

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

ROBERT BUTTERY, *Petitioner*

v.

STATE OF OHIO, *Respondent*

On Petition for a Writ of Certiorari to the
Supreme Court of Ohio

PETITION FOR WRIT OF CERTIORARI

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Questions Presented

Whether an adult felony conviction under Ohio's failure to register statute, Ohio Rev. Code Ann. § 2950.04, violates a defendant's due process and jury trial rights under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, where the defendant's duty to register arises from a civil judicial fact-finding court order and a non-jury juvenile delinquency adjudication?

Whether juvenile adjudications, which do not provide for a right to a jury trial, may serve as an element of a felony offense in Ohio's failure to register statute, Ohio Rev. Code Ann. § 2950.04, 2950.06 under the Fifth, Sixth, and Fourteenth Amendments, United States Constitution?

Whether due process under the Fourteenth Amendment allows a juvenile adjudication, which is not submitted to a jury, to qualify as a "prior conviction" which is therefore not required to be submitted to a jury and determined beyond a reasonable doubt?

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Parties to the Proceedings and Corporate Disclosure Statement

There are no parties to the proceeding other than those listed in the caption.

Under Rule 29.6, Petitioner states that no parties are corporations.

Petition for Writ of Certiorari

Petitioner Robert Butterly, appellant below, respectfully petitions for a writ of *certiorari* to review the judgment of the Supreme Court of Ohio.

Opinions Below

The Opinion of the Supreme Court of Ohio, filed on May 21, 2020, in Case No. 2018-0183, is reported as *State v. Butterly*, Slip. Opinion No. 2020-Ohio-2998 and is reproduced as Appendix A. The reconsideration entry of the Supreme Court of Ohio, denying rehearing, *State v. Butterly*, No. 2018-0183, (July 21, 2020), is unreported and reproduced as Appendix B. The Opinion of the Court of Appeals of Ohio, First Appellate District, Hamilton County, filed on December 20, 2017, is reported as *State v. Butterly*, 1st Dist. Hamilton No. C-160609, 2017-Ohio-9113, and is reproduced at Appendix C. The judgment entry of conviction of the Court of Common Pleas of Hamilton County, Ohio, *State v. Butterly*, Hamilton Cty. Ct. C.P. No. B1506464, Judgment Entry (July 15, 2016), is unreported and reproduced as Appendix D. The above proceedings are also the directly related proceedings. Petitioner is seeking to be reviewed by this Court.

Jurisdiction

The Supreme Court of Ohio entered its judgment in this case on May 21, 2020. On June 1, 2020, Robert filed a motion for rehearing. On July 21, 2020, the

Ohio Supreme Court denied Robert's request for rehearing. On March 19, 2020, by Order, this Court extended the deadline for the filing of petitions for a writ of certiorari to 150 days from the lower court's judgment denying a petition for rehearing. *See Appendix E*, Rule 13.1 and 13.3. As the Ohio Supreme Court denied Robert's petition for rehearing on July 21, 2020, the deadline to file this petition is December 18, 2020. The instant petition is timely, and this Court has jurisdiction under 28 U.S.C. § 1257(a).

Relevant Constitutional and Statutory Provisions

The Fifth Amendment to the United States Constitution 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, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put 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; nor shall private property be taken for public use, without just compensation.

The Sixth Amendment to the United States Constitution provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, 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.

The Fourteenth Amendment to the United States Constitution provides, in relevant part: "nor shall any State * * * deprive any person of life, liberty, or

property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Ohio Rev. Code Ann. § 2950.04 provides in relevant part:

(3)(a) Each child who is adjudicated a delinquent child for committing a sexually oriented offense and who is classified a juvenile offender registrant based on that adjudication shall register personally with the sheriff, or the sheriff's designee, of the county within three days of the delinquent child's coming into a county in which the delinquent child resides or temporarily is domiciled for more than three days.

Ohio Rev. Code Ann. § 2950.99 provides in relevant part:

(A) (1)

(a) Except as otherwise provided in division (A)(1)(b) of this section, whoever violates a prohibition in section 2950.04, 2950.041, 2950.05, or 2950.06 of the Revised Code shall be punished as follows:

(i) If the most serious sexually oriented offense that was the basis of the registration, notice of intent to reside, change of address notification, or address verification requirement that was violated under the prohibition is aggravated murder or murder if committed by an adult or a comparable category of offense committed in another jurisdiction, the offender is guilty of a felony of the first degree.

(ii) If the most serious sexually oriented offense or child-victim oriented offense that was the basis of the registration, notice of intent to reside, change of address notification, or address verification requirement that was violated under the prohibition is a felony of the first, second, third, or fourth degree if committed by an adult or a comparable category of offense committed in another jurisdiction, the offender is guilty of a felony of the same degree as the most serious sexually oriented offense or child-victim oriented offense that was the basis of the registration, notice of intent to reside, change of address, or address verification requirement that was violated under the prohibition, or, if the most serious sexually oriented offense or child-victim oriented offense that was the basis of the registration, notice of

intent to reside, change of address, or address verification requirement that was violated under the prohibition is a comparable category of offense committed in another jurisdiction, the offender is guilty of a felony of the same degree as that offense committed in the other jurisdiction would constitute if committed in this state.

(iii) If the most serious sexually oriented offense or child-victim oriented offense that was the basis of the registration, notice of intent to reside, change of address notification, or address verification requirement that was violated under the prohibition is a felony of the fifth degree or a misdemeanor if committed by an adult or a comparable category of offense committed in another jurisdiction, the offender is guilty of a felony of the fourth degree.

(b) If the offender previously has been convicted of or pleaded guilty to, or previously has been adjudicated a delinquent child for committing, a violation of a prohibition in section 2950.04, 2950.041, 2950.05, or 2950.06 of the Revised Code, whoever violates a prohibition in section 2950.04, 2950.041, 2950.05, or 2950.06 of the Revised Code shall be punished as follows:

(i) If the most serious sexually oriented offense that was the basis of the registration, notice of intent to reside, change of address notification, or address verification requirement that was violated under the prohibition is aggravated murder or murder if committed by an adult or a comparable category of offense committed in another jurisdiction, the offender is guilty of a felony of the first degree.

(ii) If the most serious sexually oriented offense or child-victim oriented offense that was the basis of the registration, notice of intent to reside, change of address notification, or address verification requirement that was violated under the prohibition is a felony of the first, second, or third degree if committed by an adult or a comparable category of offense committed in another jurisdiction, the offender is guilty of a felony of the same degree as the most serious sexually oriented offense or child-victim oriented offense that was the basis of the registration, notice of intent to reside, change of address, or address verification requirement that was violated under the prohibition, or, if the most serious sexually oriented offense or child-victim oriented offense that was the basis of the registration, notice of intent to reside, change of address, or address verification requirement

that was violated under the prohibition is a comparable category of offense committed in another jurisdiction, the offender is guilty of a felony of the same degree as that offense committed in the other jurisdiction would constitute if committed in this state.

(iii) If the most serious sexually oriented offense or child-victim oriented offense that was the basis of the registration, notice of intent to reside, change of address notification, or address verification requirement that was violated under the prohibition is a felony of the fourth or fifth degree if committed by an adult or a comparable category of offense committed in another jurisdiction, the offender is guilty of a felony of the third degree.

(iv) If the most serious sexually oriented offense or child-victim oriented offense that was the basis of the registration, notice of intent to reside, change of address notification, or address verification requirement that was violated under the prohibition is a misdemeanor if committed by an adult or a comparable category of offense committed in another jurisdiction, the offender is guilty of a felony of the fourth degree.

* * *

(B) If a person violates a prohibition in section 2950.04, 2950.041, 2950.05, or 2950.06 of the Revised Code that applies to the person as a result of the person being adjudicated a delinquent child and being classified a juvenile offender registrant or an out-of-state juvenile offender registrant, both of the following apply:

(1) If the violation occurs while the person is under eighteen years of age, the person is subject to proceedings under Chapter 2152. of the Revised Code based on the violation.

(2) If the violation occurs while the person is eighteen years of age or older, the person is subject to criminal prosecution based on the violation.

STATEMENT OF CASE

Youthful transgressions should remain buried in “the graveyard of the forgotten past.” *In re Gault*, 387 U.S. 1, 24, 87 S.Ct. 1428, 18 L.Ed.2d 527 (1967). Juvenile adjudications should not follow a person into adulthood. It defies all logic,

constitutional protections, as well as the historical purpose of the juvenile court for juvenile adjudications to be the basis of an adult felony conviction.

The focus on rehabilitation within the juvenile system is logical given that “the character of a juvenile is not as well formed as that of an adult.” *Roper v. Simmons*, 543 U.S. 551, 570, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005). Children are simply not as culpable as adults. *See Roper* at 570; *Miller v. Alabama*, 567 U.S. 460, 132 S.Ct. 2455, 183 L.E.2d 407 (2012); *Graham v. Florida*, 560 U.S. 48, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010). Permitting juvenile adjudications for sexually oriented offenses to follow a youth into adulthood does not advance the rehabilitative goals of the juvenile system. Rather, it achieves just the opposite. Research is clear that the labels “sex offender” and “felon” present numerous obstacles to one becoming a productive citizen. *See e.g.* Raphael, *Incarceration and Prisoner Reentry in the United States*, 635 Annals Am. Acad. Pol. & Soc. Sci. 192, 205-207 (2011) (“Former inmates reentering non-institutionalized society face a number of challenges in procuring and maintaining stable employment.”).

This “sex offender” label is thrust on a youth without the “fundamental triumvirate of procedural protections.” *United States v. Tighe*, 266 F.3d 1187, 1193 (9th Cir.2001). Within the juvenile system, the child has no right to a jury trial. *McKeiver v. Pennsylvania*, 403 U.S. 528, 545, 91 S.Ct. 1976, 29 L.Ed.2d 647 (1971). And for youth like Robert, the duty to register is imposed by way of a later hearing where the judge engages in judicial fact-finding and the standard necessary to impose the registration requirement is not beyond a reasonable doubt. *See Ohio*

Revised Code Ann. §§ 2152.83(D) and 2152.831. “[T]here is a vast difference between accepting the validity of a prior judgment of conviction entered in a proceeding in which the defendant had the right to a jury trial and the right to require the prosecutor to prove guilt beyond a reasonable doubt, and allowing the judge to find the required fact under a lesser standard of proof.” *Apprendi v. New Jersey*, 530 U.S. 466, 496, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000).

For the youth of this country who engage in problematic sexual behavior and need treatment, the current system truly represents “the worst of both worlds.” *Kent v. United States*, 383 U.S. 541, 556, 86 S.Ct. 1045, 16 L.Ed.2d 84 (1966). These children are not only deprived of the procedural protections enjoyed by adult defendants which ensure the validity of the finding, they are also punished, and more severely so, if the child later fails to register. This system violates the due process and Sixth Amendment rights of the youth of our nation.

A. Robert Butterly has an unstable childhood and engages in conduct which causes sexual harm.

At just 14 years old, Robert was alleged to have engaged in conduct which necessitated intervention. The young teen perpetrated what would have been sexually-oriented offenses if committed by an adult. These would be Robert’s first and only charges in juvenile court. On October 14, 2011, Robert was adjudicated delinquent as to these offenses. *State v. Butterly*, 1st Dist. Hamilton No. C-160609, 2017-Ohio-9113, ¶ 1. As the charges were delinquency offenses, Robert was not afforded a jury trial.

At the time of the adjudication, Robert was homeless, and his mother was having difficulty supporting him. He was placed on probation with the juvenile court and provided treatment for his behavior. *State v. Butterly*, Slip. Opinion No. 2020-Ohio-2998, ¶ 2. Specifically, the court ordered Robert to attend and complete a residential treatment program with sex offender specific treatment and to complete all aftercare requirements of the program. *Id.*

B. As a result of the adjudication and judicial fact finding, Robert is identified as a sex offender.

The aforementioned adjudication rendered Robert eligible to be placed on Ohio's juvenile sex offender registry. *See* Ohio Rev. Code Ann. § 2152.83(B). After a hearing and judicial fact-finding, the juvenile court exercised its discretion in identifying Robert as a sex offender and ordered him to register as a Tier I juvenile sex offender for the next 10 years. *See* Ohio Rev. Code. Ann. § 2152.831; *Butterly*, 2020-Ohio-2298, ¶ 2.

Robert was in residential treatment for this behavior for approximately 14 months. *Butterly*, 2017-Ohio-9113, ¶ 2. He was then transitioned back into the community and completed out-patient care for approximately five months. *Id.* Robert was 17 when he completed the court-ordered treatment. *Id.* He had no further delinquency adjudications whatsoever, sexually-oriented or otherwise.

C. Robert is indicted and convicted for failure to register as a sex offender.

In November 2015, when Robert was 19 years old and still under dispositional orders of the juvenile court, he was indicted in the Hamilton County

Court of Common Pleas for violating a duty to register under Ohio Rev. Code Ann. § 2950.04, a fourth-degree felony. (Appendix F). The indictment alleged the duty to register arose as a result of Robert “being convicted in the Hamilton County Juvenile Court under Case number /11/009085X.” *Id.*

Without the conduct that occurred when Robert was just 14 years old, no crime could have been committed. *See* Ohio Rev. Code. Ann. § 2950.04.

On May 9, 2016, Robert filed a motion to dismiss the indictment, arguing he had no lawful duty to register. *Buttery*, 2017-Ohio-9113, ¶ 3. The motion to dismiss challenged the validity of the juvenile court’s orders requiring him to register as a sex offender. *Id.* at ¶ 4. In the motion, Robert challenged his classification on multiple state law grounds.

After hearing arguments from counsel, the trial court ultimately denied the motion to dismiss the indictment. *Id.* at ¶ 3. Robert entered a no-contest plea on the failure to register charge, and the trial court found him guilty. *Id.*

D. Robert challenges the constitutionality of his conviction in the First District Court of Appeals of Ohio.

In the First District Court of Appeals of Ohio, Robert asserted the failure to register conviction violated his constitutional rights. *Buttery*, 2017-Ohio-9113, ¶ 17; (March 8, 2017 Brief of Appellant, p. 12-15). Specifically, he asserted his conviction violated the Fourteenth Amendment to the United States Constitution as well as this Court’s precedent set forth in *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed. 435 (2000). *Id.* Robert argued that because a juvenile is not afforded the right to a jury trial, a juvenile adjudication could not be used as an

element of an adult felony offense. Robert further asserted it was fundamentally unfair to allow his juvenile adjudication, which was aimed at rehabilitation and resulted from less formal proceedings, to serve as the basis for an adult felony criminal offense.

Although the claim had not been raised before the trial court, the First District Court of Appeals exercised its discretion to decide this constitutional question. The First District found no constitutional violation and upheld the trial court's decision denying Robert's motion to dismiss. *Buttery*, 2017-Ohio-9113, ¶ 20-22. In reaching its decision, the First District concluded the juvenile adjudication did not act as a penalty-enhancement and therefore did not violate *Apprendi*. *Id.*

On February 2, 2018, Robert sought review in the Ohio Supreme Court. On May 9, 2018, the Ohio Supreme Court accepted the appeal on Proposition of Law I, which stated:

Juvenile adjudications cannot satisfy elements of an offense committed as an adult. Fifth, Sixth, and Fourteenth Amendments, United States Constitution; Sections 5 and 16, Article I, Ohio Constitution. *State v. Hand*, Slip Opinion No. 2016-Ohio-5504; *State v. Bode*, 144 Ohio St.3d 155, 2015-Ohio-1519, 41 N.E.3d 1156; *Alleyne v. United States*, 570 U.S. ___, 133 S.Ct. 2151, 186 L.Ed.2d 314 (2013); *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed. 435 (2000).

E. Ohio Supreme Court Decision

Before the Ohio Supreme Court, Robert again argued that his conviction violated the Sixth and Fourteenth Amendments to the United States Constitution. *Buttery*, 2020-Ohio-2298, ¶ 6. As a threshold matter, Robert challenged the use of a juvenile adjudication as an element of an adult failure to register offense when said

adjudication had never been tested before a jury. He argued that this practice violated due process and ran afoul of *Apprendi*. *Id.*

The Ohio Supreme Court rejected Robert's argument, finding the duty to register was the element at issue in the failure to register offense, rather than the adjudication itself. *Buttery*, 2020-Ohio-2998, ¶ 20 (“But here, the delinquency adjudication itself is not at issue. We are instead dealing with Buttery’s violation of a court order instructing him to register as a sex offender”). The court opined, “[i]t is the existence of the adjudication rather than its reliability that is at issue.” *Buttery*, 2020-Ohio-2998, ¶ 32.

In 2016, the Ohio Supreme Court adopted the position that a juvenile adjudication did not qualify as a prior conviction under the *Apprendi* exception. *State v. Hand*, 149 Ohio St.3d 94, 2016-Ohio- 5504, 73 N.E.3d 448. As a result, the court found that because juveniles do not have the right to a jury, a prior adjudication could not be used as a sentence enhancement for a later conviction. *Id.* Accordingly, Robert argued that his juvenile adjudication acted as an impermissible penalty-enhancement because the degree of the adult felony offense was determined by the level of the offense for the underlying juvenile adjudication. Further, Robert argued that conduct that was once civil was being placed on equal footing with an adult criminal conviction for a sexually-oriented offense.

Although the Ohio Supreme Court previously found juvenile adjudications cannot be used as sentence enhancements under *Apprendi*, 530 U.S. at 483, it rejected Robert's claims. The court held Ohio Rev. Code Ann. § 2950.04 does not use

the juvenile adjudication as a sentence enhancement. *Id.* at ¶ 31. Rather, the court reasoned, the applicable felony level is tied to the adjudication, and there is no enhancement beyond statutory minimum and maximums. *Id.* Based on these findings, the Ohio Supreme Court affirmed Robert's failure to register conviction.

Robert now seeks review by this Court.

REASONS FOR GRANTING PETITION

In affirming Robert's conviction, the Ohio Supreme Court decided an important federal question: Whether due process under the Fourteenth Amendment or the right to a jury trial under the Sixth Amendment permit the State to convict and punish a defendant for an adult felony failure to register offense based on a civil juvenile adjudication and court order to register which was never been submitted to a jury? The Ohio Supreme Court concluded that neither the Sixth nor Fourteenth Amendments required the underlying adjudication or the court order to register to be submitted to a jury. Additionally, the court concluded *Apprendi v. New Jersey*, 530 U.S. 466, 483, 120 S.Ct. 2348, 147 L.E.2d 435 (2000) did not require the juvenile adjudication to be submitted to the jury. There is a conflict among federal circuit courts and state courts, as to whether a juvenile adjudication qualifies as a "prior conviction." A decision in this case would settle this conflict.

I. Introduction

A. Kids are different; the juvenile justice system is different.

In recent years, this Court has recognized scientific research in the realm of adolescent brain science which illustrates a child's criminal culpability is more

limited than that of an adult. This scientific research has established the now generally accepted understanding that children are fundamentally different from adults. *See, e.g., Miller v. Alabama*, 567 U.S. 467, 132 S.Ct. 2455, 2464, 183 L.Ed.2d 407 (2012); *J.D.B. v. North Carolina*, 564 U.S. 261, 131 S.Ct. 2394, 2403, 180 L.Ed.2d 310 (2011); *Graham v. Florida*, 560 U.S. 48, 130 S. Ct. 2011, 2026, 176 L.Ed.2d 825 (2010); *Roper v. Simmons*, 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005). Within these cases, this Court acknowledged that children are different from adults in three main ways. First, “children have a ‘lack of maturity and an underdeveloped sense of responsibility’ leading to recklessness, impulsivity, and heedless risk-taking.” *Miller* at 2464, quoting *Roper* at 569. Second, children “are more vulnerable * * * to negative influences and outside pressures,’ including from their family and peers; they have limited ‘contro[ll] over their own environment[,]’ and lack the ability to extricate themselves from horrific, crime-producing settings.” *Miller* at 2464. Finally, the Court recognized that “a child’s character is not as ‘well formed’ as an adult’s; his traits are ‘less fixed’ and his actions less likely to be evidence of irretrievabl[e] deprav[ity].” *Id.*, citing *Roper* at 570.

These cases all relied upon the scientific finding that adolescent brains are structurally immature in the regions associated with behavior control, and that the portion of the brain associated with planning complex cognitive behaviors, decision-making, and moderating social behavior is “one of the last regions of the brain to develop.” Casey et al., *Structural and Functional Brain Development and its Relation to Cognitive Development*, 54 Biological Psychology 241, 243 (2000). From

these findings, it is clear that a juvenile's decisions and actions are different—both scientifically and now constitutionally—in terms of culpability and responsibility. As a result, punishment for a child's misdeeds must be reflective of this diminished culpability.

The lessons of *Roper*, *Miller*, and *Graham* are exemplified in this context as well. First, children who commit sexually-oriented offenses do so for reasons distinct from adults. *See, e.g.*, Carpenter, *Against Juvenile Sex Offender Registration*, 82 U.Cin.L.Rev. 746 (2014); Halbrook, *Juvenile Pariahs*, Hastings Law Journal, 65 Hastings L.J. 1 (2013). For these children, treatment is necessary to achieve the goal of rehabilitation and to allow them to move into adulthood as productive citizens. Second, empirical research demonstrates treatment is extremely effective for youths who engage in this behavior. In fact, research has found that 97% of juveniles will not reoffend. Caldwell, *Quantifying the Decline in Juvenile Sexual Recidivism Rates*, PSYCH. PUB. POL'Y AND LAW, 2016 Vol. 222, No. 4 414-426.

Despite these scientific truths, children who are adjudicated of conduct that would be a sexually-oriented offense and ordered to register are punished in a way that fails to recognize this diminished culpability. Once that same child reaches adulthood, the conduct that was once afforded confidentiality and treatment now serves as the basis for adult felony criminal conduct. The adult conduct would not be criminal without the juvenile conduct and adjudication.

- B. Kids are different and less culpable, but as “sex offenders” these children are punished more severely and with less process.
 - 1. Ohio’s “sex offender” label is established through an informal process that is constitutionally unsound.

As noted by the Ohio Supreme Court, registration is required because a person commits “sex offenses.” *Buttery*, 1st Dist. Hamilton No. C-160609, 2017-Ohio-9113, at ¶ 27. The registry is only for those who commit “sexually-oriented offenses.” In line with the customary practice in Ohio, the label of “sex offender” was imposed upon Robert by way of two separate civil proceedings. First, it is the adjudication alone which triggers the possibility of a classification as a “sex offender.” *See* Ohio Rev. Code Ann. § 2152.83. This adjudication occurred during a civil proceeding in which there was no right to a jury. *See. McKeiver v. Pennsylvania*, 403 U.S. 528, 541, 91 S.Ct. 1976, 29 L.Ed.2d 647 (1971). As such, this Court has consistently found that because these proceedings are not “criminal,” the child has no right to a jury. *McKeiver* at 545. As a result, the commission of the offense is not submitted to and tested before a jury. The reliability of these adjudications is therefore questionable.

As one judge commented, “juvenile courts are a mess.” *Welch v. United States*, 604 F.3d 408, 432 (7th Cir.2010) (Posner, J., dissenting). Research has confirmed that juvenile courts are a breeding ground for wrongful convictions and convictions based on reasons other than the fact that the child actually committed a sexually-oriented offense. *See, e.g.*, Goldstein-Breyer, *Calling Strikes Before He Stepped to the Plate: Why Juvenile Adjudications Should Not Be Used to Enhance*

Subsequent Adult Sentences, 15 Berkeley J.Crim. L. 65, 79 (2010) (“[J]uveniles may plead guilty when they otherwise would not have out of a fear that their judge—who is often remarkably familiar with the minor and particularly knowledgeable of the facts surrounding the conduct in question—will find them guilty regardless and impose a harsher sanction in response to their unwillingness to plead initially.”);

See also Ainsworth, *Youth Justice in a Unified Court: Response to Critics of Juvenile Court Abolition*, 36 B.C. L.Rev. 927, 940–41 (1995); Marrus, *Best Interests Equals Zealous Advocacy: A Not So Radical View of Holistic Representation for Children Accused of Crime*, 62 Md. L.Rev. 288, 327–28 (2003) (arguing that attorneys may have a paternalistic approach in juvenile cases and view the juvenile system as similar to a benevolent social welfare agency); Drizin & Luloff, *Are Juvenile Courts a Breeding Ground for Wrongful Convictions?*, 34 N. Ky. L.Rev. 257 (2007); Guggenheim & Hertz, *Reflections on Judges, Juries, and Justice: Ensuring the Fairness of Juvenile Delinquency Trials*, 33 Wake Forest L.Rev. 553, 564–82 (1998).

Second, following adjudication, the duty to register pursuant to Ohio Rev. Code Ann. §§ 2152.83 and 2152.84, is imposed by way of a civil, more perfunctory process, subject to lower standards of proof than the juvenile adjudication. For juveniles such as Robert who are age 14 and 15 at the time of the offense, the duty to register is determined based on judicial fact finding. Specifically, the judge considers a number of statutory factors before deciding whether placement on the registry is necessary. *See* Ohio Rev. Code Ann. §§ 2152.83(D) and 2152.831. At this

stage, the State is not required to prove beyond a reasonable doubt that the child should be required to register as a sex offender in order to protect the public.

For juveniles placed on the registry as a child, treatment within the juvenile system presents a double-edge sword. Because the system is premised on rehabilitation rather than punishment, there is no right to a jury trial. Yet, that rehabilitation morphs into adult criminal conduct with no constitutional protections once the clock strikes midnight on the child's eighteenth birthday.

2. The future punishment of registration once an adult is more severe for juveniles than for their adult counterparts.

Furthermore, the punishment imposed for juveniles is more severe than that faced by adults.¹ Specifically, what was once civil is now criminal and subject to criminal prosecution. For adults convicted of sexually-oriented offenses, what started as a felony and a criminal act remains a criminal act. Moreover, juveniles such as Robert only faced a possible order of confinement by the judge to the Department of Youth Services for one year for the underlying sexually-oriented offense adjudication or an adjudication for the failure to register. *See Ohio Rev. Code Ann. 2152.16.* Now, as an adult, the person faces adult punishment and sentencing to the Ohio Department of Corrections based on the failure to register.

At most, a juvenile defendant may remain in Ohio's Department of Youth Services for seven years.² Once the individual reaches adulthood, the potential for

¹ In Ohio, registration has been deemed to part of the punishment for the adjudication. *See e.g., In re D.J.S.*, 130 Ohio St.3d 257, 2011-Ohio-5342, 957 N.E.2d 291.

² Under Ohio law, only those defendants 14 and older are eligible to be placed on the registry and the maximum amount of time a child may remain at the Department of Youth Services is until age

deprivation of liberty is greatly enhanced. The degree of the offense for failure to register is dictated by the level of the offense of which the child was adjudicated. For example, for those adjudicated of what would be rape, the failure to register conviction is designated as a first-degree felony and could result in the child being sentenced for up to 11 years in the Ohio Department of Corrections. *See* Ohio Rev. Code Ann. § 2950.99. By comparison, an adult offender does not face the additional or enhanced penalty. For example, the same conduct (rape) would subject an adult to a 3 to 11 year sentence for the underlying conduct as well as for the failure to register. *See* Ohio Rev. Code Ann. §§ 2950.99 and 2929.14.

Permitting Ohio Rev. Code Ann. § 2950.04 to apply to people like Robert who were placed on the registry as a result of youthful indiscretions yielding juvenile adjudications simply does not comport with the scientific research and this Court's precedent finding youth to be less culpable than their adult counterparts. It is fundamentally unfair to place this conduct and the resulting adjudications of children on equal footing with the conduct of adults.

By placement on the registry, conduct which occurred when the child was as young as 14 years of age follows him or her as an adult for 10 years, 20 years, or a lifetime. *See* Ohio Rev. Code Ann. § 2950.07(B)(1)-(3) (requiring registration for 10 years for Tier I juvenile offender registrants; 20 years for Tier II juvenile offender registrants; and a lifetime for Tier III juvenile offender registrants). Considering

21. *See* Ohio Rev. Code. Ann. §§ 2152.83 and 2152.02. Accordingly, the maximum punishment would be commitment for seven years.

the child's conduct was deemed to be insufficient at the outset to warrant punishment in the adult system, the impropriety of such consequences becomes all the more apparent.

The Ohio juvenile system is set up such that if a juvenile's conduct is sufficiently serious to warrant adult consequences, the State may seek to initially impose adult consequences on the youth. *See, e.g.*, Ohio Rev. Code Ann. § 2152.12 (permitting the State to seek transfer of jurisdiction over the offense to adult court); Ohio Rev. Code Ann. § 2152.13 (allowing the State to seek a serious-youthful offender disposition, which includes a stayed adult sentence). Of note, with the potential of adult incarceration and thus enhanced punishment, comes the right to a jury trial. *See* Ohio Rev. Code Ann. § 2152.13. Where the State does not avail itself of any of these options at the juvenile court level, it is fundamentally unfair to permit the conduct to be utilized to effectuate adult penalties and long term consequences years into the child's future.

As noted by this Court in *Roper*,

[f]rom a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed. Indeed, the relevance of youth as a mitigating factor derives from the fact that the signature qualities of youth are transient; as individuals mature, the impetuousness and recklessness that may dominate in younger years can subside.

Roper, 543 U.S. at 570. The same can be said of this case. It is simply misguided to equate the failings of a minor with that of an adult and to allow a youthful lapse in judgment to follow the child for 10 years, 20 years, or for a lifetime.

C. Kids are different, but once they reach adulthood, their constitutional rights should be the same.

The concept of a “crime” is a broad one linked to punishment, amounting to those “acts to which the law affixes * * * punishment,” or, stated differently, those “element[s] in the wrong upon which the punishment is based.” *United States v. Haymond*, 139 S.Ct. 2369, 2376, 204 L.Ed.2d 897 (2019). In the context of the failure to register offense, the Ohio Supreme Court has found the use of a juvenile adjudication and the corresponding court order to register as a sex offender is neither an element that must be proven beyond a reasonable doubt to a jury nor a sentence enhancement. *Buttery* at ¶ 27. According to the Ohio Supreme Court, because the state legislature engaged in a risk assessment and determined that certain juveniles adjudicated delinquent of sex offenses must register, this determination is sufficient. *Buttery* at ¶ 28. Some federal circuit courts have engaged in similar reasoning. *See, e.g., United States v. Bird*, CR-20-31-GF-BMM, 2020 WL 6262094 (D.Mo.2020). Robert submits that the state and federal courts employing this rationale effectively sanction the circumvention of due process protections simply because a lawmaking body deemed registration necessary for these children. There must be a check or balance against the legislature’s unilateral risk assessment to ensure there is no violation of due process or the Sixth Amendment right to a jury trial. This is yet another reason for this Court to grant certiorari over the instant case.

A child defendant is not entitled to a jury because the proceedings against him or her are not considered to be “criminal.” However, once that child reaches the

age of 18 and becomes an “adult,” he or she is entitled to the full bundle of rights under the Constitution, including due process and the right to a jury. The government does not get a “pass” just because the predicate conduct occurred when the person was a child. It is fundamental that if the defendant was an adult, even at 18 years of age, it would be unconstitutional to convict him of a sexually-oriented offense and place him on the sex offender registry without proof beyond a reasonable doubt and the right to a jury. There should be at least equal if not more protection for the youth of our country, not less.

Robert submits that the Ohio Supreme Court’s holdings were in error and require review by this Court. Specifically, Robert asserts that if a juvenile adjudication and its corresponding duty to register serves as an element of the adult offense of failure to register, both would need to be proven beyond a reasonable doubt. However, Ohio Rev. Code Ann § 2950.04 is unconstitutional because it allows for a conviction without the full panoply of constitutional protections, including the right to a jury trial. In this context, neither the sexually-oriented conduct nor the resulting duty to register has ever been submitted to a jury. Thus, the State should not and cannot prosecute Robert for failure to register without violating the Sixth and Fourteenth Amendments. Furthermore, Robert asserts the juvenile adjudication does not qualify as a prior conviction for purposes of *Apprendi*; therefore, this conduct must still be submitted to a jury to comport with due process.

The time is ripe to ensure that conduct committed as a child can only be utilized in a constitutionally protected manner,

II. The Ohio Supreme Court's decision contravenes this Court's precedent as it relates to elements of adult criminal offenses.

The framers of the United States Constitution considered the right to trial by jury "the heart and lungs, the mainspring and the center wheel" of our liberties, without which "the body must die; the watch must run down; the government must become arbitrary." *United States v. Haymond*, 139 S.Ct. 2369, 2375–76, 204 L.Ed.2d 897 (2019), quoting Letter from Clarendon to W. Pym (Jan. 27, 1766), in 1 Papers of John Adams 169 (R. Taylor ed. 1977).

The right to a jury trial does not ensure reliability alone; rather, it serves a number of functions. "The right to a jury trial sought to preserve the people's authority over its judicial functions." *Haymond*, 139 S.Ct. 2369. Toward that end, the Framers adopted the Sixth Amendment's promise that "[i]n all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury." In the Fifth Amendment, they added that no one may be deprived of liberty without "due process of law." Together, these pillars of the Bill of Rights ensure that the government must prove to a jury every criminal charge beyond a reasonable doubt, an ancient rule that has "extend[ed] down centuries." *Apprendi v. New Jersey*, 530 U.S. 466, 477, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000).

The Ohio Supreme Court's decision in this case serves to upend the centuries-old requirement that the government must prove to a jury every criminal charge beyond a reasonable doubt. In reaching its decision, the state high court found that

even without the right to a jury trial, the adjudication was “reliable” enough. *Buttery*, 2020-Ohio-2998, ¶ 27. Yet, this reasoning circumvents or fails to consider a number of other important purposes behind the right to a jury trial under the Sixth and Fourteenth Amendments. Reliability is only one function served by this hallowed right.

“Because the Constitution’s guarantees cannot mean less today than they did the day they were adopted; it remains the case today that a jury must find beyond a reasonable doubt every fact which the law makes essential to [a] punishment that a judge might later seek to impose.” (Internal quotation marks omitted.) *Haymond*, quoting *Blakely v. Washington*, 542 U.S. 296, 309, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004). The Ohio Supreme Court’s decision allows judges to impose punishment on those such as Robert without a finding beyond a reasonable doubt as to an essential element of the offense: the existence of a sexually-oriented offense and the duty to register. To ensure the right to a jury as well as due process of law, Robert respectfully requests this Court grant certiorari in this case.

A. Juvenile adjudication for sexually-oriented conduct is an essential element of the adult felony offense of failure to register.

The constitutional protections “turn on determining which facts constitute the ‘crime’ -- that is, which facts are the ‘elements’ or ‘ingredients’ of a crime.” *Apprendi v. New Jersey*, 530 U.S. 466, 500, 120 S.Ct. 2348, 147 L. Ed.2d 435 (2000) (Thomas, J., concurring). “[E]lements must be charged in the indictment, submitted to a jury, and proven by the Government beyond a reasonable doubt.” *See, e.g., Hamling v. United States*, 418 U.S. 87, 117, 94 S.Ct. 2887, 41 L.Ed.2d 590 (1974).

Importantly, the scope and substance of the due process right that all elements be proven to a jury beyond a reasonable doubt depends upon the proper designation of the facts that are indeed “elements” of the crime.

As Justice Thomas aptly wrote in his concurring opinion in *Apprendi*, “a ‘crime’ includes every fact that is by law a basis for imposing or increasing punishment.” *Apprendi* at 501 (Thomas, J., concurring). At issue in the instant case is a fact that comprises the *basis* for imposing a punishment—that is, the juvenile adjudication. Without the juvenile adjudication for a sexually-oriented offense, there could be no duty to register and thus no crime for failing to register.

In the context of Ohio Rev. Code Ann. § 2950.04, because the juvenile adjudication is a fact which forms the basis for imposing *any* punishment at all, it is an element or an ingredient of an offense under Ohio Rev. Code Ann. § 2950.04 for failure to register. Consequently, the juvenile conduct which resulted in the adjudication must have been submitted to a jury and determined beyond a reasonable doubt in order to comply with the protections due under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution.

Neither the United States Constitution nor the Ohio Constitution affords the right to a jury trial in juvenile proceedings. *McKeiver v. Pennsylvania*, 403 U.S. 528, 545, 91 S.Ct. 1976, 29 L.Ed.2d 647 (1971); *In re Agler*, 19 Ohio St.2d 70, 249 N.E.2d 808 (1969), paragraph two of the syllabus. Because the adjudication of juveniles like Robert does not entail a jury trial right, it violates the constitutional protections under the Sixth and Fourteenth Amendments to utilize such an

adjudication and the corresponding court order requiring registration to fulfill an element of the adult offense of failure to register.

In the case at bar, Robert was indicted for violating Ohio Rev. Code Ann. 2950.04. The indictment charged that Robert:

[o]n or about the 23rd day of June in the year of [2015] at the County of Hamilton and State of Ohio aforesaid, failed to register with the Sheriff's Office in Hamilton County, Ohio, when the defendant was required to register pursuant to division (A) and (B) of this section or failed to send the notice of intent as required pursuant to division (G) of this section, in accordance with those divisions or that division and the most serious sexually oriented offense or child-victim offense that was the basis of the registration, notice of intent to reside, change of address notification, or address verification requirement that was violated under the prohibition was Gross Sexual Imposition a felony of the fourth degree convicted in the HAMILTON COUNTY JUVENILE COURT under case number 11/009085X on OCTOBER 14, 2011, in violation of Section 2950.04 of [ORC].

Ohio Rev. Code Ann. § 2950.04, in turn, provides in pertinent part:

(A)(3)(a) Each child *who is adjudicated a delinquent child for committing a sexually oriented offense and who is classified a juvenile offender registrant based on that adjudication* shall register personally with the sheriff, or the sheriff's designee, of the county within three days of the delinquent child's coming into a county in which the delinquent child resides or temporarily is domiciled for more than three days.

(Emphasis added.) Relevant here is that the duty to register arose because Robert was adjudicated delinquent *and* was classified "*based on that adjudication*."

(Emphasis added.) Ohio Rev. Code. Ann. § 2950.04(A)(3)(a). Accordingly, to punish Robert for failure to register as an adult, the State was required to prove two elements: the prior delinquency adjudication for a sexually oriented offense *and*

that a corresponding duty to register was ordered by the juvenile court.³ However, this prior adjudication did not result from a constitutionally sound process where Robert was not entitled to all the rights under the Fifth, Sixth, and Fourteenth Amendments. Specifically, the fact that he committed a sexually-oriented offense was not submitted to a jury and determined to have occurred beyond a reasonable doubt. Thus, because Robert was not afforded the right to a jury to establish this adjudication, the use of this fact to prove the failure to register offense violated his right to due process.

As this Court observed, “a person accused of a crime * * * would be at a severe disadvantage, a disadvantage amounting to a lack of fundamental fairness, if he could be adjudged guilty and imprisoned for years on the strength of the same evidence as would suffice in a civil case.” *In re Winship*, 397 U.S. 358, 363, 90 S.Ct. 1068, 1072, 25 L.Ed.2d 368 (1970). Yet, that is precisely what happened here. A child who commits what *would be* a sexually-oriented offense if committed by an adult is not afforded the same due process protections as an adult alleged to have committed the same offense. Namely, the child is not provided the right for the offense to be tested by a jury. Although the standard of proof in the juvenile matter is proof beyond a reasonable doubt, this standard alone does not suffice to afford due process. As this Court noted, it is not the reliability that is at issue, but whether there is a right to a jury trial. For Robert, as explained above, he did not

³ Pursuant to Ohio Rev. Code Ann. § 2152.83(B) not all children adjudicated delinquent are required to register. Rather, the juvenile court maintains discretion as to whether the child is placed on the juvenile sex offender registry.

have a right to a jury, and the adjudication and classification occurred as a result of a civil proceeding.

B. The Ohio Supreme Court's conclusion that the juvenile adjudication is not an element of the adult failure to register offense is erroneous.

The Ohio Supreme Court concluded the adjudication was not an element of the adult failure to register offense; rather, it was the existence of the court order requiring the youth to register that served as the element. *Buttery*, 2020-Ohio-2998 at ¶ 20 (“[T]he delinquency adjudication itself is not an issue. We are instead dealing with Butterly’s violation of a court order instructing him to register as a sex offender.”). Robert submits that the Ohio Supreme Court erred in reaching this conclusion. In fact, the plain language of Ohio Rev. Code Ann. § 2950.04(A)(3)(a) counsels against such a conclusion.

Ohio Rev. Code Ann. § 2950.04(A)(3) requires a showing of not only the order requiring the child to register as a sex offender, but also that there is an adjudication. Specifically, Ohio Rev. Code Ann. § 2950.04 states:

*Each child who is adjudicated a delinquent child for committing a sexually oriented offense and who is classified a juvenile offender registrant based on that adjudication shall register personally with the sheriff * * *.*

(Emphasis added.) A juvenile cannot be ordered to register without the adjudication. *See* Ohio Rev. Code Ann. §§ 2152.83 and 2152.831. The adjudication is what triggers the potential to register. That is why the adjudication *and* the juvenile court’s classification order are both elements of Ohio Rev. Code Ann. § 2950.04. The import of adjudication cannot be ignored.

The indictment of Robert supports this conclusion. The indictment actually alleged Robert was required to register by way of a juvenile “conviction”

sexually oriented offense or child-victim oriented offense that was the basis of the registration, notice of intent to reside, change of address notification, or address verification requirement that was violated under the prohibition was GROSS SEXUAL IMPOSITION a felony of the fourth degree convicted in the HAMILTON COUNTY JUVENILE COURT under case number 11/009085X on OCTOBER 14, 2011, in violation of Section 2950.04 of the Ohio Revised Code and against the peace and dignity of the State of Ohio.

(See Appendix F). Thus, Robert’s juvenile adjudication, which was once rehabilitative and shielded from public view, was thrust into the spotlight for all to see. There was absolutely no reference in the indictment to the juvenile court’s order requiring Robert to register. *See* June 8, 2016, T.p. 54-55.

It simply cannot be said that the adjudication itself is not at issue. It is the adjudication alone that triggers a child’s placement on the registry. The adjudication is, in and of itself, an element of the offense.

Moreover, the Ohio Supreme Court’s reasoning that the State need only prove there was an order to register actually places the failure to register offense on more questionable grounds, constitutionally speaking. Instead of the adjudication and existence of the adjudication being determined beyond a reasonable doubt, the Ohio Supreme Court has now found that the court order, decided not to a standard beyond a reasonable doubt, but by a lesser preponderance standard, forms the basis of the criminal offense. At no time, in juvenile court or now in adult court, was this element, the adjudication or the duty to register, tested and proven to a jury beyond

a reasonable doubt.⁴ This is simply not what is permitted under the Sixth and Fourteenth Amendments.

The Ohio Supreme Court noted that reliability of the adjudication is not at issue, but rather its existence. *Buttery*, 2020-Ohio-2998 at ¶ 32. Even if reliability is not at issue, the problem is the absence of a right to a jury trial. As set forth above, the adjudication and resulting order to register occurred in a civil proceeding. Therefore, as the *Winship* Court warned, youth such as Robert are at a severe disadvantage, amounting to a lack of fundamental fairness, because they are found guilty in the prosecution under Ohio Rev. Code. Ann § 2950.04 and imprisoned for years on the strength of the same evidence as would suffice in a civil case. *In re Winship*, 397 U.S. 358, 363, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970).

The treatment of juvenile adjudications and the resulting court order to register as an element of an *adult* felony offense under Ohio Rev. Code Ann. § 2950.04 is an unacceptable departure from the jury tradition that is an indispensable part of our criminal justice system. Accordingly, Robert respectfully requests this Court grant certiorari to review this unconstitutional statutory scheme.

C. Ohio's statute is not unique: 38 States permit juvenile adjudications to form the basis for an adult criminal offense.

It is important for this Court to grant the writ in this case, as a decision would impact a number of youth across the country. Ohio's statute relying on the

⁴ The constitutional infirmity is highlighted when compared to adult offenders. For adult offenders, the sex offense and the resultant duty to register was submitted to a jury.

adjudication to form the basis of the offense for failure to register is not unique. There are approximately 200,000 people in 38 states that are currently on the registry for offenses committed as children. Pickett et al., *Labeled for Life: A Review of Youth Sex Offender Registration Laws*. Available at:

<https://jlc.org/sites/default/files/attachments/2020-09/Labeled%20for%20Life%202020.pdf> (last accessed Dec. 8, 2020). Each of these states criminalizes the failure to comply with the registry. Thirty-one states impose a felony conviction for failure to comply. *Id. See* Ala. Code § 15-20A-37; Ariz. Rev. Stat. Ann. § 13-3824; Ark. Code Ann. § 12-12-906(a)(1)(A); Cal. Penal Code § 290.012; Colo. Rev. Stat. § 18-3-412.5; Del. Code Ann. tit. 11, § 4120(k); Fla. Stat. §§ 943.0435(9)(a), 985.4815(13)(b); 730 Ill. Comp. Stat. 150/10; Ind. Code § 11-8-8-17; Iowa Code § 692A.111; Kan. Stat. Ann. § 22-4903; Md. Code Ann., Crim. Proc. § 11-721; Mich. Comp. Laws § 28.725a(6), .729; Minn. Stat. § 243.166; Miss. Code Ann. § 45-33-33; Mo. Rev. Stat. § 589.425; Mont. Code Ann. § 46-23-507; Nev. Rev. Stat. § 179D.550; N.C. Gen. Stat. § 14-208.11; N.D. Cent. Code § 12.1-32-15; Or. Rev. Stat. § 163A.040; 18 Pa. Cons. Stat. § 4915.1; 11 R.I. Gen. Laws § 11-37.1-10; S.D. Codified Laws § 22-24B-8; Tenn. Code Ann. § 40-39-208; Tex. Code Crim. Proc. Ann. art. 62.102; Utah Code Ann. § 77-41-107; Wash. Rev. Code § 9A.44.132; Wis. Stat. § 301.45; Wyo. Stat. Ann. § 7-19-307. Whereas, seven states provide for misdemeanor liability. Cal. Penal Code § 290.012; Colo. Rev. Stat. § 18-3-412.5 Idaho Code § 18-8409; Iowa Code § 692A.111; Md. Code Ann., Crim. Proc. § 11-721; Mich. Comp.

Laws § 28.725a(6); Okla. Stat. tit. 10A, § 2-8-107; Or. Rev. Stat. § 163A.040; Utah Code Ann. § 77-41-107; Wash. Rev. Code § 9A.44.132.

A decision in this case would affect the 200,000 registrants as well as the 38 states which currently allow for a criminal conviction where a juvenile registrant, now an adult, fails to register.

III. This case is an ideal vehicle for determining whether juvenile adjudications qualify as a prior conviction.

It is fundamental that elements must be submitted to a jury and proven beyond a reasonable doubt. *Jones v. United States*, 526 U.S. 227, 232, 119 S.Ct. 1215, 143 L.E.2d 311 (1999). (“[E]lements must be charged in the indictment, submitted to a jury, and proven by the Government beyond a reasonable doubt”). In order to uphold due process, it is essential to properly designate those facts which are indeed “elements” of the crime and prove said elements beyond a reasonable doubt. In *McMillan v. Pennsylvania*, 477 U.S. 79, 106 S.Ct. 2411, 91 L.Ed.2d 67 (1986), this Court coined the term “sentencing factor” to denote a fact that was not found by a jury but could affect the sentence imposed by the judge. The State may not “redefine the elements that constitute different crimes, characterizing them as factors that bear solely on the extent of punishment.” *Winship*, 421 U.S. at 698.

In *Apprendi*, this Court explained the general rule that any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to the jury and proven beyond a reasonable doubt. *Id.* at 490. Thirteen years later, this Court extended this concept to include any facts that increase the mandatory minimum sentence. *Alleyene v. United States*, 570 U.S. 99,

108, 133 S.Ct. 2152, 186 L.Ed.2d 314 (2013). Any fact that, by law, increases the penalty for a crime is an “element” that must be submitted to the jury and found beyond a reasonable doubt. *Apprendi* at 491. This includes the facts that not only increase the ceiling, but also increase the floor. *Alleyene* at 108.

Of note, this Court recognized a narrow exception to the aforementioned rule. Where the “fact” at issue is a prior conviction, such fact does not need to be submitted to a jury. *Apprendi* at 496. Also known as the *Apprendi* prior conviction exception. *Id.* The rationale behind the exception is that the prior conviction was the product of a proceeding wherein the defendant was afforded the full panoply of procedural safeguards under the Constitution. *Apprendi* at 496 (“There is a vast difference between accepting the validity of a prior judgment of conviction entered in a proceeding in which the defendant had the right to a jury trial and the right to require the prosecutor to prove guilt beyond a reasonable doubt, and allowing the judge to find the required fact under a lesser standard of proof”).

This case implicates *Apprendi* and its progeny. Robert argued below, as he does now, that the juvenile adjudication and duty to register elements of Ohio Rev. Code Ann § 2950.04 do not qualify as a prior conviction. Accordingly, this fact was required to be submitted to a jury.

A. The Federal Circuits as well as state courts are split as to whether a juvenile adjudication qualifies as a prior conviction.

There is a conflict as to whether juvenile adjudications qualify as prior convictions under *Apprendi*. Compare *United States v. Crowell*, 493 F.3d 744, 749-51 (6th Cir.2007); *United States v. Burge*, 407 F.3d 1183, 1187-91 (11th

Cir.2005); *United States v. Jones*, 332 F.3d 688, 696 (3d Cir.2003); and *United States v. Smalley*, 294 F.3d 1030, 1031-33 (8th Cir.2002); *see also United States v. Matthews*, 498 F.3d 25, 32-36 (1st Cir.2007), *Welch v. United States*, 604 F.3d 408, 431 (7th Cir.2010)(finding juvenile adjudications qualify as prior convictions) *with United States v. Tighe*, 266 F.3d 1187, 1193 (9th Cir.2001)(juvenile adjudication is not the same as a prior conviction). State courts are also divided on the issue. *Compare State v. Hand*, 149 Ohio St.3d 94, 2016-Ohio-5504, 73 N.E.3d 448 (holding that a juvenile adjudication cannot be used to enhance the degree of an offense or the sentence of an offense committed as an adult, as juveniles lack the right to a jury trial); *State v. Brown*, 879 So.2d 1276, 1289 (La.2004) (holding that a juvenile “adjudication should not be counted as a ‘prior conviction’ for *Apprendi* purposes”); *with Ryle v. State*, 842 N.E.2d 320, 323 (Ind.2005) (holding that juvenile adjudications are prior convictions for purposes of the *Apprendi* exception and indicating that “[t]he main concern [in *Apprendi*] was whether the prior conviction’s procedural safeguards ensured a reliable result, not that there had to be a right to a jury trial).

This case presents this Court with an opportunity to settle this conflict.

1. Majority view: Juvenile adjudications are reliable enough to qualify as a prior conviction.

The majority of federal circuits addressing the issue have concluded that juvenile adjudications qualify as a prior conviction under *Apprendi* and therefore need not be proven to a jury. In so holding, these courts reasoned that juvenile adjudications have sufficient procedural safeguards to render them reliable enough

to satisfy the *Apprendi* exception even though the juvenile did not have a right to a jury. *See, e.g.*, *Welch* at 428-429.

2. Minority View: Being reliable in the juvenile justice system does not render the adjudication equivalent to adult convictions.

By contrast, the Ninth Circuit in *Tighe* found that because juvenile adjudications are not afforded the right to a jury and to proof beyond a reasonable doubt, they do not fall within *Apprendi*'s prior conviction exception. *Tighe* at 1193. According to the *Tighe* court, prior convictions are distinct and treated differently because they are established through procedures satisfying fair notice, reasonable doubt, and jury trial guarantees. *Tighe* at 1193. The court characterized these constitutional procedural safeguards as the "fundamental triumvirate of procedural protections." *Id.*

The rationale of the dissenting opinion in *Tighe* has been utilized by a number of the courts that have adopted the majority position. Yet the rationale is flawed. The *Tighe* dissent argued Congress may constitutionally treat prior convictions as sentencing factors, and thus subject them to a lesser standard of proof, because the defendant received all process that was due in being convicted of the underlying crime. *Tighe* at 1198. For adults, that process included the right to a jury trial. But for juveniles, due process does not require that right. To the dissent, there is no constitutional problem in using that adjudication to support a later sentencing enhancement as the child received all the process due to the child during the juvenile proceeding. *Id.*

The rationale espoused by the *Tighe* dissent only works if the child, and the offense for failure to register, remains in the juvenile system. However, once the registrant turns age 18, punishment is removed from the juvenile system and thrust into the adult system. *See* Ohio Rev. Code Ann. § 2950.99. The once juvenile is now an adult, entitled to the full quantum of constitutional protections—*including* the right to a jury. Simply because the predicate conduct occurred as a child does mean that the defendant should receive less rights as an adult.

Furthermore, contrary to the majority viewpoint, it is clear the adjudication and requirement to register are not reliable. As an initial matter, the adjudication and duty to register were borne out of a system focused not on punishment, but on treatment and rehabilitation. *See* Ohio Rev. Code Ann. § 2152.02. Moreover, the assessment that these children pose a risk to re-offend is a fallacy. As stated, research indicates that those who commit sex offenses as children rarely recidivate. In fact, approximately 97% of all youth never re-offend sexually. Denniston & Caldwell, *Answering the Call to Study the Effects of Juvenile SORN: Lessons from Two Studies* (Oct. 15, 2015).

The adjudication is simply not indicative of a risk to reoffend or reliable so as to be used to label a person a sex offender.

B. The Ohio Supreme Court held that the juvenile adjudication set forth in the failure to register offense is neither an element nor prior offense subject to *Apprendi*.

Here, the Ohio Supreme Court concluded the juvenile adjudication did not fall within the ambit of *Apprendi* because, according to the court, the juvenile

adjudication did not enhance the sentence. *Buttery*, 2020-Ohio-2998 at ¶ 27.⁵ Under the Ohio Supreme Court's view, the adjudication is neither an element nor a sentence enhancement. The adjudication is in its own category. Essentially, the Ohio Supreme Court has given the legislature a pass and has allowed it to "define" the crime under Ohio Rev. Code Ann. § 2950.04 for juvenile registrants in such a way that the State never has to prove to a jury the sexually-oriented crime.

The Ohio Supreme Court's holding does not comport with due process. "[I]t is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed. It is equally clear that such facts must be established by proof beyond a reasonable doubt." *Apprendi* at 490. Here, the legislature has removed from the jury the assessment of the existence of a sexually-oriented offense or the resulting duty to register as it relates to juvenile registrants. This is a violation of due process and the right to a jury trial.

This case presents this Court with the opportunity to settle the conflict amongst the circuits, find a juvenile adjudication is not a prior conviction, and adopt the *Tighe* position. Because the juvenile adjudication and the duty to register has never been submitted to a jury and proven beyond a reasonable doubt, it was unconstitutional for Robert to have lost his liberty based on these untested facts.

⁵ Interestingly, the Ohio Supreme Court had previously found juvenile adjudications do not qualify as a prior conviction and therefore may not constitutionally be used to enhance a sentence as an adult. *State v. Hand*, 149 Ohio St.3d 94, 2016-Ohio-5504, 73 N.E.3d 448. Yet, in this context, this Court found the use of the juvenile adjudication did not implicate Robert's Sixth or Fourteenth amendment rights.

As this Court recently reiterated in *United States v. Haymond*, ___ U.S. __, 139 S.Ct. 2369, 204 L.E.2d. 897 (2019): “The Constitution seeks to safeguard the people’s control over the business of judicial punishments by ensuring that any accusation triggering a new and additional punishment is proven to the satisfaction of a jury beyond a reasonable doubt.” *Id.* at 2380. There, an adult registered sex offender was on supervised release, and it was alleged he was found in possession of child pornography, in violation of his conditions of release. The court found by a preponderance of the evidence that the defendant downloaded child pornography. As to the punishment for the violation, a federal statute required the judge to impose a 5-year minimum prison term. Had it not been for this statute, the potential sentence would have been between zero and two years in prison. *Haymond* at 2374. This Court ruled that a “congressional statute compelled a federal judge to send a man to prison for a minimum of five years without empaneling a jury of his peers or requiring the government to prove his guilt beyond a reasonable doubt. As applied here, we do not hesitate to hold that the statute violates the Fifth and Sixth Amendments.” *Id.* at 2373.

In *Haymond*, even though the judge was imposing a penalty for conduct subsequent to the initially-charged conduct, this Court still found the *jury* “must find any facts that trigger a *new* minimum sentence.” *Id.* at 2369. “Only a jury, acting on proof beyond a reasonable doubt, may take a person’s liberty. That promise stands as one of the Constitution’s most vital protections against arbitrary government.” *Id.* at 2373. This promise has been unrealized for Robert

and for the youth of this country who face imprisonment due to placement on the registry as a child and any failure to register as an adult.

Similar to *Haymond*, registration represents “new and additional” punishment beyond that of the initial adjudication. Accordingly, before such punishment is imposed, it must be submitted a jury.

CONCLUSION

It is important for this Court to grant the writ in this case, as a decision would impact a significant number of youth across the country. Again, Ohio’s statute relying on the adjudication to form the basis of the offense for failure to register is not unique. No fewer than 200,000 people in 38 states await guidance from this Court on the issues implicated by the instant case. Robert respectfully requests that this Court grant certiorari to decide these important issues.

Respectfully submitted,

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