.4.

The Court, however, did not consider the system fatally flawed. The Court reaffirmed its faith in the juvenile system, despite the system's acknowledged problems.

> The juvenile concept held high promise. We are reluctant to say that, despite disappointments of grave dimensions, it still does not hold promise, and we are particularly reluctant to say . . . that the system cannot accomplish its rehabilitative goals. . . . We are reluctant to disallow the States to experiment further and to seek in new and different ways the elusive answers to the problems of the young, and we feel that we would be impeding that experimentation by imposing the jury trial.

Id. at 547.

In his concurrence, however, Justice White sought to restrict the Court holding to juveniles charged in the juvenile court system. *Id.* at 551.

> We have not, however, considered the juvenile case a criminal proceeding within the meaning of the Sixth Amendment and hence automatically subject to all of the restrictions normally applicable in criminal cases. The question here is one of due process of law and I join the plurality opinion concluding that the States are not required by that clause to afford jury trials in juvenile courts where juveniles are charged with improper acts.

Id.

is not necessary for "accurate factfinding" in the juvenile context.[86] The Court believed that juries might be disruptive to the "unique nature of the juvenile process,"[87] and that other procedural rights adequately protect the accused juvenile.[88]

E. FEDERAL COURT APPLICATION OF SECTION 4A1.2(d)

Although federal courts have addressed several issues regarding section 4A1.2(d),[89] few have addressed whether, because of the unique nature of juvenile procedures, using this

86. *Id.* at 543.

87. *Id.* at 540.

88. *Id.* (quoting *In re* Terry, 438 Pa. 339, 346, 265 A.2d 350, 355 (1970)). The Court, as support for its decision, cited the *President's Comm'n on Law Enforcement and Admin. of Justice, Task Force Report: Juvenile Delinquency and Youth Crime* 38 (1967). "Had the Commission deemed this vital to the integrity of the juvenile process, or to the handling of juveniles, surely a recommendation or suggestion to this effect would have appeared." *McKeiver*, 463 U.S. at 544-46.

Eleven states provide juveniles a right to jury trials in all cases. *See* ALASKA STAT. § 47.10.070 (1990); COLO. REV. STAT. § 19-2-501 (1989) (six-person jury for felony and misdemeanor cases); MASS. ANN. LAWS ch. 119, § 55A (Law. Co-op. 1990); MICH. COMP. LAWS ANN. § 712A.17(2) (West 1990) (six-person jury); MONT. CODE ANN. § 41-5-521(1) (1989); N.M. STAT. ANN. § 32-1-31(A) (1989); OKLA. STAT. ANN. tit. 10, § 1110 (West 1991) (six-person jury); TEX. FAM. CODE ANN. § 54.03(c) (Vernon 1991); W. VA. CODE § 49-5-6 (1990) (twelve-person jury); WIS. STAT. ANN. § 48.31(2) (West 1990); WYO. STAT. § 14-6-223(c) (1990).

Other states provide juveniles limited rights to jury trials. *See* ALA. CODE § 15-19-1 (1990) (jury trials available for juveniles only if the defendant waives the right to be tried in juvenile court); KAN. STAT. ANN. § 38-1656 (1989) (if charge is one that would be triable by a jury if defendant were an adult, the judge may grant the juvenile the right to a jury trial); S.D. CODIFIED LAWS ANN. § 26-8-31 (1990) (cases generally heard by the court, except that the court may, on its own motion, order a six-person jury); TENN. CODE ANN. § 37-1-129 (1990) (same).

89. The legislative history of the Guidelines, however, is devoid of mention of *Gault*, *McKeiver*, or any specific reason for including juvenile adjudications in the criminal history score. The courts, therefore, are left without guidance as to why the systematic inclusion of juvenile sentences in criminal history scores is constitutionally permissible.

Several federal courts have accepted the constitutional validity of sentence enhancement under § 4A1.2(d) without question. *See* United States v. Chester, 919 F.2d 896, 898 (4th Cir. 1990); United States v. Reid, 911 F.2d 1456, 1466 (10th Cir. 1990), *cert. denied*, 111 S. Ct. 990 (1991); United States v. Brown, 903 F.2d 540, 543 (8th Cir. 1990); United States v. Keys, 899 F.2d 983, 989 (10th Cir.), *cert. denied*, 111 S. Ct. 160 (1990); United States v. White, 888 F.2d 1252, 1254 (8th Cir. 1989); United States v. Nichols, 740 F. Supp. 1332, 1334 (N.D. Ill. 1990).

Other courts have addressed various issues dealing with enhancement based on juvenile incarceration, holding that incarceration in a juvenile facility is an "imprisonment" for Guidelines purposes, and that using juvenile incar-

section to enhance adult sentences violates the due process

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ceration to enhance adult sentences does not violate due process. *See* United States v. Davis, 929 F.2d 930 (3d Cir. 1991), stating that

> We can think of no reason why the Commission might have wanted to measure the length of [adult sentences under § 4A1.2(d)(2)] using a different method from that employed in measuring adult sentences under all of the other closely related provisions. Thus we conclude that the term "sentence of confinement" in section 4A1.2(d)(2) has the same meaning as the term "sentence of imprisonment" in the other provisions.

Id. at 933; *see also* United States v. Hanley, 906 F.2d 1116, 1120 (6th Cir.) ("commitment to a juvenile facility constitutes an 'imprisonment' for the purposes of applying the . . . Guidelines"), *cert. denied*, 111 S. Ct. 357 (1990); United States v. Bucaro, 898 F.2d 368, 373 (3d Cir. 1990) (a commitment following an adjudication of delinquency by a state juvenile court can be considered an "incarceration" under the Guidelines); United States v. Kirby, 893 F.2d 867, 868 (6th Cir. 1990) (same); United States v. Williams, 891 F.2d 212, 216 (9th Cir. 1989) (commitment to juvenile hall was a "sentence to confinement" under the Guidelines), *cert. denied*, 110 S. Ct. 1496 (1990). If juvenile incarceration is a "sentence to confinement" under the Guidelines, then courts must increase that person's criminal history score by two points. U.S.S.G. § 4A1.2(d)(2)(A). If the juvenile incarceration is not a "sentence to confinement," however, then the incarceration falls within the residual exception and increases the criminal history score by only one point. *Id.* § 4A1.2(d)(2)(B).

The First Circuit, in United States v. Unger, 915 F.2d 759 (1st Cir. 1990), *cert. denied*, 111 S. Ct. 1005 (1991), simply narrowed the definition of status offense not counted by the Guidelines in calculating criminal history scores, as a way around the Guidelines' definitional problems. The *Unger* court held that in determining whether a juvenile offense was a status offense (not counted under the Guidelines) or a non-status offense (countable), courts should look not to the offense the juvenile was found guilty of violating, but to "the substance of the underlying . . . offense." *Id.* at 762-63. *But see* United States v. Martinez, 905 F.2d 251, 253-54 (9th Cir. 1990) (state law determines whether an offense runs afoul of the Guidelines).

Many years after the incident, the *Unger* court decided what was in the mind of the juvenile judge at the time Unger was sentenced and what crime Unger was guilty of violating. As a juvenile, Unger was alleged to have committed conduct that constituted breaking and entering, receiving stolen goods, and assault and battery. The Rhode Island Family Court did not find him guilty of these specific offenses, which would have lead to a finding of "delinquency," but instead judged him to be "wayward." *Unger*, 915 F.2d at 763. Rhode Island law defined these terms as follows:

> 14-1-3. Definitions.
>
> . . .
>
> (F) The term "delinquent" when applied to a child shall mean and include any child —
>
> Who has committed any offense which, if committed by an adult, would constitute a felony, or who has on more than one occasion violated any of the other laws of the state or of the United States or any of the ordinances of cities and towns, other than ordinances relating to the operation of motor vehicles.
>
> (G) The term "wayward" when applied to a child shall mean and include any child —

clause.[90] To illustrate this issue, consider the Ninth Circuit's 1989 decision in *United States v. Williams*.[91] In *Williams*, after considering Williams's prior juvenile adjudications, the sentencing judge applied section 4A1.2(d) to enhance Williams's sentence by over a year.[92] Williams argued that the judge could

(1) Who has deserted his or her home without good or sufficient cause; or
(2) Who habitually associates with dissolute, vicious or immoral persons; or
(3) Who is leading an immoral or vicious life; or
(4) Who is habitually disobedient to the reasonable and lawful commands of his or her parent or parents, guardian or other lawful custodian; or
(5) Who, being required by chapter 19 of title 16 to attend school, wilfully and habitually absents himself therefrom, or habitually violates rules and regulations of the school when he or she attends; or
(6) Who has on any occasion violated any of the laws of the state or of the United States or any of the ordinances of cities and towns, other than ordinances relating to the operation of motor vehicles.

R.I. GEN. LAWS § 14-1-3 (Supp. 1990). Under Rhode Island law, "waywardness" is normally a status offense and does not denote specific criminal wrongdoing. *Id.* An adjudication of "delinquency," however, would have required a finding of guilt equal to that of a felony. *Id.* In either case, a finding of guilt beyond a reasonable doubt is required by *In re* Winship, 397 U.S. 358, 360-61 (1970). This process of finding a juvenile guilty, one way or another, has shades of *Gault*'s warning of "kangaroo courts." *In re* Gault, 387 U.S. 1, 28 (1967); *see also* Feld, *supra* note 6, at 699 ("[m]any courts now charge juveniles with minor criminal offenses instead of status offense, for which there are no dispositional limits").

90. United States v. Booten, 914 F.2d 1352, 1353, 1355 (9th Cir. 1990) (equating a juvenile court adjudication of guilt with an adult criminal conviction does not violate due process); United States v. Rangel-Navarro, 907 F.2d 109, 110 (9th Cir. 1990) (juvenile proceedings for acts that constitute criminal behavior for adults "are criminal proceedings for juveniles").

91. 891 F.2d 212 (9th Cir. 1989), *cert. denied*, 110 S. Ct. 1496 (1990).

92. *Id.* at 213. Williams pled guilty to one count of unarmed bank robbery. Williams criminal history score was ten. Four of these points were enhancements due to two juvenile adjudications. These adjuducations took place after the defendant committed two bank robberies when he was a juvenile. In 1984, a California juvenile court ordered Williams to serve 180 days in the county juvenile hall for committing one of the robberies. Williams contended that this commitment "did not constitute a 'sentence of imprisonment' under the Sentencing Guidelines." Brief for Appellant at 7, United States v. Williams, 891 F.2d 212 (9th Cir. 1989) (No. 89-50017). In a second juvenile proceeding later in the same year, Williams was committed to the California Youth Authority for the second bank robbery. *Williams*, 891 F.2d at 213. Had Williams's juvenile sentences not been included in his criminal history score, his sentence would have been in the 30 to 37 month range instead of the 46 to 57 month range. *Id.* at 214.

The court in *Williams* was only the second appellate court to confront a case involving § 4A1.2(d). The first appellate court to mention § 4A1.2(d) in a

not include two juvenile bank robbery adjudications in his criminal history score,[93] because their inclusion violated the due process clause of the fifth amendment.[94] Although he conceded that a juvenile can be denied a jury trial without violating the Constitution,[95] Williams argued that *Baldasar* prohibited a sentencing judge from using an adjudication resulting from those proceedings to enhance a later adult sentence.[96]

The Ninth Circuit held that even if a juvenile sentence is imposed without a jury trial, courts may still use the sentence to enhance an adult sentence under the Guidelines.[97] In reaching its decision, the court narrowly read the *Baldasar* holding to apply only to cases denying the right to counsel.[98] If

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published opinion was the Eighth Circuit in United States v. White, 888 F.2d 1252 (8th Cir. 1989). The *White* court, however, did not address the constitutionality of § 4A1.2(d). *Id.* at 1254.

The *Williams* court was the first to address two major constitutional issues involved under the Guidelines. The appellant phrased the issue: "Does the provision of the Sentencing Guidelines for increases in a defendant's criminal history score and hence increases in the applicable guideline range based on prior juvenile adjudications for which there was no right to a jury trial violate the due process clause of the fifth amendment?" Brief for Appellant at 1, United States v. Williams, 891 F.2d 212 (9th Cir. 1989) (No. 89-50017). The appellee phrased the issue: "Whether the district court erred by considering defendant's prior juvenile convictions in computing defendant's applicable sentencing guideline range." Brief for Appellee at 1, United States v. Williams, 891 F.2d 212 (9th Cir. 1989) (No. 89-50017).

93. *Williams*, 891 F.2d at 213. Williams had earlier agreed to the prosecution's plea bargain agreement. Brief for Appellant at 4-5, United States v. Williams, 891 F.2d 212 (9th Cir. 1989) (No. 89-50017).

94. *Williams*, 891 F.2d at 214.

95. *Id.* Although conceding *McKeiver* does not require a jury trial for juveniles, Williams pointed out that the *McKeiver* Court "did not address the question of whether such a juvenile adjudication can later be used to enhance an adult sentence." Brief for Appellant at 9, United States v. Williams, 891 F.2d 212 (9th Cir. 1989) (No. 89-50017).

96. *Williams*, 891 F.2d at 214. Williams contended that to "use a prior juvenile adjudication or sentence to enhance a later adult sentence substantially equates the juvenile and criminal processes" and is inconsistent with *McKeiver*. Brief for Appellant at 10, United States v. Williams, 891 F.2d 212 (9th Cir. 1989) (No. 89-50017). Williams also contended that under *Baldasar*, "an adult cannot have a criminal sentence enhanced because of a conviction at a prior proceeding to which the right to a jury trial did not attach." *Williams*, 891 F.2d at 215.

97. *Williams*, 891 F.2d at 215.

98. *Id.* In *Baldasar*, the first conviction was valid for the punishment inflicted (a $159 fine and a year of probation), Baldasar v. Illinois, 446 U.S. 222, 223-24 (1980) (per curiam), but not a valid conviction for punitive incarceration, *id.* The *Williams* court stated that although the *Baldasar* Court concluded that an uncounseled conviction that is invalid for the purpose of

McKeiver allows a juvenile court to deprive a juvenile of liberty without first providing a jury trial,[99] the Ninth Circuit reasoned that courts may use a sentence imposed as a result of that proceeding to later enhance an adult deprivation of liberty.[100]

II. CONTINUING THE "WORST OF BOTH WORLDS"

In addressing the use of section 4A1.2(d) for enhancement purposes, an important distinction exists between the constitutionality of using prior juvenile *adjudications* to enhance adult sentences and the fairness of using juvenile *disposition* as the enhancement mechanism. Although distinct conceptually, these two issues are closely related because of the role that providing juveniles the right to a jury trial plays in curing defects in section 4A1.2(d). Part A discusses the adjudication issue, while Part B examines the disposition issue.

A. THE CONSTITUTIONALITY OF SECTION 4A1.2(d)

Section 4A1.2(d) is inconsistent with Supreme Court precedent. It is premised on the faulty notion that the Supreme Court's holding in *McKeiver* allows courts to use a sentence im-

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imposing a prison sentence is also invalid for the purpose of enhancing a sentence, this holding did not apply to the *Williams* case. *Williams*, 891 F.2d at 214-15.

99. The *Williams* court noted that although it is unconstitutional to deprive a misdemeanant of his liberty where the defendant was denied counsel, "it is not unconstitutional to deprive a juvenile of liberty without a jury trial." *Williams*, 891 F.2d at 215.

100. *Id.* The *Williams* court stated that Williams's prior juvenile convictions were constitutionally valid for imposing a "sentence of imprisonment" on juvenile offenders. *Id.* The court, in making this assumption, implicitly relied on the *McKeiver* holding, which was based on treatment and rehabilitation of the juvenile, and did not justify imprisonment of the child for punitive ends.

The *Williams* court cited pre-Guidelines cases for the rationale that a judge could consider the fact that a defendant was found not guilty of a prior offense in enhancing a present offense. *Williams*, 891 F.2d at 215 (citing United States v. Morgan, 595 F.2d 1134, 1135-37 (9th Cir. 1979); United States v. Williams, 782 F.2d 1462 (9th Cir. 1985)). The court stated that prior to the Guidelines, sentencing judges could consider factors that lacked full due process guarantees. Thus, judges considering sentencing after the adoption of the Guidelines can consider prior adjudication where the defendant received counsel. *Id.*

The *Williams* court concluded that the use of Williams's prior, nonjury adjudications was not a violation of Williams's due process rights. *Id.* Minnesota courts considering the problem of enhancement under its sentencing guidelines also have held that no violation of due process occurs when courts use prior juvenile convictions without the right to jury trials to enhance adult sentences. *See* State v. Little, 423 N.W.2d 722, 724 (Minn. Ct. App. 1988).

posed during a juvenile proceeding later to enhance a sentence imposed in an adult proceeding.[101] The problem with using *McKeiver* as precedent for section 4A1.2(d) is that the assumptions about the juvenile justice system's nature underlying the *McKeiver* Court's decision do not survive when applied in adult sentencing contexts.[102] The *McKeiver* Court made two assumptions to justify providing juveniles with a lower constitutional standard of due process:[103] that juvenile proceedings result in treatment, not punishment,[104] and that juvenile proceedings will not detrimentally affect the juvenile when she reaches the age of majority.[105]

Nowhere in its explanation of section 4A1.2(d) does the

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101. Unconstitutional convictions may not be considered when determining the criminal history score of a defendant. U.S.S.G. § 4A1.2 application note 6. The Sentencing Commission, however, expressly includes all juvenile offenses, with a few exceptions, in the defendant's criminal history score. *Id.* §§ 4A1.2(c), 4A1.2(d). Assuming that the Sentencing Commission was aware of the relevant precedents regarding juvenile offense when it formulated the Guidelines, the Commission must have concluded that enhancement of adult sentences by use of juvenile prior adjudications was constitutional (no Guidelines comment makes note of any problem at all with the constitutional use of juvenile offenses in calculating criminal history scores).

102. *See* Zimring, *Notes Towards Jurisprudence of Waiver*, in MAJOR ISSUES IN JUVENILE JUSTICE INFORMATION & TRAINING: READINGS IN PUBLIC POLICY 193, 197 (1980).

103. When judging the procedural fairness of juvenile proceedings, the Supreme Court uses a fourteenth amendment "fundamental fairness" standard that is less stringent than the comparable adult "selective incorporation" standard. *See supra* notes 80-88 and accompanying text.

104. *See* Feld, *supra* note 45, at 248 n.415 ("[t]he fundamental justification in juvenile jurisprudence for denying jury trials and, more basically, for maintaining a juvenile justice system separate from the adult one is based on the difference between punishment and treatment").

105. Inherent in the Court's decisions providing juveniles with fewer protections is the Court's assumption that children will be protected from the effects of juvenile delinquency proceedings in the future. *See supra* notes 77-88 and accompanying text. The *McKeiver* court based its decision on the fact that a finding of juvenile delinquency "*is* significantly different from and less onerous than a finding of criminal guilt." *Id.* at 540 (emphasis in the original). In *McKeiver*, Justice White assumed that the juvenile delinquency proceeding would not "brand" the child a criminal and that the juvenile's period of confinement would last only until the child reached age 21 or until "his behavior demonstrates" that he is no longer a risk, whichever is earlier. *Id.* at 552 (White, J., concurring); *see also* Fink, *supra* note 61, at 276.

" 'The purpose of juvenile courts, and laws relating to juvenile delinquency, is to carry out a modern method of dealing with youthful offenders, so that there may be no criminal record against immature youth to cause detrimental local gossip and future handicaps because of childhood errors and indiscretions.' " S**** S**** v. State, 299 A.2d 560, 566 (Me. 1973) (quoting Wade v. Warden of State Prison, 145 Me. 120, 126, 73 A.2d 128, 131 (1950)). This dif-

United States Sentencing Commission account for these assumptions.[106] Consequently, courts upholding the use of section 4A1.2(d) rest their decisions on a faulty understanding of the constitutional underpinnings that allow juvenile dispositions absent a jury trial.[107]

1. The Need for Constitutionally Valid Convictions

Courts may not constitutionally use a sentence stemming from a juvenile conviction that is unconstitutional by adult standards to enhance a later adult sentence. Thus, courts properly applying the constitutional limits on enhancement[108] do not consider sentences stemming from uncounseled juvenile adjudications when sentencing an adult.[109] Courts applying section 4A1.2(d) to enhance adult sentences, however, imply that the limits on enhancement do not apply when the constitutional right denied the juvenile was the right to a jury trial.[110] As in *Baldasar*, when a court uses a prior juvenile adjudication in which a lower standard of due process was provided to enhance an adult sentence, that court threatens all adult defendants by opening the door to enhancement based on looser constitutional protections.[111] Consequently, such enhancement

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ference between adult and juvenile proceedings is crucial. *Cf.* Kent v. United States, 383 U.S. 541, 557 (1966); *In re* Gault, 387 U.S. 1, 24-25 (1967).

In addition, FED. R. EVID. 609(d) prohibits using a juvenile adjudication to attack the credibility of an accused.

106. *See* U.S.S.G. § 4A1.2(d).

107. Some judges have already reached this conclusion. The theory of benevolent treatment that is the underpinning of the juvenile justice system does not provide an adequate rationale for dispensing with the constitutional protections provided adults. *In re* Dino, 359 So. 2d 586, 605 (La.) (Dennis, J., dissenting in part and concurring in part), *cert. denied*, 439 U.S. 1047 (1978).

108. *See supra* notes 32-41 and accompanying text.

109. Rizzo v. United States, 821 F.2d 1271, 1274 (7th Cir. 1987); Grant v. White, 579 F.2d 48, 49 (8th Cir. 1978).

110. United States v. Williams, 891 F.2d 212, 215 (9th Cir. 1989), *cert. denied*, 110 S. Ct. 1496 (1990).

111. In addition to the failure to provide juveniles with a right to a trial by jury, juvenile standards for probable cause hearings and for search and seizure are lower than in similar adult situations. *See* New Jersey v. T.L.O., 469 U.S. 325, 340-46 (1985) (a diminished fourth amendment standard applies to juveniles in school searches). When courts apply § 4A1.2(d), they use prior juvenile adjudications to enhance adult sentences even though the prior juvenile proceedings did not provide full constitutional protections. Using prior juvenile adjudications in this manner is inconsistent with *Baldasar*, because *Baldasar* allows for enhancement only when the prior proceeding would be valid for adult imprisonment. Baldasar v. Illinois, 446 U.S. 222, 228 (1980) (Marshall, J., concurring).

should be unconstitutional.[112]

In *Baldwin*, the Supreme Court held that all adult and juvenile defendants have the right to a jury trial when prosecuted in adult criminal proceedings that authorize a sentence of more than six months.[113] Because almost every state allows discretionary sentencing of juveniles regardless of the offense committed,[114] any juvenile proceeding may result in a sentence of more than six months.[115] As a result, all juvenile proceedings fall within the *Baldwin* proscription.

In *McKeiver*, decided less than a year after *Baldwin*, however, the Supreme Court denied the right of trial by jury to juveniles. By selectively denying such a basic constitutional right so shortly after strongly affirming this right, the Court suggests that it perceived a fundamental difference in the outcome and nature of juvenile, as opposed to adult, proceedings.[116] The key difference is the therapeutic nature of the disposition.[117]

Enhancement under the Guidelines, however, is applied using a double standard. Courts treat juvenile confinements like adult sentences[118] to the detriment of the adult defendant;[119]

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112. *See Baldasar*, 446 U.S. at 228 (Marshall, J., concurring). In *Baldasar*, the Court held that convictions obtained according to the lower misdemeanor standard for non-incarceration convictions — a standard higher than the juvenile standard — cannot be used later for enhancement purposes. *See supra* notes 37-41 and accompanying text.

113. *See supra* notes 67-72 and accompanying text; *see also supra* note 53 (text of the sixth amendment); McKeiver v. Pennsylvania, 403 U.S. 528, 551 (1971) (White, J., concurring) (if a juvenile case is considered a criminal proceeding as defined by the sixth amendment, it is "automatically subject to all of the restrictions normally applicable in criminal cases").

114. *See* Feld, *supra* note 6, at 711.

115. *See supra* note 48 and accompanying text (indefinite sentencing).

116. If no substantive difference existed, courts would violate the juvenile's due process rights whenever they denied juveniles the right to trial by jury. *See* Zimring, *supra* note 102, at 197.

117. *See* Allen v. Illinois, 478 U.S. 364, 369-70, 373 (1986) (when the state's intent is to punish the proceeding must be considered criminal; when the state's purpose is treating the person, however, the sixth amendment protections do not apply). The Court has held that when the state's goal is to improve the life of the defendant, the Constitution allows the state more informality and flexibility in its proceedings. *See* Schall v. Martin, 467 U.S. 253, 263 (1984); *McKeiver*, 403 U.S. at 534.

118. Under the Guidelines, adults can receive two points for offenses where the period of incarceration is at least 60 days and less than one year. They receive three points for offenses where the period of incarceration is over one year. U.S.S.G. § 4A1.1. Juveniles receive two points for all offenses where the period of imprisonment is 60 days or greater. *Id.* § 4A1.2(d)(2)(A).

119. *See* Feld, *supra* note 6, at 718.

they fail, however, to consider whether use of juvenile adjudications to enhance adult sentences is valid under the *Baldasar* standard, when adult due process protections would have been to the juvenile defendant's advantage.[120]

2. *McKeiver*: Treatment versus Punishment

The sixth amendment does not distinguish between a person's right to a trial by jury and the right to counsel.[121] In federal court, therefore, an adult defendant is entitled to all sixth amendment protections.[122] Thus, even under the Guidelines, if a court denied an adult the right to a jury trial in a previous adult proceeding, a later court would disregard the previous sentence when calculating the criminal history score.[123] Courts applying section 4A1.2(d), however, mistakenly believe that the enhancement prohibitions do not apply to juvenile proceedings.[124] This error stems from a belief that *McKeiver* authorized "sentences of imprisonment"[125] for juveniles without a trial. To remedy this mistake, courts should apply section 4A1.2(d) in light of the policy undergirding *McKeiver*.

The Supreme Court approves of lower standards for incarceration procedures only in treatment-oriented proceedings[126] where the government has disavowed any interest in criminal prosecution or punishment.[127] Only when treatment is the objective of the juvenile's sentence does *McKeiver* allow for different sentencing standards and a correspondingly lower level of due process in juvenile proceedings.[128] Accordingly, courts

120. For example, under an adult standard, Williams's prior sentence would not have been upheld because Williams was denied a jury trial. *See* Duncan v. Louisiana, 391 U.S. 145, 162 (1968). Therefore, under the Guidelines, enhancement based on that sentence would have been invalid.

121. Middendorf v. Henry, 425 U.S. 25, 34 n.13 (1976) ("[w]hatever may be the merits of 'selective incorporation' under the Fourteenth Amendment, the *Sixth Amendment makes absolutely no distinction* between the right to jury trial and the right to counsel") (emphasis added).

122. *See supra* note 32 and accompanying text.

123. *See* U.S.S.G. § 4A1.2 application note 6 ("Convictions which the defendant shows to have been constitutionally invalid may not be counted in the criminal history score.").

124. *See, e.g.*, United States v. Williams, 891 F.2d 212, 215 (1989), *cert. denied*, 110 S. Ct. 1496 (1990).

125. *See, e.g., id.* at 215.

126. *See also* Allen v. Illinois, 478 U.S. 364, 370 (1986) (lower standards are allowable in proceedings to confine the mentally ill).

127. A defendant in all criminal prosecutions has the right to an impartial jury. McKeiver v. Pennsylvania, 403 U.S. 528, 540 (1971).

128. *See supra* notes 77-81 (distinguishing between procedures for treatment and punishment); *see also* Zimring, *supra* note 102, at 197.

should not interpret *McKeiver* to justify using juvenile convictions with reduced procedural protections for punitive purposes at the adult level.[129] Interpreted in this manner, *McKeiver* would not allow courts to enhance an adult's sentence based on juvenile sentences obtained during proceedings governed by the lower "fundamental fairness" standard.

Courts should also interpret *McKeiver* narrowly because the fundamental policy principles supporting the decision fail to withstand constitutional muster when expanded beyond their limited therapeutic bounds.[130] If a sentence was imposed under the guise of therapy, it should remain a therapeutic sentence; it should not be allowed to metamorphosize into a criminal conviction at the prosecution's convenience.[131] In the same vein, enhancing a sentence because of an earlier period of incarceration imposed under a mental illness statute would be inherently unfair.[132] Because the procedural protections found

129. This interpretation would conform with the "rule of lenity," which states that laws whose purpose is to punish must be strictly construed. W. ESKRIDGE & P. FRICKEY, LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 658 (1988).

130. *See* Feld, *supra* note 6, at 718-20.

131. If a juvenile accepts the rationale of the juvenile justice system and thinks the outcome — a new environment, educational opportunities, drug rehabilitation — might help him in the future, he may not contest a juvenile proceeding. The juvenile, however, cannot be said to have consented to a punitive proceeding, or the later use of this therapeutic proceeding against himself. The court in United States v. Davis, 929 F.2d 930 (3d Cir. 1991), discussed the fact that an "indeteminate juvenile sentence may not reflect the seriousness of a juvenile's offense." *Id.* at 933-34 n.2.

132. It is a basic principle of criminal law that no person should be punished for crimes they could not prevent themselves from committing. *E.g.*, United States v. Brawner, 471 F.2d 969 (D.C. Cir. 1972); Daniel M'Naghten's Case, 8 Eng. Rep. 718, 10 Cl. & Fin. 200 (H.L. 1843). Therefore, if a person cannot be held legally responsible for the original act, it would be inherently unfair to enhance punishment of the later act because of the original excusable act.

The Guidelines, however, make no specific provision for criminal history points resulting from periods of incarceration for mental illness. The language of the Guidelines also may open the formerly mentally ill to the possibility of enhanced punishment based on their conduct while mentally ill. The Guidelines may include incarceration for mental illness under § 4A1.2(f) — diversionary dispositions. Under § 4A1.2(f), no points are added for diversionary dispositions that do not result in a "finding or admission of guilt." A finding or admission of guilt in a judicial proceeding, however, is counted in the criminal history score "*even* if a conviction is not formally entered." U.S.S.G. § 4A1.2(f) (emphasis added). This rule reflects the Sentencing Commission's policy "that defendants who receive the benefit of a rehabilitative sentence and continue to commit crimes should not be treated with further leniency." *Id.* § 4A1.2 application note 9.

sufficient in juvenile proceedings are not sufficient in adult proceedings,[133] *McKeiver* cannot support the collateral use of such juvenile proceedings against juveniles when they reach adulthood.

When juveniles may face more than six months of additional confinement as adults, because of their deviant juvenile behavior, they deserve the same protection that juries provide to adults.[134] The courts would not enhance adult punishment with prior juvenile offenses if the juvenile in those prior offenses had been denied her sixth amendment right to counsel.[135] Similarly, if an adult had been denied the sixth amendment right to a jury trial, the court could not use any conviction resulting from that proceeding to enhance a later punishment.[136]

The situation arising under section 4A1.2(d), where courts enhance adult sentences because of juvenile adjudications, cannot be distinguished from *Baldasar*. In *Baldasar*, the Court held that although a prior conviction may be valid for a limited purpose, it cannot be used later to enhance a subsequent sentence if the prior conviction would be unconstitutional for placing an adult in prison.[137] To illustrate this notion, consider a case, such as *Williams* set forth above, in which the original juvenile adjudication was *valid* for juvenile therapeutic purposes. The later collateral use of the adjudication to enhance an adult

133. *Compare* McKeiver v. Pennsylvania, 403 U.S. 528, 540 (1971) (the right to a jury trials is not required in juvenile proceedings regardless of the possible length of incarceration) *with* Baldwin v. New York, 399 U.S. 66, 69 (1970) (the right to a jury trial is required for all proceedings "where imprisonment for more than six months is authorized").

134. R.L.R. v. State, 487 P.2d 27, 32, 38 (Alaska 1971). Adults whose sentences are enhanced under § 4A1.2(d) may be deprived of liberty solely as a result of their juvenile records. The Guidelines-required enhancement may force a judge to sentence a person to jail time, whereas if they had no criminal history points, they would receive no jail time. *See* U.S.S.G. § 5A (for offense levels two through six).

135. *See* Rizzo v. United States, 821 F.2d 1271, 1274 (7th Cir. 1987); Grant v. White, 579 F.2d 48, 49 (8th Cir. 1978); *see also In re* J.W., 164 Ill. App. 3d 826, 830, 518 N.E.2d 310, 313 (1987) (uncounseled juvenile convictions may not be used to adjudicate a juvenile as a habitual juvenile offender); People v. Miller, 179 Mich. App. 466, 469, 446 N.W.2d 294, 295 (1989) ("a court may not consider factors violative of a defendant's constitutional rights in passing sentence").

136. *See* United States v. Tucker, 404 U.S. 443, 449 (1972). Enhancement under *Burgett* and *Baldasar* would be improper if Williams had been an adult at the time of his prior sentence, because adult sentences may not be enhanced with prior constitutional proceedings that did not offer full due process. *See supra* notes 32-41 and accompanying text.

137. *See supra* notes 37-41 and accompanying text.

sentence should be invalid, because the original proceeding would have been unconstitutional for the purpose of placing an adult in prison.

B. PROBLEMS WITH SECTION 4A1.2(d)'S ENHANCEMENT MECHANISM

Even if juveniles receive the right to a jury trial in juvenile proceedings,[138] problems still exist with using juvenile sentences as the enhancement mechanism, as required by section 4A1.2(d). These problems concern using treatment oriented sentences to enhance punitive sentences. When sentencing courts treat a sentence imposed because of a juvenile adjudication as if it were imposed by an adult court, courts perpetuate unfair and arbitrary sentence enhancement. Such enhancement contradicts Congress's intent in establishing the Sentencing Commission to promulgate the Guidelines.[139] To remedy these problems, courts must limit the use of juvenile sentences to enhance adult sentences. Properly limited, such use would occur only if strict constitutional standards were followed in earlier juvenile proceedings whose nature was punitive.

1. Fairness Problems

Today, twenty-four years after *Gault*, most juvenile proceedings still fail to meet its "fundamental fairness" standard.[140] The government prosecutes juveniles on charges that would not withstand the higher evidentiary and probable cause standards in the adult context.[141] The frequency with which some juveniles come before judges causes prejudice towards the juvenile defendants, thus compounding the inequitable treatment of juvenile offenders.[142] For example, a juvenile judge af-

138. At least in terms of the sixth amendment protections, providing juveniles with jury trials would insure the constitutionality of § 4A1.2(d). The constitutionality of enhancement based on juvenile dispositions derived under the juvenile search standard of New Jersey v. T.L.O., 469 U.S. 325 (1985), may still raise fourth amendment questions.

139. *See supra* notes 12-17 and accompanying text.

140. *See* Feld, In Re Gault *Revisited: A Cross-State Comparison of the Right to Counsel in Juvenile Court*, 1988 CRIME & DELINQ. 393-94.

141. Juveniles may be stopped and searched on the suspicion of having committed status offenses. *See, e.g., T.L.O.*, 469 U.S. at 341-46.

142. Feld, *supra* note 45, at 231, 239-41. Professor Feld notes:

> Whenever a judge knows information that is not admissible at trial but is prejudicial to a defendant, the impartiality of the tribunal is open to question. . . . To whatever degree a judge is unable to com-

ter previously seeing a child for three or four uncounseled status and misdemeanor offenses, is more likely to treat the child harshly for a felony offense the next time he sees that child.[143]

The constitutional validity of juvenile adjudications that lack the rigorous safeguards of adult criminal courts rests on the juvenile justice system's adherence to rehabilitative rather than penal goals.[144] When courts use juvenile adjudications to enhance adult sentences, the adjudications in effect become "criminalized." This event, in turn, should cause the constitutional validity of the juvenile adjudications to disappear.[145] Therefore, when the rehabilitative goal of the juvenile justice system is later abandoned in favor of the punitive policies of the Guidelines, the constitutional validity for the juvenile justice system as a whole comes into question.

Because of enhancement based on section 4A1.2(d) of the Guidelines, prior juvenile proceedings are no longer the benign and beneficial therapeutic events that the *McKeiver* Court envisioned.[146] Even if juveniles receive the right to a jury trial, the Sentencing Commission has failed to articulate any independent reason why the earlier good-for-the-child-treatment-oriented juvenile proceedings should now lead to adult prison walls. Nor have courts addressed the conflict created when the punitive policies of the Guidelines supplant the therapeutic as-

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partmentalize, a juvenile is denied the basic right to a fair trial by an impartial tribunal with a determination of guilt based on admissible evidence. . . . Since juveniles have no right to a jury trial, their risk of prejudice are aggravated by their inability to avoid those risks.

Id.

143. *See* Feld, *supra* note 63, at 1245 (the severity of punishments increases as the number of prior offenses increase).

144. Inmates of Boy's Training School v. Affleck, 346 F. Supp. 1354, 1364 (D.R.I. 1972); *see also* Zimring, *supra* note 102, at 197.

145. *See* McKeiver v. Pennsylvania, 403 U.S. 528, 551 (1971) (White, J., concurring) (juvenile adjudications do not require jury trials when they are not "criminal proceedings"). When involuntary commitments are criminal, they trigger the range of criminal procedural protections. Allen v. Illinois, 478 U.S. 364, 372 (1986).

146. *See supra* notes 77-79 and accompanying text. At the time the Court decided *McKeiver*, state sentencing of juveniles was quite different from today. *See* Feld, *supra* note 48, at 889-90. Many states have moved to a punitive sentencing model. Nearly one-third of the states now either use minimum mandatory sentences for serious offenses, determinative sentencing statutes, or administrative sentencing guidelines for incarcerating juveniles. *Id.* These sentences are not based on the "needs" of the juvenile offenders, but upon the past crimes they have committed. *Id.*

sumptions held by the judges and attorneys at the initial juvenile adjudication.

Although a court may appropriately apply a lower procedural standard when punishment is neither the aim nor the result of the process,[147] such a lower standard is inappropriate when actual punishment is the goal.[148] Although juvenile judges may determine that a period of therapeutic incarceration will rehabilitate a juvenile,[149] under section 4A1.2(d), this therapeutic incarceration for the child's good, works to the adult's detriment.[150] In addition, when sentencing minor juvenile offenders, juvenile judges may be more likely than adult criminal judges to issue sentences of greater severity,[151] because therapeutic decisions by definition have no detrimental effect.[152] Conversely, if juvenile judges know that a juvenile sentence will become a permanent black mark on the juvenile's record used to enhance an adult sentence, judges may be more likely to ensure that the sentence corresponds to the seriousness of the underlying offense.[153]

The Sentencing Commission erred in assuming that, re-

147. *See generally McKeiver*, 403 U.S. at 528-53 (jury trials not constitutionally mandated when punishment is not the aim of the proceeding).

148. The Supreme Court applies the fourteenth amendment "fundamental fairness" standard to measure the extent of juvenile constitutional rights under state law. *Id.* at 543. The "fundamental fairness" standard is a judicial balancing test applied specifically to the states. The courts balance the state's *parens patriae* interest with fourteenth amendment due process considerations. Schall v. Martin, 467 U.S. 253, 263 (1984).

149. Feld, *supra* note 45, at 246.

150. *See* U.S.S.G. § 4A1.2(d).

151. *See supra* notes 43-45 and accompanying text. The juvenile judge's goal in sentencing is to reform the child's behavior, to rehabilitate the offender. A severe sentence for a minor crime may persuade the child to leave "his path down the road of crime." *See* Feld, *supra* note 6, at 695. The adult criminal judge, however, simply punishes the offender for the offense he committed. For example, although shoplifting an item valued at under $50 is a petty misdemeanor in most states, subject to only a fine, a juvenile found to have committed the same offense may be incarcerated. *Cf. McKeiver*, 403 U.S. at 552 (White, J., concurring) (juvenile custody is not "any measure of the seriousness of the particular act that the juvenile has performed").

152. *Cf. McKeiver*, 403 U.S. at 552 (White, J., concurring) (a juvenile disposition will last no longer than required to prove that the juvenile's behavior is acceptable); Fink, *supra* note 61, at 276 (juvenile courts must consider not only the present interests of the child and society, but also the courts "must attempt to envision within the significant limits of the state of the art of prediction the interests and circumstances, as well as the probable effects of particular modes of intervention, upon the *future* child") (emphasis in original).

153. Two of the factors that juvenile judges consider in making their dispositional decisions are "whether the child will commit a future crime or

gardless of the procedural safeguards employed, the substantive results would and should be the same in juvenile cases as in adult criminal cases. Because the procedural safeguards employed in therapeutic proceedings are less rigorous than those employed in criminal procedures,[154] a sentence of incarceration is more likely to result from juvenile procedures.[155] Therefore, juvenile adjudications which result in incarceration should be more constitutionally suspect when used for enhancement purposes.[156]

Nowhere do the Guidelines address constitutional problems of notice.[157] Such problems arise when the juvenile is not informed that courts may use sentences imposed as a juvenile for enhancement purposes in the adult system.[158] If the juvenile judge were to provide the juvenile with notice of future detrimental effect, counsel for the juvenile could urge an alternative disposition that may reduce or eliminate the juvenile's criminal history score. Under Supreme Court precedent, this possibility renders the juvenile sentence imposed without notice invalid for enhancement purposes.[159]

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whether a particular treatment modality will help or hinder his progress." Fink, *supra* note 61, at 276.

154. *See, e.g.*, Allen v. Illinois, 478 U.S. 364, 368-69 (1986) (Illinois commitment proceedings under its Sexual Dangerous Person's Act are not criminal in nature and therefore do not trigger the fifth amendment privilege against self-incrimination).

155. Higher standards of punitive procedures lead to different substantive outcomes in criminal cases. *See* Nix v. Williams, 467 U.S 431, 444 n.5 (1984) (increasing the prosecution's burden of production makes conviction of the defendant more difficult). As the procedural requirements increase, the prosecution's burdens of persuasion and production increase proportionately.

156. *Cf.* Baldasar v. Illinois, 446 U.S. 222, 228 n.2 (1980) (per curiam) (Marshall, J., concurring) (misdemeanor convictions may be "less reliable than felony convictions").

157. *In re* Gault, 387 U.S. 1, 33 (1967) (specifying constitutional notice requirements). The court in United States v. Daniels, 929 F.2d 128 (4th Cir. 1991), did discuss problems of notice to juvenile offenders in relationship to § 4A1.2(d), but did "not reach the point" in its conclusion. *Id.* at 130. Juveniles also continue to have problems receiving counsel. *See generally* Feld, *supra* note 63, at 1199-1209 (noting that in many places, despite *Gault*, juveniles do not receive counsel). In addition, a majority of juveniles in many jurisdictions "waive" their right to counsel. *Id.* at 1201.

158. This also raises the question of whether a minor can legally consent to something that will be detrimental to himself as an adult. In contrast, it should be noted that in many states, a minor cannot even enter into a contract. *See, e.g.*, Winter v. Skoglund, 404 N.W.2d 786, 795 (Minn. 1987) (Coyne, J., concurring in part, dissenting in part) ("A typical instance of a voidable contract is a contract of a minor child. The child is not bound and may disavow the contract.").

159. United States v. Tucker, 404 U.S. 443, 447-48 (1972) (reasoning that the

Further, the Guidelines do not address problems arising from prior unconstitutional juvenile adjudications that often taint subsequent juvenile dispositions.[160] Because a juvenile judge can consider a juvenile's prior uncounseled convictions during disposition, the problems with the collateral use of juvenile sentences are compounded.[161] The nature of the juvenile justice system makes it possible that the system will not discover an unconstitutional adjudication until late in the juvenile's life, if at all.[162] Therefore, even if the juvenile receives full due process rights for the specific juvenile offense used for enhancement, the danger of inadvertently compounding an earlier error is grave. For example, judges in juvenile court consider prior status offenses and petty misdemeanors, offenses that courts sentencing adults under the Guidelines do not consider.[163] Although the Guidelines disregard the petty offenses, these prior adjudications directly affect juvenile sentencing.[164]

When prior uncounseled adjudications lead the juvenile court judge to sentence the juvenile as a delinquent,[165] the sentence becomes suspect. Further, enhancement of an adult sentence predicated on prior juvenile enhancement, and further predicated on prior unconstitutional juvenile adjudications, poses an unresolved problem. The use of these later periods of incarceration are constitutionally infirm in adult contexts under *Baldasar*.[166] These sentences, however, are not easily

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question is not whether the results of the original proceedings would have been different, but whether the sentencing judge would have imposed a different sentence without previous unconstitutional convictions).

160. *See* Feld, *supra* note 6, at 722.

161. *See id.* (the use of prior unconstitutional convictions to sentence compounds the original injustice).

162. The failure of juveniles to receive counsel in juvenile proceedings may result in earlier unconstitutional prosecutions not being brought to the attention of the juvenile courts at the time of disposition. *See* Feld, *supra* note 63, at 1199 (juveniles are often unable to prepare adequately for their own defense because of their youth).

163. *See supra* note 28 and accompanying text.

164. *See supra* notes 142-43 and accompanying text.

165. A juvenile adjudication evidentiary standard less stringent than the adult standard might also allow a judge to make a finding of delinquency. *See, e.g.*, New Jersey v. T.L.O., 469 U.S. 325, 341-46 (1985).

166. Applying the holding of *Baldasar*, the Guidelines provide that an uncounseled misdemeanor convictions that result in unconstiutional sentences of imprisonment are not to be included in the calculation of a criminal history score. U.S.S.G. § 4A1.2 application note 6. Because a sentence in violation of *Baldasar* in the adult context is unconstitutional, a similar sentence in the juvenile context should also be unconstitutional.

discovered as infirm.[167] Even if the final disposition of a juvenile adjudication would remain unchanged despite enhanced juvenile rights, the Constitution demands that the denial of the opportunity to fully exercise those rights should void the use of those sentences.[168]

2. Congressional Intent Problems

In establishing the Sentencing Commission to create the Guidelines, Congress wanted to eliminate the consideration of discretionary factors,[169] such as race, sex, or socioeconomic status, in sentencing.[170] By incorporating juvenile offenses into criminal history scores under section 4A1.2(d) of the Guidelines, the Sentencing Commission unintentionally incorporates into the new sentencing system some of the very biases[171] that Congress wanted to eliminate. Therefore, by considering prior juvenile adjudications, courts applying section 4A1.2(d) continue to inadvertently consider these discretionary factors.[172]

A typical case of this type of biased discretionary sentencing might occur when two juveniles are caught breaking and entering together. A judge may direct one juvenile into a community service program because the juvenile comes from a "good home" and is a motivated student. The same judge, however, might sentence the other juvenile to a period at the detention center because the juvenile comes from an unstable home environment located in a decaying inner-city neighborhood.[173] If the two individuals later commit an offense together as

167. *See supra* note 162 and accompanying text.

168. *See* United States v. Tucker, 404 U.S. 443, 447-48 (1972) (reasoning that the question is not whether the results of the original proceedings would have been different, but whether the sentencing judge would have imposed a different sentence without previous unconstitutional convictions).

169. The Guidelines do allow for an increase or decrease in a defendant's criminal history score where "reliable information indicates that the criminal history [score] does not adequately reflect" the defendant's criminal history or likelihood of recidivism. U.S.S.G. § 4A1.3. However, "a prior arrest record itself" may not be considered under this provision. *Id.* Any departure from the Guidelines is grounds for appeal. *Id.* § 1A2.

170. *See* 28 U.S.C. § 994(d) (1988).

171. *See supra* notes 12-17; 28 U.S.C. § 994(d) (1988).

172. Under the Guidelines, the prior state sentences of adults based on the use of "illegal" discretionary factors at the state level also affect criminal history scores. *See* U.S.S.G. § 4A1.2 application note 6 (all sentences that are not constitutionally invalid are counted in the criminal history scores).

173. The *Gault* Court pointed out that the Constitution cannot permit juvenile judges or welfare workers to violate the due process rights of children in "their zeal to care for [them]." 387 U.S. at 19 n.25.

adults, only the individual sentenced to detention as a juvenile would receive enhanced punishment as an adult according to section 4A1.2(d).[174] Such disparate treatment occurs because, despite having committed the same two offenses, only the second individual was "sentenced" within the meaning of section 4A1.2(d) as a juvenile.[175] Thus, the Guidelines, founded on uniformity, fail when later objective determinations depend on earlier subjective determinations.

The Guidelines also fail to correct other differences.[176] Most importantly, section 4A1.2(d) does not distinguish between juvenile misdemeanor and felony offenses in determining criminal history scores.[177] The Guidelines differentiate only according to the length of time served. By failing to recognize the differences in the seriousness of the prior offenses, section 4A1.2(d) ignores Congress's underlying mandate for uniformity. As a result, when sentenced as adults for the same offenses, serious violent juvenile offenders actually may receive lighter sentences than the repetitive troublemaking, but non-violent, juvenile misdemeanant.[178] This unequal treatment cannot be

174. U.S.S.G. § 4A1.2(d).

175. "Government is at its most arbitrary when it treats similarly situated people differently." Etelson v. Office of Personnel Management, 684 F.2d 918, 926 (D.C. Cir. 1982).

176. The Guidelines do try to correct for differential treatment of adult defenders based on the age classification of "juvenile offense" by various states.

> Attempting to count every juvenile adjudication would have the potential for creating large disparities due to the differential availability of records. Therefore, for offenses committed prior to age eighteen, only those that resulted in adult sentences of imprisonment exceeding one year and one month, or resulted in imposition of an adult or juvenile sentence or release from confinement on that sentence within five years of the defendant's commencement of the instant offense are counted. *To avoid disparities from jurisdiction to jurisdiction in the age at which a defendant is considered a "juvenile,"* this provision applies to all offenses committed prior to age eighteen.

U.S.S.G. § 4A1.2 application note 7 (emphasis added).

177. As Justice Marshall recognized in *Baldasar*, "misdemeanor convictions may actually be less reliable than felony convictions." *Baldasar*, 446 U.S. at 228 n.2 (Marshall, J., concurring). The Guidelines do exempt juvenile status offenses, truancy, hitchhiking, loitering, vagrancy, public intoxication, and minor traffic infractions from calculation in criminal history scores. U.S.S.G. § 4A1.2(c)(2). A juvenile, however, may find that a status offense can easily become a more serious crime. For example, a juvenile adjudicated a habitual truant may find himself in contempt of court if he does not obey a judge's order to return to school.

178. A juvenile found to have committed murder or rape by a juvenile court and sentenced to juvenile incarceration until the age of majority will receive a maximum of two points in his criminal history score for the crime — a Category II offender. *See* U.S.S.G. §§ 4A1.2(d)(2)(A), 5A. The petty juvenile

reconciled with the dominant policy of the Guidelines of enhancing the punishment of adults demonstrating career criminal behavior patterns.

The method used to determine the length of confinement imposed most clearly reflects the problem with enhancement based only on the length of prior sentences.[179] In the *Williams* case, for example, Williams was committed to the California Youth Authority following his second juvenile bank robbery.[180] Williams's commitment, however, was not for a fixed sentence.[181] Instead, the Youth Authority determined the duration of Williams's incarceration according to its treatment mandate. A judge sentencing Williams, in contrast, might have taken into consideration the affect of the length of the sentence on Williams's adult criminal history score. Moreover, because the length of juvenile incarceration directly affects the period of adult incarceration under section 4A1.2(d), the Guidelines unfairly penalize an adult who, as a juvenile committed only minor offenses, but was incarcerated by a judge as a warning.

Finally, section 4A1.2(d) fails to distinguish adequately between adult and juvenile sentences. Consequently, defendants receive the same increase in their criminal history score for all offenses that result in a sentence of less than one year, regardless of whether the sentence was imposed in an adult criminal court or a juvenile court.[182] For example, as applied in the *Williams* case, section 4A1.2(d) effectively equated Williams prior juvenile disposition with an adult criminal conviction.[183]

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shoplifter caught and convicted of shoplifting on seven different occasions and never incarcerated will receive seven criminal history points — a Category IV offender. *See id.*

179. A juvenile disposition resulting in a period of incarceration of less than 60 days results in a lower criminal history score than an incarceration of 60 or more days. *Id.* § 4A1.2(d). The length of the incarceration will often depend in part on prior juvenile offenses, whether or not they resulted in incarceration.

180. United States v. Williams, 891 F.2d 212, 213 (9th Cir. 1989), *cert. denied*, 110 S. Ct. 1496 (1990).

181. The Youthful Offender Parole Board determines the length of incarceration of a juvenile committed to the California Youth Authority. *See* Feld, *supra* note 48, at 878.

182. Under the Guidelines, Williams's first bank robbery sentence would have added two points to his criminal history score whether he had been sentenced for 180 days to prison as an adult with full constitutional protection or whether, as was the case, he was sentenced to 180 days in the county juvenile hall. *Compare* U.S.S.G. § 4A1.1 *with id.* § 4A1.2(d).

183. One of the crucial variables in determining if something is a criminal prosecution is whether it can lead to a deprivation of liberty for the purpose of punishment. The *McKeiver* Court premised its ruling in part on the fact that

Thus, Williams's 180 days in juvenile hall added two points to his criminal history score, the same number of points he would have received for the sentence had he been an adult afforded full due process protection.[184]

C. MITIGATING THE PROBLEMS

Providing juveniles with the right to a jury trial would mitigate the unfairness inherent in section 4A1.2(d). As section 4A1.2(d) is now applied, denying juveniles a jury trial could snowball beyond the treatment of juvenile delinquency to longer sentences for the person when they commit crimes as adults. By providing juveniles the right to a jury trial, the system would insure than any juvenile sentence, used to enhance an adult sentence, was imposed only after the juvenile adjudication satisfied the minimum due process standards guaranteed by the Constitution.[185] At a minimum, providing juveniles with jury trials would increase the aggregate validity of resulting adjudications.

Juries provide all defendants with essential protections from the long and protective arm of the government.[186] In the juvenile context, juries are more likely to protect the rights of juveniles than are judges[187] because juries are held to the standard of guilt beyond a reasonable doubt,[188] and are more likely to acquit a juvenile than a judge.[189] In addition, the procedural formalities of the right to a jury trial would reinforce the often ignored juvenile right to counsel.[190]

"the juvenile court proceeding had not yet been held to be a 'criminal prosecution,' within the meaning and reach of the Sixth Amendment." McKeiver v. Pennsylvania, 403 U.S. 528, 541 (1971). Because the Guidelines use juvenile adjudications to deprive adults of their liberty in adult criminal facilities for punishment reasons, it is hard to distinguish those juvenile adjudications from *McKeiver*'s idea of a criminal prosecution.

184. U.S.S.G. §§ 4A1.1(b), 2(d)(2)(A).

185. Although in adult proceedings other rights may be more important than the right to a jury trial, the realities of the juvenile justice system make for the exact opposite. Contrary to common assumption, empirical research studies have shown that unrepresented juvenile offenders are more likely to avoid incarceration or receive shorter sentences than juveniles with counsel. Feld, *supra* note 140, at 396. The Guidelines fail to recognize this reality.

186. *See* Feld, *supra* note 6, at 719.

187. *Id.*

188. *See* Feld, *supra* note 45, at 246. Juries are usually more favorable to the accused than a judge is. *Id.*

189. *Id.*

190. Because of the time and expense involved in jury trials, the court and the prosecution would find it undesirable for a juvenile to exercise his right to

Finally, juries enhance other constitutional rights by raising the level of public scrutiny and awareness of the juvenile justice system.[191] Such scrutiny and awareness can prevent the juvenile court from again becoming a "kangaroo court" where the juvenile is presumed guilty of something and the court's only job is to discover what.

CONCLUSION

The United States Sentencing Guidelines section 4A1.2(d) has opened the floodgates for the enhancement of adult sentences based on prior juvenile adjudications in a manner that the *McKeiver* Court never contemplated. Thus, under section 4A1.2(d), juvenile offenders continue to receive the "worst of both worlds:"[192] they do not receive the sixth amendment protections adults receive, but they may endure additional adult punishment. The collateral use of juvenile adjudications to enhance adult sentences demonstrates that the Supreme Court's "fundamental fairness" standard has failed to protect the very persons it was meant to protect. The Supreme Court, by refusing to review the constitutionality of section 4A1.2(d),[193] has only postponed the need to clarify the minimum constitutional standards governing the enhancement of adult sentences on the basis of juvenile adjudications.

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a jury trial without counsel and are therefore more likely to see that the juvenile receives counsel.

191. Juvenile proceedings may be closed to the public. McKeiver v. Pennsylvania, 403 U.S. 528, 550 (1971).

192. *See* Kent v. United States, 383 U.S. 541, 566 (1966).

193. Williams v. United States, 110 S. Ct. 1496 (1990) (denying certiorari); Mackbee v. United States, 110 S. Ct. 2574 (1990) (same).