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DW's Cautionary Tale

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DW'S CAUTIONARY TALE

John Mahoney† and Cynthia McCollum‡‡

I. INTRODUCTION................................................................. 770
II. PROSECUTING JUVENILE OFFENDERS AND THE
    CONSEQUENCES OF ADJUDICATIONS ............................. 775
III. COLLATERAL ATTACK OF PRIOR JUVENILE ADJUDICATIONS .. 782
    A. The Development of Minnesota Law on Collateral Attack........ 782
    B. The McFee Problem.................................................. 785
    C. The Custis Problem................................................. 787
IV. A NEW APPROACH: ATTACKING ENHANCEMENT AS PART OF
    PROBABLE CAUSE..................................................... 789
V. USING PRIOR JUVENILE ADJUDICATIONS AS AN ELEMENT
    TO ENHANCE CRIMINAL OFFENSES OFFENDS DUE PROCESS
    PROTECTIONS .............................................................. 794
    A. Finding an Issue of Constitutional Dimension.................... 794
    B. A Constitutional Theory: Due Process and the “Fact of
       Conviction”............................................................... 795
    C. A Constitutional Theory: Due Process and “Reliability of
       Convictions”............................................................ 798
    D. A Constitutional Theory: Juvenile Court Due Process
       Hazards and “Reliability”........................................... 803
       1. Due Process Hazards: The Prevalence of Pleas in
          Juvenile Court...................................................... 803
       2. Due Process Hazards: The Delivery of Legal Services ...... 807

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I. INTRODUCTION

Even as a twelve year old, DW\(^1\) was familiar with juvenile court. Ramsey County had recently terminated his mother’s parental rights, and although DW lived in St. Paul, the county social services placed him in foster care in Minneapolis. Separated from his mother and living with strangers, DW soon found himself in the juvenile delinquency system.

On March 21, 2002, school officials called the police and had DW arrested. According to the police report, a school secretary walked in on DW “going through some papers” in her office. She told him to leave. DW said he needed to use the phone, but she refused. DW “grabbed [her] by the shoulders and shoved her into the door. [She] struck her hand on the edge of the door and cut her finger.” Police detained DW at the Hennepin County Juvenile Detention Facility.\(^2\)

Hennepin County filed a delinquency petition charging fourth-degree assault.\(^3\) At his hearing,\(^4\) DW waived his right to have a parent present,\(^5\) waived his trial rights, “admitted” the assault, and

1. DW is a real person who was involved in real cases. All identifying information has been intentionally left out of this article. The facts come from available records, but juvenile court hearings are private and the transcripts were not introduced in the adult trial. See Minn. R. Juv. Del. P. 30.02.
2. See generally id. R. 5.02 (defining the power to detain juveniles).
3. Minnesota law makes assault of certain persons a more serious offense, including school personnel: “Whoever assaults a school official while the official is engaged in the performance of the official’s duties, and inflicts demonstrable bodily harm, is guilty of a gross misdemeanor. As used in this subdivision, ‘school official’ includes teachers, school administrators, and other employees of a public or private school.” Minn. Stat. § 609.2231, subdiv. 5 (2008). While a misdemeanor may be punished with up to ninety days in jail, a gross misdemeanor may include up to a year in jail. Id. § 609.03.
4. This is called a detention hearing. Under Minnesota law, detained juveniles must be brought before a judge or referee within thirty-six hours of being taken into custody. Minn. Stat. § 260B.176, subdiv. 2.
5. Minnesota law requires a parent to attend most juvenile court hearings.
established a factual basis for the offense. The county reduced the charge to simple assault\(^6\) in exchange for the admission. The judge accepted the waivers and admission, but did not make any findings.\(^7\) She transferred venue to Ramsey County for disposition, where DW had a pending case. The judge detained DW until that hearing.

DW appeared in Ramsey County on April 8, 2002, after having been held in custody for eighteen days. Once again, no relative appeared at the hearing. DW’s Ramsey County attorney alerted the court that the parental rights of DW’s mother were recently terminated and asked that a guardian ad litem be ordered to protect DW’s interests.\(^8\) The judge ordered a guardian ad litem to represent DW at “all further proceedings.”\(^9\) Despite this order, no

\(^{\text{6}}\) See MINN. STAT. § 609.224, subdiv. 1 (categorizing charges of fifth-degree assault).

\(^{\text{7}}\) The juvenile court rules require written findings within seven days of a hearing. MINN. R. JUV. DEL. P. 13.09. Without written findings, it is very difficult to recreate what happened at a hearing or review judicial reasoning at subsequent hearings. In DW’s case, the authors had to try to track down transcripts of the hearings to determine whether his rights had been vindicated.

\(^{\text{8}}\) Minnesota law provides for guardians in delinquency cases. MINN. STAT. § 260B.163, subdiv. 6. A guardian has obligations to the child to remain independent of the court and court personnel. Id.

\(^{\text{9}}\) Cf. O’Neil v. Swan, 299 Minn. 206, 207, 218 N.W.2d 457, 457 (1974) (“[T]he purpose of a guardianship ad litem . . . is to protect the rights of the infant.”); In re Welfare of J.S., 470 N.W.2d 697, 700 (Minn. Ct. App. 1991) (“The guardian ad litem has the duty to act within the judicial proceedings to further the best interests of the child, and to do so the guardian ad litem must be free ‘to engage in vigorous and autonomous representation of the child.’” (quoting Tindell v. Rogosheske, 428 N.W.2d 386, 387 (Minn. 1988))). Minnesota law outlines the guardian’s duties as:

(b) A guardian ad litem shall carry out the following responsibilities:

1. conduct an independent investigation to determine the facts relevant to the situation of the child and the family, which must include, unless specifically excluded by the court, reviewing relevant documents; meeting with and observing the child in the home setting and considering the child’s wishes, as appropriate; and interviewing parents, caregivers, and others with knowledge relevant to the case;
guardian ad litem appeared at any subsequent hearings.

The judge adjudicated DW delinquent. The transcript referenced two files with different dates and case numbers. However, the order stated only that “[t]he child is adjudicated delinquent” without referencing to which petitions the order applied. The judge released DW to a group home.

DW continued to have trouble adjusting to his new life, and soon found himself back in detention. On July 31, 2002, DW, still twelve, punched a seventeen-year-old boy living in his group home. After being held in detention for thirty days, DW appeared in Ramsey County Juvenile Court on a petition charging assault in the fifth-degree. Neither a relative nor the appointed guardian appeared with DW. He waived his rights and admitted the petition. The judge continued the case for disposition. At the disposition hearing, DW once again appeared without a relative or the guardian ad litem. The court continued DW on probation and ordered him back to the group home. He was never adjudicated

(2) advocate for the child’s best interests by participating in appropriate aspects of the case and advocating for appropriate community services when necessary;
(3) maintain the confidentiality of information related to a case, with the exception of sharing information as permitted by law to promote cooperative solutions that are in the best interests of the child;
(4) monitor the child’s best interests throughout the judicial proceeding; and
(5) present written reports on the child’s best interests that include conclusions and recommendations and the facts upon which they are based.

(c) The court may waive the appointment of a guardian ad litem pursuant to paragraph (a), whenever counsel has been appointed pursuant to subdivision 2 or is retained otherwise, and the court is satisfied that the interests of the minor are protected.

MINN. STAT. § 260B.163, subdiv. 6(b)–(c) (emphases added).

10. At the hearing, the judge ordered:
DW, I’m going to follow the recommendations of probation. I’m going to order that you be placed in the [name withheld] group home for a period of nine to twelve months, that you attend outpatient sexual-offender treatment as directed by probation, that you attend your psychiatric appointments and follow the medication orders, that you perform 24 hours of community work service, and that you make restitution. I am going to—you will be adjudicated for this offense at this time given the nature of the offenses.

11. See MINN. STAT. § 609.224 (defining fifth-degree assault).

12. The juvenile court rules do not require a court to enter an adjudication of delinquency, but provide options including a continuance without any adjudication for various amounts of time. MINN. R. JUV. DEL. P. 15.05, subdiv. 4.
delinquent on this petition.

On November 3, 2003, Ramsey County filed a new petition against DW, then thirteen, alleging assault in the fourth-degree. The petition averred that DW “got angry with the [school] principal when he intervened in a dispute with another student . . . [so DW] pushed and swung at him.” Although there was no guardian ad litem present, DW’s grandfather appeared with him at this hearing. In exchange for an amended charge of assault in the fifth-degree (simple assault) and dismissal of the other counts, DW admitted the offense. The judge adjudicated DW delinquent and placed him at a Department of Corrections residential facility for twenty-one days.

13. Also included in the petition were charges of possession of a small amount of marijuana and disorderly conduct.
14. The Department of Court Services committed DW to the Minnesota Correctional Facility (“MCF-Togo”). According to the facility website:

Togo . . . is available for use on a per diem basis by all Minnesota juvenile county courts and provides court and social service agencies with an alternative residential program. Average daily population is about 41.

The MCF-Togo offers a three-week program, operated separately for boys and girls between 13 and 17 years of age. It also offers a three-month program for boys. Each program is intended to serve as a treatment resource for juveniles who have experienced failure in the home, school and community.

MCF-Togo Facility Information, MINN. DEP’T OF CORRS., http://www.doc.state.mn.us/facilities/togo.htm (last visited Nov. 17, 2010). The twenty-one day program is described as follows:

Thistledew Wilderness Endeavors is a year-round, 21-day adventure therapy program for boys or girls (the girls’ program operates separately from the boys program and has a strong gender-specific focus). It provides students with a safe but challenging environment in which to discover and develop tools for change and personal growth. Wilderness activities such as backpacking, canoeing, and cross-country skiing are used, along with rock climbing and a teams course. Participants also have a four-day solo experience, which includes cognitive skills, finalizing goals and personal reflection. A therapy component helps residents process their experiences and transfer them to real-life situations. Students receive one-half year of school credit in English, one-half year credit in science, and also one full year in physical education.

Id.
Finally, on July 23, 2009, Minneapolis police arrested DW, then nineteen, for “domestic assault.”\(^{15}\) Hennepin County charged the domestic as a felony, enhanced by the three juvenile “adjudications” which had occurred during a sixteen month period, beginning seven years earlier.

This article examines an emerging issue in the use of juvenile adjudications as an element in the enhancement of offenses.\(^{16}\) It seems inherently unfair to change a misdemeanor to a felony based on juvenile adjudications when the defendant was only twelve or thirteen. In preparing DW’s defense, we found serious flaws in the juvenile adjudications used to enhance the charge. The record raised doubt about the legality of the adjudications, as to both the fact of conviction and the reliability of the procedures. There is a fundamental difference between using recidivism to lengthen felony sentences and using recidivism to enhance the charge itself. The difference amounts to a violation of due process protections.

The first part of this article briefly discusses the history of juvenile court development and the trends in legislation which led to enhancement by prior adjudication. The second part of this article relates the litigation in DW’s case and attacks the enhancement portion of the charge in the pretrial probable cause

\(^{15}\) Minnesota’s domestic assault statute provides:

Whoever does any of the following against a family or household member . . . commits an assault and is guilty of a misdemeanor: (1) commits an act with intent to cause fear in another of immediate bodily harm or death; or (2) intentionally inflicts or attempts to inflict bodily harm upon another.

MINN. STAT. § 609.2242, subdiv. 1. The statute’s penalty section makes a simple assault a felony when the defendant has prior convictions for a variety of crimes, even though they are not “domestics” and include juvenile convictions no matter how young the child was at adjudication. Id. subdiv. 4.

\(^{16}\) The legislature has provided for use of juvenile adjudications as predicate offenses and as enhancements in a variety of criminal contexts. E.g., MINN. STAT. § 169A.05, subdiv. 20 (including prior juvenile adjudications in the definition of a prior impaired driving conviction for purposes of driving while impaired laws); id. § 609.224, subdivs. 2, 4 (enhancing fifth-degree assault to gross misdemeanor or felony based on previous adjudications of delinquency); id. § 609.2242, subdivs. 2, 4 (enhancing domestic assault to gross misdemeanor or felony based on previous adjudications of delinquency); id. § 609.377, subdiv. 3 (enhancing malicious punishment of a child to a felony based on previous adjudications of delinquency); id. § 609.749, subdiv. 4 (enhancing harassment to a felony based on previous adjudications of delinquency); id. § 624.713, subdiv. 1 (making persons adjudicated delinquent for a crime of violence ineligible to possess a firearm); see also State v. McFee, 721 N.W.2d 607, 614 (Minn. 2006) (listing the new ways in which juvenile adjudications may be used as predicate offenses).
hearing. The third part of this article contends that the use of prior juvenile adjudications to enhance criminal offenses violates due process. Due process requires the state to first prove the fact of conviction, and second the reliability of the adjudication. This article exposes serious flaws in the hypothesis that juvenile court adjudication bears protections comparable to the adult jury-trial system.

In conclusion, this article proposes eliminating the practice of using juvenile adjudications to enhance offenses. If DW’s family situation had not placed him in institutional settings, his behavior might have been better controlled. Furthermore, but for zero-tolerance policies,17 DW’s outbursts at school may not have come to the attention of the police. Few adults would have been prosecuted for DW’s conduct, and if they had, most adults would much more vigorously defend against those prosecutions. The article concludes with some proposals for ending the practice of enhancing charges with prior juvenile adjudications, as it is inherently unfair.

II. PROSECUTING JUVENILE OFFENDERS AND THE CONSEQUENCES OF ADJUDICATIONS

Scholars have documented the history of Minnesota’s juvenile court to a great degree.18 The principle goal in establishing a


The juvenile court system was the rehabilitation of youthful offenders. However, as the rate of juvenile crime rose, courts became more punitive, and juvenile court practices came to resemble traditional court prosecutions for adult offenders. Concern over fair treatment mounted, eventually compelling the United States Supreme Court to curb these abuses through a due process "explosion," thus ensuring juveniles most constitutional protections.

19. See, e.g., In re Gault, 387 U.S. 1, 15–16 (1967) ("The early reformers were appalled by adult procedures and penalties, and by the fact that children could be given long prison sentences and mixed in jails with hardened criminals. They were profoundly convinced that society’s duty to the child could not be confined by the concept of justice alone. They believed that society’s role was not to ascertain whether the child was ‘guilty’ or ‘innocent,’ but ‘[w]hat is he, how has he become what he is, and what had best be done in his interest and in the interest of the state to save him from a downward career.’ The child—essentially good, as they saw it—was to be made ‘to feel that he is the object of (the state’s) care and solicitude,’ not that he was under arrest or on trial. The rules of criminal procedure were therefore altogether inapplicable. The apparent rigidities, technicalities, and harshness which they observed in both substantive and procedural criminal law were therefore to be discarded. The idea of crime and punishment was to be abandoned. The child was to be ‘treated’ and ‘rehabilitated,’ and the procedures, from apprehension through institutionalization, were to be ‘clinical’ rather than punitive." (footnotes omitted)); Peterson v. McAuliffe, 151 Minn. 467, 470, 187 N.W. 226, 227 (1922) ("The whole tenor of the [juvenile court] act indicates that the sole purpose is the welfare of the delinquent as well as the dependent or neglected child. The treatment accorded the two classes is essentially the same. The rights of the parents are amply protected. . . . That the delinquency charge is not intended as a proceeding to punish for a crime . . . [that w]e consider [the juvenile court act] designed to secure the welfare of delinquent children, and not to punish them, and the restraint put on them to secure that end is not imprisonment, but parental control by the state in cases where parents have failed.").

20. Similarities between those two systems led the Court in other cases to apply other constitutional protections to juvenile court. Barry C. Feld, The Constitutional Tension Between Apprendi and McKeiver: Sentence Enhancements Based on Delinquency Convictions and the Quality of Justice in Juvenile Courts, 38 WAKE FOREST L. REV. 1111, 1140–43 (2003); see also McFee, 721 N.W.2d at 612.

21. In Gault, the Court held that juveniles were entitled to due process protections that attach in criminal cases; specifically, the right to notice of charges, the right to counsel, the privilege against self-incrimination, and the right to confront and cross-examine witnesses. In re Gault, 387 U.S. at 33. Three years after Gault, the Supreme Court held that charges against juveniles must be proven by the same standard applicable to criminal cases—beyond a reasonable doubt. In re Winship, 397 U.S. 358, 368 (1970). Then, in 1975, the Court held that double jeopardy protections apply to juvenile delinquency cases. Breed v. Jones, 421 U.S. 519, 541 (1975). Unfortunately, juveniles have no constitutional right to a jury trial. McKeiver v. Pennsylvania, 403 U.S. 528, 545 (1971) (plurality opinion) ("[T]rial by jury in the juvenile court’s adjudicative stage is not a constitutional
A steep rise in juvenile crime occurred between the late 1980s and mid-1990s. In response, the legislature enacted measures such as the Extended Juvenile Justice ("EJJ") legislation, which was designed to “get tough on crime” while retaining some of the traditional juvenile justice protections. EJJ came to Minnesota in 1994 as an effort to balance rehabilitative goals with societal protection.

requirement."); see also In re K.A.A., 410 N.W.2d 836, 841 n.9 (Minn. 1987) (suggesting approval of McKeiver, as noted in McFee, 721 N.W.2d at 612 n.7).

22. E.g., James C. Backstrom & Gary L. Walker, The Role of the Prosecutor in Juvenile Justice: Advocacy in the Courtroom and Leadership in the Community, 32 WM. MITCHELL L. REV. 963, 964 (2006) (“Arrests of juvenile offenders for murder skyrocketed between 1985 and 1993, rising approximately 150%. Juvenile arrests for aggravated assault also rose dramatically by more than 120% from 1983 to 1994. Total arrests of juveniles for serious, violent offenses increased by 67% between 1985 and 1994. Arrests of juveniles for weapons offenses rose by 93% during this same timeframe. In many areas of our country, substantial growth also occurred in nonviolent juvenile crime during this time period. The growth rates in juvenile crime between 1985 and 1994 far outpaced the rate for adults, which began to decline in most categories beginning in 1992.” (footnotes omitted)). But see LORI DORFMAN & VINCENT SCHIRALDI, BUILDING BLOCKS FOR YOUTH, OFF BALANCE: YOUTH, RACE, AND CRIME IN THE NEWS (2001), available at http://www.cclp.org/documents/BBY/offbalance.pdf (noting that the most significant factor in the public’s misinformation is the distortion of juvenile crime by the news media). A comprehensive examination of crime in the news conducted by Lori Dorfman and Vincent Schiraldi in 2001 found that: (1) the press reported juvenile crime out of proportion to its actual occurrence; (2) violent crime, although representing only twenty-two to twenty-four percent of juvenile crime from 1988 to 1997, dominated the media’s coverage of juvenile offenses; (3) the media presented crimes without an adequate contextual base for understanding why the crime occurred; (4) press coverage unduly connected race and crime; and (5) juveniles were rarely covered by the news other than to report on their violent criminal acts. Id. at 8–26.


25. Clarke, supra note 17, at 682; see also Feld, supra note 17, at 982–86.
Ever younger children are being prosecuted in juvenile court. Increasingly, juveniles are being “waived” into adult court. Legislatures across the country have swept away many of the hurdles traditionally imposed to prevent the transfer of children to traditional adult court. The zero-tolerance policies of the 1990s continue to reverberate in juvenile proceedings. State legislatures


27. See MINN. STAT. § 260B.125, subdiv. 1 (stating that a juvenile offender who has committed a serious offense may be waived from juvenile court to adult court). Sometimes this is a discretionary waiver, where the prosecutor files a motion to have the young offender tried as an adult. See id. § 260B.141, subdiv. 4. After a hearing, where evidence is presented for and against a waiver, the judge decides whether the offender should be tried as a juvenile or an adult. See id. § 260B.125, subdiv. 4. Sometimes, this is a mandatory waiver, where the law requires the young offender to be tried as an adult. E.g., id. subdiv. 5. Many states have passed laws allowing prosecutors to file adult charges against juveniles for certain serious offenses, without having to apply for a waiver. E.g., id. Between 1992 and 1997 forty-five states made it easier to transfer juveniles to adult court. Jennifer Park, Note, Balancing Rehabilitation and Punishment: A Legislative Solution for Unconstitutional Juvenile Waiver Policies, 76 GEO. WASH. L. REV. 786, 797 (2008).

28. HOwARD N. SNYDER & MELISSA SICKMUND, U.S. DEPT. OF JUSTICE, JUVENILE OFFENDERS AND VICTIMS: 2006 NATIONAL REPORT 96–97 (2006), available at http://www.ojjdp.ncjrs.gov/ojstatbb/nr2006/downloads/NR2006.pdf (noting that as many state legislatures have made it easier to transfer juvenile offenders into the adult criminal justice system, sentencing options have been increased and expanded to include punitive aspects and confidentiality laws have been relaxed); see also Clarke, supra note 17, at 673–76 (discussing the evolution of punitive philosophy with respect to children); Sacha M. Coupet, What to Do with the Sheep in Wolf’s Clothing: The Role of Rhetoric and Reality About Youth Offenders in the Constructive Dismantling of the Juvenile Justice System, 148 U. Pa. L. Rev. 1303, 1317–18 (2000) (discussing legislative reform of the juvenile justice system); Park, supra, at 797.

29. See generally RALPH C. MARTIAN, II, AM. BAR ASS’N, ZERO TOLERANCE POLICY REPORT, available at http://www.abanet.org/crimjust/juvjus/zerotolreport.html (discussing state and local enactments and school district rules, providing for punishment up to and including expulsion for any infractions, no matter how small or allegedly excusable of certain school rules, such as bringing weapons, drugs, or alcohol to the school premises).

30. Id.; see also Anthony V. Alfieri, Post-Racialism in the Inner City: Structure and Culture in Lawyering, 98 GEO. L.J. 921, 957–58 (2010) (“In 2000, states recorded ‘over three million school suspensions and over 97,000 expulsions.’ Statistically, advocates report, ‘a child who has been suspended is more likely to be retained in grade, to drop out, to commit a crime, and/or to end up incarcerated as an adult.’ In addition to suspension and expulsion, students increasingly suffer arrest and referral to law enforcement officials or juvenile courts for prosecution.”); Linda F. Giardino, Statutory Rhetoric: The Reality Behind Juvenile Justice Policies in America, 5 J.L. & POL’Y 223 (1996); Margaret Graham Tebo, Zero Tolerance, Zero Sense, 86 A.B.A.J. 40, 41 (2000) (“Nationwide, statistics gathered by the Justice Policy Institute and the U.S. Department of Education show that crime of all sorts is down at public
have aggressively cracked down on juvenile crime, criminalizing conduct and lengthening incarcerations.\footnote{Park, supra note 27, at 789 (“After a perceived wave of violent juvenile crime in the 1980s and 1990s, however, state legislators actively increased penalties for juvenile crime and shifted the purpose of the juvenile court from rehabilitation to punishment.”).} Juvenile adjudications increasingly inflict wide-reaching collateral consequences.\footnote{Alfieri, supra note 30, at 957–58.; see also Robert E. Shepherd, Jr., Collateral Consequences of Juvenile Proceedings, 15 A.B.A. CRIM. JUST. MAG. 2, 59 (2000), available at http://www.abanet.org/crimjust/juvjus/cjmcollconseq1.html.}

These transformations in juvenile justice theory have had lingering consequences.\footnote{See, e.g., Barry C. Feld, Juvenile Justice in Minnesota: Framework for the Future, COUNCIL ON CRIME & JUST., http://www.crimeandjustice.org/councilinfo.cfm?pID=46 (last visited Oct. 14, 2010) (discussing the negative consequences of the changes in the juvenile justice system in Minnesota).} Traditionally, juvenile courts have been private and closed to the public.\footnote{Minn. R. Juv. Del. P. 2.01. Juvenile court proceedings are closed to the public except as provided by law. Id. Rule 2.01 allows persons authorized by statute to attend juvenile court proceedings. Id. Authorized persons include members of the public, in cases where a juvenile over age sixteen is alleged to have committed a felony, and victims. Id. The public is also entitled to be present during a juvenile certification hearing where a juvenile over age sixteen is alleged to have committed a felony, except that the court may exclude the public from portions of a certification hearing to discuss psychological material or other evidence that would not be accessible to the public in an adult proceeding. Minn. Stat. § 260B.163, subdiv. 1(c)(2) (2008). The statute does not currently permit exclusion when similar material is being presented in an extended jurisdiction juvenile proceeding. This may simply be an oversight. Rule 2.02 permits exclusion of persons from hearings, even when they have a right to participate, to serve the child’s best interests. Minn. R. Juv. Del. P. 2.02. “The 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 . . . not to fix criminal responsibility, guilt and punishment.” Kent v. United States, 383 U.S. 541, 554 (1966).} As a policy matter, it was believed that youthful offenders should not be stigmatized forever because of one mistake.\footnote{Giardino, supra note 30, at 251 (“[Minors] do not possess mature judgment and may not fully realize the consequences of [their] acts . . . therefore [such individuals] should not generally have to bear the stigma of a criminal conviction for the rest of [their lives].” (quotation omitted)).} However, in a variety of ways, adjudications follow the juvenile into adulthood.

Although not a conviction, an adjudication of delinquency has many consequences. Some jurisdictions preclude persons with certain juvenile adjudications from possessing firearms.\footnote{E.g., Minn. Stat. § 260B.245 subdiv. 1(b) (“A person who was adjudicated since 1990—some studies say by as much as 30 percent. Less than 1 percent of all violent incidents involving adolescents occur on school grounds.”).} Such
persons may be required to submit to DNA testing and fingerprinting. Many employers require job applicants to submit to criminal background checks. If a juvenile’s fingerprints are on file, then the record may come up. Despite traditional provisions regarding the confidentiality of juvenile proceedings, adjudicated juveniles may have their identities entered into police intelligence databases, such as gang membership databases. In certain cases, an adjudication of delinquency may affect eligibility for public housing and other benefits. Adjudications may factor into judicial determination of “patterned sex offenders” and require lifetime registration as predatory offenders.

\[37. \text{E.g., id. § 299C.105, subdiv. 1(a)(3) (stating that juvenile detention facilities shall take biological specimens for DNA testing).} \]

\[38. \text{See James Jacobs & Tamara Crepet, The Expanding Scope, Use, and Availability of Criminal Records, 11 N.Y.U. J. LEGIS. & PUB. POL’Y 177, 185 (2007–2008) (noting that private providers of background checks to clients, such as employers, are thriving); Kristen A. Williams, Employing Ex-Offenders: Shifting the Evaluation of Workplace Risks and Opportunities from Employers to Corrections, 55 UCLA L. REV. 521, 535 (2007) (“[E]mployers are increasingly turning to background checks to screen out potentially dangerous employees.”).} \]

\[39. \text{See, e.g., 18 U.S.C. § 5038(d), (f) (2006) (providing that in some circumstances, where a juvenile is prosecuted as an adult or after his or her thirteenth birthday, he or she shall be fingerprinted and photographed); 43 C.J.S. Infants § 24 (2010) (“A statute may allow the fingerprinting of a juvenile of a specified age or older charged with delinquency based on an act that would be a crime if committed by an adult and it may permit the retention of the fingerprint records for criminal identification purposes.”).} \]

\[40. \text{See Smith v. Daily Mail Publ’g Co., 443 U.S. 97, 107 (1979) (noting that one of the historically important characteristics of a juvenile court proceeding is its confidentiality, especially shielding the process from the public and media in order to reduce stigma on the juvenile).} \]

\[41. \text{Minn. Stat. § 299C.091, subdiv. 1.} \]

\[42. \text{Public housing authorities have the right to evict families of delinquent children, even if their delinquent conduct does not occur on public housing property. See Dep’t of Hous. & Urban Dev. v. Rucker, 535 U.S. 125, 133–36 (2002).} \]

\[43. \text{See Minn. Stat. § 243.166, subdiv. 1b(a)(4).} \]

\[44. \text{Id. subdiv. 6(d).} \]
The Minnesota Sentencing Guidelines allow consideration of a juvenile record in sentencing adults. Judges may use juvenile adjudications in sentencing; however, getting more time for a felony conviction is fundamentally different from changing a maximum ninety-day sentence to a five-year prison sentence.

These are just some of the ways in which juvenile adjudications can plague one into adulthood. Without efforts to mitigate deficits both inherent (the juvenile mind and social development) and transitory (adequate funding to train and supply juvenile defenders), society will find increasingly damaging consequences.

45. MINN. SENTENCING GUIDELINES § II.B.401 (2010), available at http://www.msgc.state.mn.us/guidelines/guide10.pdf. The comments to the provision state:

The juvenile history item is included in the criminal history index to identify those young adult felons whose criminal careers were preceded by repeated felony-type offenses committed as a juvenile. The Commission held several public hearings devoted to the issue of using juvenile records in the criminal history index. Those hearings pointed out differences in legal procedures and safeguards between adult and juvenile courts, differing availability of juvenile records, and differing procedures among juvenile courts. As a result of these issues, the Commission originally decided to establish rigorous standards regulating the consideration of juvenile records in computing the criminal history score.

Id. at 16–17.

46. For violation of the felony domestic abuse statute, Minnesota law provides:

[Whoever violates the provisions of this section or section 609.224, subdivision 1, within ten years of the first of any combination of two or more previous qualified domestic violence-related offense convictions or adjudications of delinquency is guilty of a felony and may be sentenced to imprisonment for not more than five years or payment of a fine of not more than $10,000, or both.

MINN. STAT. § 609.2242, subdiv. 4.


RESOLVED, That the American Bar Association urges federal, state, territorial and local governments to increase the opportunities of youth involved with the juvenile or criminal justice systems and to prevent the continuing discrimination against those who have been involved with these systems in the past by limiting the collateral consequences of juvenile arrests, adjudications, and convictions.

Id.
III. COLLATERAL ATTACK OF PRIOR JUVENILE ADJUDICATIONS

This section of the article examines the case law regarding collateral attack of juvenile adjudications in subsequent prosecutions. In DW’s case, weaknesses in the available juvenile court records exposed the enhancement element of the complaint to collateral attack. DW disputed probable cause for the offense based upon a challenge to the prior adjudications. After spotting the issue, we needed a way to challenge the prior adjudications. No reported Minnesota case directly addressed prior adjudications used to enhance the charge. However, prior convictions have been used to enhance a sentence, and have been accepted as an exception to the proof requirements established in Apprendi v. New Jersey. 48 Minnesota accepts that prior convictions used to enhance felony sentencing generally are not subject to collateral attack. 49 We filed a probable cause challenge for a pretrial hearing to the court, which avoided allowing the jury to hear about the prior conviction. If the court ruled against DW, we could stipulate to the enhancement and still keep knowledge of the priors from the jury.

A. The Development of Minnesota Law on Collateral Attack

As in most jurisdictions, the collateral attack of prior convictions has a long and complicated history in Minnesota law. 50 As a general rule, a criminal defendant’s prior convictions are presumptively valid; thus, a trial court “need not review the

48. See Apprendi v. New Jersey, 530 U.S. 466, 490 (2000) (“Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.”); see also Blakely v. Washington, 542 U.S. 296, 301 (2004).
49. State v. McFee, 721 N.W.2d 607, 609 (Minn. 2006) (“The Apprendi/Blakely rule requires that facts used to increase a defendant’s sentence beyond the statutory maximum provided for the offense must be found by a jury or admitted by the defendant. Prior convictions are a well-recognized exception to the rule.” (citations omitted)); State v. Leake, 699 N.W.2d 312, 323 (Minn. 2005) (“[I]t appears that, after Blakely, the prior conviction exception recognized in Apprendi retains validity . . . .”).
50. In State v. Cook, 275 Minn. 571, 572, 148 N.W.2d 368, 369–70 (1967), the court refused to reverse a conviction for an offense enhanced by the action of the Department of Motor Vehicles. The court reasoned that the defendant had the right to a hearing on the order, and “[u]nder well-settled principles” he may not collaterally attack the order. Id. at 369. The decision does not cite any Minnesota authority on the law, but does cite out-of-state cases.
Because collateral attacks on prior convictions “weaken the finality of judgments,” they are allowed only in unique cases. Over time, the “unique case” standard eroded to protect only uncounseled pleas. The Minnesota Supreme Court has recognized that Minnesota law extends the right to counsel beyond the dictates of the federal constitution to any case that may lead to incarceration.

In Nordstrom, the Minnesota Supreme Court held that a Wisconsin criminal conviction in which the defendant was not represented by counsel could not be used to enhance a subsequent DWI offense to a gross misdemeanor if the right to counsel was not properly waived. The Nordstrom court was concerned that an accused person may be incarcerated without the assistance of counsel to present potential defenses. Its reasoning rested on federal law stating that a person may collaterally attack a prior conviction on constitutional grounds and have it invalidated in a subsequent proceeding for the purposes of an enhanced penalty statute.

As recently as 2006, the Nordstrom rule had become articulated as, “the defendant cannot collaterally attack the validity of those prior convictions except by showing that the other state lacked jurisdiction or that the recognition of the conviction would improperly interfere with important interests of the State of Minnesota.” In Schmidt, the supreme court reiterated the central holding of Nordstrom—that a criminal defendant may collaterally attack a prior Minnesota conviction on the ground that it arose from an uncounseled plea of guilty. The Nordstrom rule applies

52. Id. (“Ordinarily, in computing a criminal history score, the sentencing court need not review the procedures that led to a prior conviction and a collateral attack will be allowed only in ‘unique cases.’” (quoting State v. Edmison, 379 N.W.2d 85, 86 (Minn. 1983))); see also Pilger v. State, 337 N.W.2d 695, 698 (Minn. 1983) (“There may be cases in which the sentencing court, in determining the defendant’s criminal history score, should look at the procedures that led to the prior conviction.”).
53. Id. at 905.
54. Id. at 904-05 (Minn. 1983) (holding that a prior uncounseled DWI guilty plea could not be used to convert the second DWI offense into a misdemeanor).
55. See id.
56. Id. at 905.
57. Id. (citing Baldasar v. Illinois, 446 U.S. 222 (1980)).
58. State v. Schmidt, 712 N.W.2d 530, 531 (Minn. 2006).
59. Id. at 533 (citing Nordstrom, 331 N.W.2d at 905).
only if the uncounseled guilty plea was obtained in violation of a person’s constitutional rights. The Schmidt court observed that the unconstitutional “failure to appoint counsel [is] a unique constitutional defect’ that presents a jurisdictional issue that can always be raised by collateral challenge.” Although in Schmidt the defendant lost his argument that his DWI charge could not be enhanced by a prior, uncounseled chemical test, the court affirmed the collateral attack of prior convictions for enhancement under limited and compelling circumstances.

There was some confusion over the status of the Nordstrom rule due to the overruling of a federal case that had provided some of the rationale for the decision. The rationale for permitting collateral attacks on prior convictions used for enhancement purposes recognized in Nordstrom was weakened by the 1994 United States Supreme Court opinion, Nichols v. United States, which overruled Baldasar. Yet, despite the lack of a clear rationale for

60. See State v. Dumas, 587 N.W.2d 299, 302 (Minn. Ct. App. 1998) (“[W]e read Nordstrom as prohibiting the use of a prior unconstitutionally obtained conviction to enhance a subsequent charge.”).


62. Id. The court opined:

Schmidt essentially argues that the collateral attack procedure permitted in Nordstrom and Warren should be available for a prior conviction that was obtained in violation of our decision in Friedman that the Minnesota Constitution provides a right to counsel for a DWI test decision. But Nordstrom and Warren do not support collateral attack in this case for several reasons. First, each involved the effects of a prior Minnesota conviction. Second, each involved the more fundamental decision to plead guilty to a charge and, thus, waive the whole array of trial rights. In contrast, the Friedman right to counsel is described as a “limited right” applicable to the decision to participate in a chemical test during a police traffic investigation. Thus, the precise issue is whether Nordstrom and Warren should be extended to include the limited right to counsel that exists in Minnesota for test decisions and to apply to convictions rendered in another state where no equivalent right to counsel exists. Id. (internal citations omitted).

63. See State v. Dukowitz, No. C4-01-856, 2002 WL 338296, at *1 n.1 (Minn. Ct. App. 2002) (internal citations omitted) (“The continuing vitality of the Nordstrom holding that a prior misdemeanor conviction may be collaterally attacked and invalidated for enhancement purposes is subject to question. . . . For [the] purpose of our analysis, we assume without deciding that Nordstrom continues to represent Minnesota law.”).

64. 511 U.S. 738 (1994).

65. Similarly, in Dumas, the Minnesota Court of Appeals stated:

Initially, we note that the continuing vitality of Nordstrom may be subject to question. The Nordstrom court relied in part on the reasoning of the
permitting a defendant to collaterally attack a revocation in a subsequent enhancement proceeding, the appellate court has adhered to the assumption that such a collateral attack is permitted in some circumstances, and not merely for uncounseled pleas.  

B. The McFee Problem

In State v. McFee, the Minnesota Supreme Court held that juvenile adjudications fall within the prior conviction exception to the Apprendi/Blakely rule and may be used in calculating a criminal history score without submitting the facts of the adjudication to a jury. McFee notes that Minnesota courts have long approved the use of prior juvenile adjudications in calculating a defendant’s criminal history score under the Sentencing Guidelines. In McFee, the defendant sought review of his sentence on the grounds that the sentencing court violated Blakely by using prior juvenile adjudications in computing his criminal history score. He alleged

United States Supreme Court in Baldasar v. Illinois. Baldasar, however, has been overruled by Nichols v. United States. Because the Minnesota Supreme Court has not addressed Nordstrom since Nichols was decided, we assume for purposes of our analysis that Nordstrom continues to represent the law in Minnesota.

Dumas, 587 N.W.2d at 302 (internal citations omitted).


67. 721 N.W.2d 607 (Minn. 2006).

68. Id. at 619; accord State v. Leake, 699 N.W.2d 312, 323 (Minn. 2005) (“[A]fter Blakely, the prior conviction exception recognized in Apprendi retains vitality and it is constitutional for a defendant’s sentence to be increased based on a prior conviction without submitting the fact of the conviction to the jury.”); State v. Allen, 706 N.W.2d 40, 48 (Minn. 2005) (rejecting the claim that the assignment of a custody status point does not fall within the prior-conviction exception); State v. Turnbull, 766 N.W.2d 78, 81 (Minn. Ct. App. 2009).

69. McFee, 721 N.W.2d 609.  In 1980, “Minnesota became the first state to adopt legally-binding sentencing guidelines, and it was the first state to employ a permanent, independent sentencing commission to develop and monitor the implementation of guidelines and make other recommendations related to sentencing.” Richard Frase, Sentencing Policy and Criminal Justice in Minnesota: Past, Present, and Future, COUNCIL ON CRIME & JUST., http://www.criminaljustice.org/councilinfo.cfm?piID=52 (last visited Oct. 17, 2010). Minnesota uses a
a Sixth Amendment and Due Process violation because juvenile adjudications are not “criminal convictions” and also juveniles do not enjoy a right to a jury trial. Following an extensive review of case precedent and the history of the juvenile court system, highlighting the latter’s original rehabilitative purpose and the change to promoting public safety and reducing juvenile delinquency, the court concluded:

Absent clear direction from the United States Supreme Court, we will not upset our precedent upholding the use of juvenile criminal behavior in sentencing and the carefully-balanced approach the legislature ratified in the Guidelines for use of juvenile adjudications in calculating criminal history score. In sum, we hold that it is not inconsistent with the legislature’s purpose in maintaining the juvenile justice system for sentencing courts to use prior juvenile adjudications in calculating criminal history under the Minnesota Sentencing Guidelines.

McFee seemed to present an insurmountable barrier against attacking the juvenile adjudications, except in “unique cases,” which had come to mean only uncounseled pleas. However, the "guidelines" approach in felony sentencing. See generally Frequently Asked Questions, MINN. SENTENCING GUIDELINES COMM’N, http://www.msgc.state.mn.us/msgc5/faqs.htm (last visited Oct. 17, 2010). A defendant’s prior convictions and custody status give the defendant a “criminal history score” and each offense a severity ranking. Id. The score and ranking combine on a “sentencing guidelines grid” to determine a range of months to serve. Id. The Guidelines are promulgated annually by the Minnesota Sentencing Guidelines Commission, which updates the guidelines with any legislative changes and case law analysis or direction from the appellate courts. See id. The commission also receives notice from trial courts for every sentence which deviates from the guidelines, with written grounds articulated by the judge. See id. The Minnesota Sentencing Guidelines Commission provides the following answer to the question “What are the Sentencing Guidelines?":

The [Sentencing Guidelines Commission] embod[ies] the goals of the criminal justice system as determined by the citizens of [our] state through their elected representatives. This system promotes uniform and proportional sentences for convicted felons and helps to ensure that sentencing decisions are not influenced by factors such as race, gender, or the exercise of constitutional rights by the defendant. The guidelines serve as a model for the criminal justice system as a whole to aspire to, as well as provide a standard to measure how well the system is working.

Id.

72. McFee, 721 N.W.2d at 611.
73. Id. at 615.
74. In State v. Schmidt, the Minnesota Supreme Court explained that “collaterally attacking the underlying conviction is [a procedure] that we have
McFee decision only reached the question of juvenile court trials.\textsuperscript{75} The court left unchallenged the presumption of the accuracy of the fact of adjudication as well as the reliability of the juvenile court process.

The McFee case should not be considered as controlling the issue presented in DW’s case. There, the defendant challenged the use of juvenile adjudications to enhance his sentence, not enhance charging.\textsuperscript{76} The difference may seem sublime, but nevertheless remains essential. As a sentencing issue, the McFee court focused on the use of adjudications in computing a criminal history score as a matter of recidivism.\textsuperscript{77} The court noted: “The question presented here is whether his choice to recidivate is relevant to his sentence. We believe, as we have said before, that such behavior, even though committed by a juvenile, is appropriately considered when sentencing the offender as an adult.”\textsuperscript{78}

C. The Custis Problem

In Custis—cited by the Minnesota Supreme Court in Schmidt as authority from the federal courts over federal constitutional protections\textsuperscript{79}—the United States Supreme Court also observed that collateral attacks may only be allowed in cases where the right to

\begin{footnotesize}
\begin{enumerate}
\item[75.] McFee, 721 N.W.2d at 616–17 ("[Petitioner] does not dispute that he received all the process and protections that were due to him in connection with his juvenile cases.").
\item[76.] Id. at 609.
\item[77.] Id. at 615.
\item[78.] Id. (citing State v. Peterson, 331 N.W.2d 483, 484 (Minn. 1983) (holding that "it was not error" for district court to "assign defendant one point for his juvenile record" when calculating his criminal history score)); see also Jackson v. State, 329 N.W.2d 66, 67 (Minn. 1983) (noting that defendant’s long juvenile record could be used as a basis for dispositional departure under the Guidelines).
\item[79.] Schmidt, 712 N.W.2d at 534 (citing Custis, 511 U.S. at 496).
\end{enumerate}
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counsel has been denied. The *Custis* Court recognized that “failure to appoint counsel for an indigent defendant was a unique constitutional defect” which could always be raised as a jurisdictional defect. The Court then limited collateral attack to unconsulced pleas (which it calls a *Gideon* issue), even in the case of other claimed constitutional defects. However, the *Custis* Court’s *Gideon* limitation need not control Minnesota law.

*Custis* did not intend to establish a change in substantive constitutional law. Rather, it set forth a rule of federal criminal procedure. Justice Ginsburg, who voted with the majority in *Custis*, observed the following in *Nichols*: “*Custis* presented a forum question. The issue was where, not whether, the defendant could attack a prior conviction for constitutional infirmity.” Thus, *Custis* presented a procedural question and not a substantive question. The Court’s focus on administrative concerns such as convenience and finality bears this out. Convincingly, the Court concludes by observing that Custis could seek relief from his allegedly unconstitutional conviction through habeas corpus in state or federal court. As the California Court of Appeals has stated: “If the majority in *Custis* intended the decision to prohibit constitutional attacks on prior convictions in state courts, assuming it even has the authority to do so, it would not have allowed Custis to litigate his constitutional claims through a state habeas corpus proceeding.”

80. *Custis*, 511 U.S. at 492–93 (explaining the law is well established that, with the sole exception of convictions obtained in violation of a defendant’s right to counsel, no constitutional violation occurs when a prior conviction, state or federal, is used to enhance a federal sentence).

81. *Id.* at 496.

82. *Id.* The Court concluded that, outside of the right to appointed counsel as recognized in *Gideon v. Wainwright*, 372 U.S. 335 (1963), lesser violations of the federal Constitution (specifically, ineffective assistance of counsel, entry of a plea that was not knowing and intelligent, or agreement to a stipulated facts trial without being adequately advised of trial rights) did not rise to the level of a jurisdictional defect that could be raised by collateral challenge when the conviction was used to enhance the defendant’s sentence. *Custis*, 511 U.S. at 496; *see also Schmidt*, 712 N.W.2d at 534 (citing *Gideon* and *Custis* in addressing whether a defendant in Minnesota may collaterally challenge the validity of a prior conviction rendered in another state when the prior conviction is offered to enhance the defendant’s Minnesota crime).


85. *Id.* at 497.

IV. A NEW APPROACH: ATTACKING ENHANCEMENT AS PART OF PROBABLE CAUSE

DW challenged the enhancement priors in the complaint on the grounds that the State could not prove that the juvenile courts had made adjudications of delinquency. The challenge attacked the validity of the prior juvenile adjudications as part of the probable cause determination because the priors had been pleaded as elements of the offense. The issue of probable cause is a matter of jurisdiction. If the state cannot show there is probable cause to believe the defendant committed a crime, then the court has no jurisdiction over the defendant.

Minnesota has developed a unique approach to litigating certain trial issues. The rules of court provide for an omnibus hearing, intended to litigate all pretrial motions as part of an

cites commentators on Custis that have arrived at the same conclusion. Id. at 1603 n.3. (citing Alan C. Smith, More Than a Question of Forum: The Use of Unconstitutional Convictions To Enhance Sentences Following Custis v. United States, 47 Stan. L. Rev. 1323, 1336 (1995); Barry W. Strike, Custis v. United States: Are Unconstitutional Prior Convictions Being Used To Increase Prison Terms?, 25 Golden Gate U. L. Rev. 267, 291–92 (1995)). The Nevada Supreme Court articulated:

We decline this opportunity to adopt such a strict rule limiting collateral attacks and note that we are not bound by the Custis decision as it involved a federal sentencing law not at issue here and merely established the floor for federal constitutional purposes as to when collateral attacks of prior convictions may be prohibited.


88. The Comment to Rule 11 of the Minnesota Rules of Criminal Procedure states:

The current statutory hearing on probable cause has been replaced under these rules by a motion to dismiss the complaint for lack of probable cause which is to be made in accordance with Rule 10 and heard at the Omnibus Hearing pursuant to Rule 11.03. If such a motion is made, the court shall base its probable cause determination upon the evidence set forth in Rule 18.06, subd. 1. In State v. Florence, 306 Minn. 442, 239 N.W.2d 892 (1976), the Supreme Court discussed the type of evidence that may be presented and considered on a motion to dismiss the complaint for lack of probable cause. Nothing in that case or in the rule prohibits a defendant from calling any witness to testify for the purpose of showing an absence of probable cause. In determining whether to dismiss a complaint under Rule 11.03 for lack of probable cause, the trial court is not simply reassessing whether or not probable cause existed to warrant the arrest. Rather, under Florence the trial court must determine based upon the facts disclosed by the record whether it is fair and reasonable to require the defendant to stand trial.

In 1964, the United States Supreme Court declared that a defendant who challenged the admissibility of evidence on constitutional grounds “has a due process right to a reliable determination” that the evidence was obtained without constitutional infringement. In response, the Minnesota Supreme Court developed a procedure called a Rasmussen hearing (named for the seminal case) to be followed with respect to problems of evidence which may arise in connection with, particularly, searches and seizures and confessions, as well as other constitutional questions. The principles in Rasmussen have been codified in the Minnesota Rules of Criminal Procedure.

The Rasmussen hearing is the logical forum in which to litigate whether the state can prove the fact of prior adjudications. The hearing is testimonial but is not held in front of a jury. Also, a defendant can stipulate to a prior if there is no issue or demand that the prior be proved. Trial court judges routinely make
findings and conclusions on record at the hearing’s conclusion. 96

The *Rasmussen* portion of the trial also serves to litigate suppression issues. 97 If challenged on constitutional grounds, the state must prove the evidence it seeks to introduce was constitutionally obtained. 98 The constitutional issue affects the burden of proof at the trial level, as well as the standard of review on the appellate level. The trial court’s factual conclusions will be reversed only where clearly erroneous, but the legal questions will be examined de novo. 99

The rule that allows, in a “unique case,” a defendant to collaterally attack prior convictions survived despite the *Nichols* case and remains good law. 100 *State v. Mellet* articulated a two-step process for a defendant to mount a collateral attack. 101 The *Mellet* test states:

defendants may offer to stipulate prior convictions, yet the offer to stipulate does not necessarily take away the State’s right to present related evidence).

96. See *State v. LaFrance*, 302 Minn. 245, 246, 223 N.W.2d 813, 814 (1974) (“The trial court [in cases where evidence at a *Rasmussen* hearing is conflicting] acts as finder of facts, deciding for purposes of admissibility which evidence to believe and whether the state has met its burden of proof.”). On appeal, the Minnesota Supreme Court will not reverse a trial court’s finding of fact unless it is clearly erroneous. *State v. Stephenson*, 310 Minn. 229, 231, 245 N.W.2d 621, 623 (1976).

97. See, e.g., *Stephenson*, 310 Minn. at 230, 245 N.W.2d at 622 (noting appellant’s *Rasmussen* hearing considered a motion to suppress evidence).


99. *State v. Othoudt*, 482 N.W.2d 218, 221 (Minn. 1992) (citation omitted) (“Normally, this court will only reverse a pretrial decision of the trial court suppressing evidence if the State demonstrates ‘clearly and unequivocally that the trial court has erred in its judgment and that, unless reversed, the error will have a critical impact on the outcome of the trial.’ However, when reviewing a pretrial order suppressing evidence where the facts are not in dispute and the trial court’s decision is a question of law, the reviewing court may independently review the facts and determine, as a matter of law, whether the evidence need be suppressed.”); see also *State v. Harris*, 590 N.W.2d 90, 98 (Minn. 1999) (“When reviewing pretrial orders on motions to suppress evidence, we may independently review the facts and determine, as a matter of law, whether the district court erred in suppressing—or not suppressing—the evidence.”).

100. See *State v. Warren*, 419 N.W.2d 795, 798 (Minn. 1988) (explaining collateral attacks are reserved for “unique cases” (quoting *State v. Edmison*, 379 N.W.2d 85, 86 (Minn. 1985))). But see *Nichols v. United States*, 511 US 738, 746–47 (1994) (holding, consistent with Sixth and Fourteenth Amendments, that “uncounseled” misdemeanor convictions, valid due to absence of imposition of prison term, may be used to enhance punishment at subsequent conviction).

To properly raise the constitutionality of a [conviction] and shift the burden of proof to the state, [a defendant] must (1) promptly notify the state that her constitutional rights were violated during a prior [case]; and (2) produce evidence in support of that contention with respect to each challenged [conviction].

In Nordstrom, the Minnesota Supreme Court concluded that “once a defendant properly raises the issue of the constitutionality of a prior conviction, the state then has the burden of proving that the conviction was obtained consistent with constitutional requirements.”

“The factual ambiguity of delinquency adjudications sometimes makes it difficult for criminal courts to determine for what offense the juvenile court actually convicted a youth when it uses those convictions for sentence enhancements or other collateral purposes.” Two of DW’s adjudications could not be proved to be legal. Therefore, DW challenged probable cause for the enhancement.

As charged under the enhancement provision of the assault statute, the proof of qualified prior adjudications must be considered an element of the offense. As an element, like any other element, the enhancement must be subject to a probable cause challenge, and proved as part of the omnibus hearing. Every element of a criminal charge must be proved beyond a reasonable doubt.

Both the United States and Minnesota Constitutions guarantee the right to a jury trial in a criminal case. A defendant’s right to a jury trial includes the right to be tried on every element of the charged offense. When stipulating to an element of the offense,
a defendant effectively waives the right to a jury trial on that element and removes evidence regarding that element from the jury’s consideration. 110 Consequently, a defendant must personally waive a jury trial on the element in writing or on the record in open court before stipulating at trial to any elements of an offense. 111 When the prior conviction is uncontroverted, a stipulation generally is perceived as beneficial to the defendant because it effectively removes potentially prejudicial evidence from the jury’s consideration. 112 Nevertheless, the prior conviction is an essential element of the crime.

The McFee court ruled that the fact of prior juvenile adjudications need not be submitted to the jury to vindicate a defendant’s right to trial by jury. 113 In his appeal, McFee suggested that the proof of prior adjudications be submitted as a jury question. 114 The court rejected this argument, stating, “[a]s we noted in Allen, this type of review is properly performed by the district court without need of jury fact finding.” 115 The McFee court suggested that this may be accomplished by examination of the juvenile court records. 116 This suggestion returns us to the essential problem in DW’s case: the uncertainty in the record of the fact of conviction, as well as the obvious unreliability of the due process protections actually observed.

DW’s prior adjudications presented a probable cause issue in the traditional sense. The state could not prove the actual adjudications—Apprendi’s “fact of adjudication” standard.

111. State v. Fluker, 781 N.W.2d 397, 400 (Minn. Ct. App. 2010) (citing Minn. R. Crim. P. 26.01, subdiv. 1(2)(a)).
112. Berkleman, 355 N.W.2d at 397.
113. State v. McFee, 721 N.W.2d 607, 609 (Minn. 2006) (explaining appellant’s argument that juvenile adjudications do not fall within the Apprendi exception and, thus, must be submitted to a jury for sentencing decisions).
114. Id.
115. Id. at 618 (citing State v. Allen, 706 N.W.2d 40, 48 (Minn. 2005)).
116. Allen, 706 N.W.2d at 48 (“Like the fact or character of a prior conviction, a defendant’s custody status can be determined by reviewing court records relating to that conviction.”).
V. USING PRIOR JUVENILE ADJUDICATIONS AS AN ELEMENT TO ENHANCE CRIMINAL OFFENSES OFFENDS DUE PROCESS PROTECTIONS

As part of the probable cause challenge, DW fought the enhancement as a violation of his constitutional rights. At each of DW’s juvenile hearings, most procedural formalities had been observed, including his right to a lawyer. However, in reviewing the proceedings, it became clear that the attention paid to DW focused on what to do with DW—on social work rather than criminal justice. This section of the article defends the premise that charging a person with a felony based on adjudications made when as young as ten years of age violates due process. Juvenile adjudications do not guarantee reliability of the outcome; juvenile court practice elevates procedural due process formalities over substantive due process.

A. Finding an Issue of Constitutional Dimension

A due process challenge to the use of prior adjudications presents an issue of constitutional dimension. When faced with constitutional issues, a trial court will exact closer scrutiny of government actions, and an appellate court will apply the highest standard of review. Thus, the most effective pretrial challenges find some kind of constitutional protection.

Similar to standards of review, “[s]tandards of proof—preponderance, clear and convincing, beyond a reasonable

117. Minnesota juvenile delinquency jurisdiction extends to children as young as ten years old. See MINN. STAT. §§ 260C.007, 260C.101 (2008) (explaining that juvenile jurisdiction reaches children under the age of eighteen with some exceptions). Generally, children under ten who commit delinquent acts are treated as “children in need of protection and services” (commonly referred to as “CHIPS”) under section 260C.007, subdivision 6, of the Minnesota Statutes. However, Minnesota’s largest county, Hennepin, received money for a “Targeted Early Intervention” program to research offenders under ten. See MICHELLE DECKER GERRARD & GREG OWEN, DELINQUENTS UNDER 10: TARGETED EARLY INTERVENTION 1 (2000), available at http://www.wilder.org/download.0.html?report=1142&summary=1. A December 2000 report which described the program noted a median age of 8.8 years for children identified as first-time offenders in the program at that time. Id. at 2.

118. See, e.g., MICHAEL E. & JANE B. TIGAR, FEDERAL APPEALS JURISDICTION AND PRACTICE § 5.13 (3d ed. 1999) (“When a constitutional question is present, the appellate court should be . . . much less deferential to the . . . lower court whose action it is reviewing. . . . [A]ppellate courts often will make a de novo review not only of the constitutional claim but also of the factual basis upon which it is said to rest.”).
doubt—reflect society’s interests in the correct outcome of cases.”

[S]ociety’s interest in the outcomes of criminal cases is regarded as quite high, and the trier of fact is asked to be satisfied “beyond a reasonable doubt,” the highest standard of proof. The disutility of convicting an innocent person is viewed as being much greater than the disutility of freeing a guilty one; hence, the probability of error is intentionally weighted in the defendant’s favor.

B. A Constitutional Theory: Due Process and the “Fact of Conviction”

The cases considering the use of prior juvenile adjudications have arisen as part of sentencing issues, rather than the use of a prior adjudication as an element of the crime itself. One theoretical rationale for the prior convictions exclusion relies on the “fact of conviction.” DW disputed the “fact” of adjudication.

As observed by the McFee court, the defendants in the underlying cases never disputed the fact of their conviction. The McFee court held that the use of prior convictions did not offend “the due process and Sixth Amendment concerns otherwise implicated in allowing a judge to determine a ‘fact’ increasing punishment beyond the maximum of the statutory range” because the defendant in that case did not contest the accuracy of the “fact” of his prior convictions. DW challenged the “fact” of the prior adjudications used to enhance the charge from a misdemeanor to a felony. A review of the juvenile court records revealed that not all of the “certified adjudications” accurately reflect what actually took

119. Feld, supra note 20, at 1125 n.34.
120. Dorothy K. Kagehiro & W. Clark Stanton, Legal vs. Quantified Definitions of Standards of Proof, 9 L. & HUM. BEHAV. 159, 161 (1985); see generally Dorothy K. Kagehiro, Defining the Standards of Proof in Jury Instructions, 1 PSYCHOL. SCI. 194 (1990) (discussing a research study examining juror comprehension of both legal and quantified definitions of standards of proof and the impact of jury instructions on verdicts).
121. Id. (quoting Apprendi, 530 U.S. at 488).

122. Id. (emphasis added) (citing Apprendi v. New Jersey, 530 U.S. 466, 488 (2000)).
place at the hearings. The certified copies of conviction, as submitted by the prosecutor, did not reveal these problems. Without proving legal prior adjudications, the enhancement violated DW’s Fourteenth Amendment right to due process.

Not all juvenile court petitions end as actual adjudications of delinquency. For example, the dispositional provisions allow but do not require a district court to continue a case without adjudicating a child delinquent “when it is in the best interests of the child and the protection of the public to do so.”\textsuperscript{123} Similarly, a district court may continue a juvenile delinquency case without adjudicating a child delinquent “[w]hen it is in the best interests of the child to do so and when the child has admitted the allegations contained in the petition before the judge.”\textsuperscript{124} This is what happened in DW’s case; the judge accepted his admission, but did not find him delinquent.

DW challenged the fact of adjudication for the assault from March 21, 2002. In that case DW admitted the facts in Hennepin County, but venue changed to Ramsey County for disposition. Unfortunately, no record exists for review in Hennepin County. There are no hearing transcripts, court reporter’s recordings, or steno notes. Only one juvenile court document, captioned “ORDER,”\textsuperscript{125} is available for review.

The order says DW appeared March 25th, represented by counsel. Before the hearing, DW met with a public defender in the detention facility. This lawyer, assigned to represent all the children appearing that day on a “Detention Calendar,” would have explained to DW his rights at the hearing and what the judge would consider in deciding whether to release or hold DW. They would have discussed the facts of the case, especially since DW intended to admit the petition. They also would have tried to find

\textsuperscript{123} MINN. R. JUV. DEL. P. 15.05, subdiv. 4(A).
\textsuperscript{124} MINN. STAT. § 260B.198, subdiv. 7 (2008); see In re Welfare of J.R.Z., 648 N.W.2d 241, 246 (Minn. Ct. App. 2002) (emphasizing permissive language in statute), review denied (Minn. Aug. 20, 2002). These provisions give a district court broad discretion in deciding whether to adjudicate delinquency or continue a case without adjudication. \textit{Id.} at 244. They require neither that a district court make particularized findings when making the decision nor that it take the “least drastic step necessary to restore law-abiding conduct in the juvenile.” \textit{Id.} at 245 (quotation omitted); \textit{see also id.} at 245–46 (distinguishing decision to adjudicate from decision to impose particular disposition).
\textsuperscript{125} The “Order” records the case pedigree, appearances, and some notes on proceedings.
some alternative to detention. At the hearing, DW waived his right to have a parent present. He also waived his trial rights, “admitted” the assault, and established a factual basis. The county reduced the charge to simple assault in exchange for the admission. The judge accepted the waivers and admission, but did not make any findings.

DW appeared on two different delinquency petitions at that disposition hearing. The transcript referenced two files with different dates and case numbers. However, the order stated only that “[t]he child is adjudicated delinquent” without specifying which petition. As noted at the outset of the article, the judge ordered:

DW, I’m going to follow the recommendations of probation. I’m going to order that you be placed in the [name withheld] group home for a period of nine to twelve months, that you attend outpatient sexual-offender treatment as directed by probation, that you attend your psychiatric appointments and follow the medication orders, that you perform 24 hours of community work service, that you make restitution. I am going to—you will be adjudicated for this offense at this time given the nature of the offenses.

In the Placement Order, the judge made no findings of fact specifically designating either petition. In the order portion, there is a single adjudication of delinquency, once again, without reference to files or facts. Juvenile adjudications may not be made without “due caution and scrupulous professional dignity” because written dispositional findings are essential to meaningful appellate review and failure to make sufficient written findings constitutes reversible error.126

DW was never adjudicated delinquent in the petition alleging the assault from July 31, 1992. At the various hearings on the petition, the judge never actually made a finding or adjudication of delinquency. A mere entry of an admission or finding of guilt is not the same as an adjudication in the way a plea might be considered in criminal court. The rules of juvenile court require entry of an order specifying adjudication of delinquency.127 In the

127. Rule 15.05 states:
On each of the charges found by the court to be proved, the court shall either:
Disposition Order, the judge “continue[d] the case for review and [placed] the child on probation.” The court never entered a finding of delinquency, so there was no “adjudication.”

C. A Constitutional Theory: Due Process and “Reliability of Convictions”

The Apprendi Court’s holding is quite straightforward: “Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.”128 Courts should exclude satisfied prior convictions if they come with guarantees of reliability inherent in the truth-finding engine of criminal trials.129 Apprendi emphasized that “the requirements of trying to a jury all facts necessary to constitute a statutory offense, and proving those facts beyond reasonable doubt” constituted essential elements of due process.130 Apprendi exempted the “fact of a prior conviction” because criminal defendants enjoyed a constitutional right to a jury trial for the prior conviction, which assured accuracy and reliability.131

To meet due process:

[P]ractice must at least adhere to the basic principles undergirding the requirements of trying to a jury all facts necessary to constitute a statutory offense, and proving those facts beyond reasonable doubt. As we made clear in Winship, the “reasonable doubt” requirement “has [a] vital role in our criminal procedure for cogent reasons.” Prosecution subjects the criminal defendant both to “the possibility that he may lose his liberty upon conviction and . . . the certainty that he would be stigmatized by the conviction.” We thus require this, among other, procedural protections in order to “provid[e] concrete

(A) adjudicate the child delinquent pursuant to Minnesota Statutes, section 260B.198, subdivision 1; or
(B) continue the case without adjudicating the child delinquent and order a disposition pursuant to Minnesota Statutes, section 260B.198, subdivisions 1(a) or (b).

The adjudication or continuance without adjudication shall occur at the same time and in the same court order as the disposition.

MINN. R. JUV. DEL. P. 15.05, subdiv. 1.

129. See id. at 476.
130. Id. at 483–84.
131. Id. at 496; see also Courtney P. Fain, What’s In a Name? The Worrisome Interchange of Juvenile “Adjudications” with Criminal “Convictions”, 49 B.C. L. REV. 495, 511 (2008).
substance for the presumption of innocence,” and to reduce the risk of imposing such deprivations erroneously.\textsuperscript{132}

Similarly, the McFee court approved using juvenile adjudications based on this same thesis that procedural safeguards attach to prior conviction.\textsuperscript{133} In response to the argument that juvenile adjudications lack the right to a jury trial, the McFee court focused on reliability and the due process requirements attached to juvenile proceedings.\textsuperscript{134} Recognizing that a jury trial is not constitutionally required in juvenile proceedings, the court stated that “[j]uvenile adjudications, where juvenile defendants have the right to notice, the right to counsel, the right to confront and cross-examine witnesses, the privilege against self-incrimination, and the right to a finding of guilty beyond a reasonable doubt, provide more than sufficient safeguards to ensure the reliability that Apprendi requires . . . .”\textsuperscript{135} The procedural safeguards the McFee court envisioned hardly seem evident in DW’s adjudications. DW contested the efficacy of the “procedural safeguards” afforded juveniles through the juvenile court system.

Apprendi and McFee presume that the due process guarantees actually result in reliable adjudications. The Apprendi Court exempted any “fact of a prior conviction” because the defendant was presumptively afforded due process in the trial that culminated in the conviction, therefore making it accurate and reliable.\textsuperscript{136} The McFee court’s decision presumes reliability attached to prior convictions.\textsuperscript{137} The Apprendi Court specifically noted that prior convictions are valid in part because of the defendant’s right to jury trial and the prosecutor’s burden of proving guilt beyond a reasonable doubt.\textsuperscript{138} The Court pointed to its recent decision that proposed:

\begin{itemize}
  \item \textsuperscript{132} Apprendi, 530 U.S. at 483–84 (quoting In re Winship, 397 U.S. 358, 363 (1970)).
  \item \textsuperscript{133} State v. McFee, 721 N.W.2d 607, 610–11, 615 (Minn. 2006) (examining Almendarez-Torres and Apprendi).
  \item \textsuperscript{134} Id. at 616.
  \item \textsuperscript{135} Id. (quoting United States v. Burge, 407 F.3d 1183, 1190 (11th Cir. 2005)).
  \item \textsuperscript{136} Apprendi, 530 U.S. at 496.
  \item \textsuperscript{137} McFee, 721 N.W.2d at 616.
  \item \textsuperscript{138} Apprendi, 530 U.S. at 490.
\end{itemize}
One basis for that possible constitutional distinctiveness is not hard to see: unlike virtually any other consideration used to enlarge the possible penalty for an offense, and certainly unlike the factor before us in this case, a prior conviction must itself have been established through procedures satisfying the fair notice, reasonable doubt, and jury trial guarantees.

The McFee court decided that “McFee received all of the protections to which he was constitutionally entitled when he was adjudicated delinquent.” However, juvenile adjudications do not meet this high standard. Without guarantees of reliability, enhancing an offense with juvenile adjudications violates constitutional guarantees of due process, fundamental fairness, and protection against cruel and unusual punishment.

The due process guarantees that ensure the fairness of convictions in adult court do not function the same way in juvenile adjudications. Too many methods, procedures, and practices common to juvenile court systems with their overriding concern for “the welfare of the child” actually conspire against accuracy in deciding guilt. Among these deficits are: the prevalence of pleas in juvenile court, the inhibitions juveniles feel against vigorously defending themselves, the lack of a right to a jury trial, poor delivery of legal services, adjudications by referees, and little post-conviction review by juveniles. The juvenile court is not a criminal court. Although increasingly punitive, the juvenile

139. Jones v. United States, 526 U.S. 227, 249 (1999). The Apprendi Court noted that its holding was “foreshadowed” by the Court’s 1999 opinion in Jones “that ‘under the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment . . . and proven to a jury beyond a reasonable doubt.’” Apprendi, 530 U.S. at 476. (citing Jones, 526 U.S. at 243 n.6). “In Jones, the Court distinguished prior convictions from other factors, noting that prior convictions must have been established through procedures which satisfied the guarantees of fair notice, reasonable doubt, and the jury trial.” Fain, supra note 131, at 528 n.3 (citing Jones, 526 U.S. at 249).

140. McFee, 721 N.W.2d at 616.

141. See generally Fain, supra note 131 (arguing that it is improper to equate juvenile delinquency adjudications with criminal convictions for these very reasons).

142. Howard N. Snyder & Melissa Sickmund, U.S. Dep’t of Justice, Office of Juvenile Justice & Delinquency Prevention, Juvenile Offenders and Victims: 2006 National Report 96–97 (2006) (noting that many state legislatures have made it easier to transfer juvenile offenders into the adult criminal justice system, sentencing options have been increased and expanded to include punitive aspects,
The Apprendi Court’s premise that using prior juvenile adjudications to enhance sentences is without constitutional defect has not gone unchallenged. Since the Court decided Apprendi, courts that have considered this issue have gone either way, but “the majority of courts that have addressed the issue we face here have held that juvenile adjudications fall within the prior conviction exception.” The McFee court explored the rationale presented by both sides, and, as noted, felt satisfied that juvenile adjudications “provide more than sufficient safeguards to ensure the reliability that Apprendi requires.”

In United States v. Tighe, a Ninth Circuit panel held that a sentencing court could not use prior nonjury juvenile adjudications to increase a defendant’s sentence above the statutory maximum. The Tighe court reasoned that the basis for the prior conviction exception in Apprendi was that the procedural safeguards of a jury trial and proof beyond a reasonable doubt in the defendant’s prior trial satisfied his or her Sixth Amendment rights. Quoting Apprendi, the Tighe court states:

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.

143. See, e.g., Fain, supra note 131, at 528 n.178 (citing several cases which note the rehabilitative goal of juvenile court).
144. Id., 721 N.W.2d at 616.
145. Id. (quoting United States v. Burge, 407 F.3d 1183, 1190 (11th Cir. 2005)) (citation omitted).
146. 266 F.3d 1187, 1194 (9th Cir. 2001).
147. Id. at 1193–94.
148. Id. at 1194.
149. Id. (quoting Apprendi v. New Jersey, 530 U.S. 466, 496 (2000)).
The court held that this justification did not apply to a defendant in a juvenile adjudication who did not have a right to a jury trial. Accordingly, such adjudications could not enhance a sentence beyond the statutory maximum. “[T]he ‘prior conviction’ exception to Apprendi’s general rule must be limited to prior convictions that were themselves obtained through proceedings that included the right to a jury trial and proof beyond a reasonable doubt.”

In United States v. Jones, the Third Circuit took the opposite view, holding prior nonjury juvenile adjudications could be used for sentence enhancements. The Jones court accepted the Apprendi (and McFee) premise that the defendant “received all process that was due when convicted—for adults that includes the right to a jury trial; for juveniles, it does not.” The court relied on the fact that under McKeiver, due process does not entitle juvenile defendants to a jury trial. Accordingly, because the adjudications complied with what the Constitution required at the time of the conviction, the court saw no problem with using them at a later time as a prior conviction.

Of the two approaches, the Tighe court’s reasoning appears closer to recognizing the emphasis that the United States Supreme Court has placed on the Sixth Amendment’s jury trial guarantee in sentencing since the Apprendi decision. Tighe recognized the exceptional nature of the use of prior convictions under Apprendi—that they are only considered because of the procedural safeguards provided in the prior trial. Conversely, Jones relied on McKeiver’s holding that jury trials are not required in juvenile proceedings; however, McKeiver had to do with maintaining the rehabilitative and diagnostic functions of the juvenile system. That court did

150. Id.; see also McKeiver v. Pennsylvania, 403 U.S. 528, 551 (1971) (holding that juvenile court proceedings are not criminal prosecutions within reach of the Sixth Amendment guaranteeing right to an impartial jury in all criminal prosecutions); accord McFee, 721 N.W.2d at 612 (referencing the holding in McKeiver that there is no federal constitutional right to a jury trial in juvenile court).
151. Tighe, 266 F.3d at 1194.
153. Id. at 696.
154. Id. at 695.
155. Id. at 696.
156. Id.
not consider the reliability issue. Jones also predated Apprendi and did not consider the possibility of using juvenile adjudications in later proceedings. The Tighe court’s consideration of Apprendi’s reliability requirements better fits the due process protections contemplated by that court.

As applied to DW’s case, the juvenile court hearings did not afford him the “procedural safeguards” envisioned by Apprendi and McFee. Although McFee’s challenge rested on the lack of jury trial in juvenile court, the court did emphasize the importance of trial safeguards. Thus, DW’s juvenile adjudications do not meet the reliability standard for constitutionality.

D. A Constitutional Theory: Juvenile Court Due Process Hazards and “Reliability”

1. Due Process Hazards: The Prevalence of Pleas in Juvenile Court

At his detention hearing on March 25, 2002, DW admitted to the assault charge which the county later used to enhance his

159. Id.
160. See id. at 545–51.
162. In McFee, the Minnesota Supreme Court discussed Apprendi in relation to Almendariz-Torres. State v. McFee, 721 N.W.2d 607, 610–11 (2006). According to the Minnesota Supreme Court, the due process and Sixth Amendment concerns raised in Apprendi were mitigated in Almendariz-Torres because of procedural safeguards and due to the fact that the defendant did not contest the accuracy of the ‘fact’ of his prior conviction. Id.
163. The court stated:

[T]he prior conviction exception applies, not because the defendant had a right to a jury trial in the prior proceeding, but because the prior proceeding met all due process requirements that attached to that proceeding. Ultimately, according to the majority, “the question of whether juvenile adjudications should be exempt from Apprendi’s general rule should not turn on the narrow parsing of words, but on an examination of whether juvenile adjudications, like adult convictions, are so reliable that due process of law is not offended by such an exemption.” McFee, 721 N.W.2d at 616 (quoting United States v. Smalley, 294 F.3d 1030, 1032–33 (8th Cir. 2002)).
164. See McFee, 721 N.W.2d at 616 (quoting United States v. Burge, 407 F.3d 1183, 1190 (11th Cir. 2005)).
felony. DW would have met with a court-appointed lawyer the morning of the hearing. This was his only opportunity to consult with a lawyer before his hearing. The two would have discussed his legal rights and what might happen at the hearing. His lawyer might have had police reports for the offense before the hearing started, but probably not. His lawyer may have had as many as fifteen other children to interview that morning. The purpose of the hearing was to decide whether DW could be released.\textsuperscript{165} DW used this first appearance to admit the offense. His lawyer would have had very little time with DW, could not have explored defenses, talked to witnesses, or in any way prepare a defense for DW. However, as with adults, the decision to admit or deny rests with the client.\textsuperscript{166}

The prevalence of pleas in juvenile court is a primary hazard to due process in juvenile justice.\textsuperscript{167} It has been well-established that, as a general rule, most of those juveniles who actually possess a statutory right to a jury trial waive this right and admit delinquency.\textsuperscript{168} The many constraints on the system encourage those juveniles to waive trial rights.\textsuperscript{169} Still, for those who exercise this right, “it is not clear that [they] exercise their right in a meaningful way that allows them to benefit from the enhanced procedural safeguard.”\textsuperscript{170} Some juveniles do not even seem to be aware of what charge they have admitted.\textsuperscript{171} Professor Steven A.
Drizin observed:

The combination of heavy caseloads, juvenile court culture that frowns upon advocacy and lawyers who only meet their clients on the day of adjudication creates a system of representation ripe for wrongful convictions. In Montana, one judge reported that he only had 2–3 trials a year and defenders stated that cases rarely go to trial. One attorney explained, “I tell the clients the rights that they have, but the risks are so low, they don’t want to go through with it. The worst that they can look at is [a county facility] until 18.”

There is no transcript of the proceedings or other verbatim record of DW’s March 25, 2002, Hennepin County Juvenile Court hearing. Nevertheless, the State tried to use an adjudication from this hearing against DW. The only record available was an order from the court identifying the parties and issuing the change of venue. The unavailable records made it impossible for the court to review the adequacy of the procedural safeguards as promised in McFee. Failure to afford DW a verbatim record violated his right to due process of law.

*State v. Nordstrom* arose from the State’s failure to produce any record of Nordstrom’s prior conviction. There was neither a transcript nor a plea petition. The court observed that both constitutional law and Minnesota statute required a record of proceedings where incarceration might follow. There is a constitutional requirement that a valid guilty plea be made pursuant to a knowing and voluntary waiver of rights. The court led to their commitment because pleas resulted in charges being dropped or modified. See *id*. It is significant that children would plead delinquent and not know to what charge they were actually pleading delinquent; this fact may indicate that children do not attach much significance to being found delinquent for any particular offense, since their maximum time commitment is likely the same (not beyond their eighteenth birthday).


173. *State v. Nordstrom*, 331 N.W.2d 901, 904 (Minn. 1983) (“There is no record whatsoever in relation to Nordstrom’s guilty plea and conviction.”). In *Nordstrom*, the state enhanced a DWI charge by using a prior conviction in which Nordstrom had waived his rights and pled, without counsel and without any kind of recording or transcript of the conviction. *Id.* at 903.

174. *Id.* at 904 (noting “a verbatim record shall be made or a petition to enter a plea of guilty, as provided in the Appendix B to Rule 15, shall be filed with the court” for entry of a guilty plea to a misdemeanor (internal quotations omitted)).

175. *Id.*

also observed that the criminal rules require a record as well.\textsuperscript{177} A verbatim record of criminal proceedings ensures that a conviction may be properly reviewed as necessary.\textsuperscript{178} In \textit{State v. Pederson},\textsuperscript{179} the defendant wanted to pay his own appellate lawyer but have the public defender pay for the necessary transcript.\textsuperscript{180} Basically, he qualified for public defender services, but only wanted the court to order payment of the transcript fee.\textsuperscript{181} No rule required the public defender to pay for the transcript.\textsuperscript{182} The court observed that the State had to pay for a transcript where a public-defender-eligible appellant proceeds pro se.\textsuperscript{183} The court also found that many other states provide an indigent appellant with a transcript.\textsuperscript{184} Ultimately, the court found a transcript so critical to effective representation that it ordered payment, in the name of “the fair administration of justice,” exercising its power to “supervise the criminal justice system.”\textsuperscript{185}

Similarly, in \textit{Hoagland v. State},\textsuperscript{186} the Minnesota Supreme Court held that a verbatim record was a critical element in the effective administration of justice.\textsuperscript{187} In \textit{Hoagland}, the defendant appealed a

\textsuperscript{177} Id. The court opined:
Furthermore, the Minnesota Rules of Criminal Procedure set out in Rule 15.09 the record of guilty plea proceedings which must be made by Minnesota courts. In the case of misdemeanors, a verbatim record “shall be made” or “a petition to enter a plea of guilty, as provided in the Appendix B to Rule 15, shall be filed with the court.” The Comments to Rule 15.09, citing \textit{Casarez, Boykin and Mills v. Municipal Court}, 10 Cal. 3d 288, 110 Cal. Rptr. 329, 515 P.2d 273 (1973), note: “This provision for either a verbatim record or a petition is included to satisfy the constitutional requirement that a plea to a misdemeanor offense punishable by incarceration must be shown on the record to be knowingly and voluntarily entered.”

\textsuperscript{178} Id. (citing MINN. R. CRIM. P 15.09).

\textsuperscript{179} See id. at 905.

\textsuperscript{180} Id. at 451.

\textsuperscript{181} Id. at 452–53.

\textsuperscript{182} Id.

\textsuperscript{183} Id. at 453 (discussing State v. Seifert, 423 N.W.2d 368 (Minn. 1988)).

\textsuperscript{184} Id. at 453–54.

\textsuperscript{185} Id. at 454–55 (citing State v. Windish, 590 N.W.2d 311, 319 (Minn. 1999)).

\textsuperscript{186} 518 N.W.2d 531 (Minn. 1994).

\textsuperscript{187} Id. at 535 (“When an employee of the judicial system fails to follow clearly stated judicial policies and consequently a defendant is deprived of a transcript to his trial for appeal; and when it is impossible to reconstruct the trial because of the
denial of post-conviction relief. The court observed the fundamental importance of a trial transcript for judicial review, as codified in Minnesota Rule of Criminal Procedure 31.02, which states that “[p]lain errors or defects affecting substantial rights may be considered by the court upon motions for new trial, post-trial motions, and on appeal although they were not brought to the attention of the trial court.”

The court also referred to other jurisdictions with similar rules. The United States Supreme Court has observed, “The right to notice ‘plain errors or defects’ is illusory if no transcript is available at least to one whose lawyer on appeal enters the case after the trial is ended.” Once a defendant establishes that no verbatim record of a proceeding is available for review, the burden shifts to the state to prove the conviction may be used to enhance a later charge. A transcript provides crucial due process protections of knowing and voluntary waiver of constitutional rights. A transcript also makes possible a subsequent review of the adequacy of those waivers both for the defendant’s efforts to review the conviction and the state’s determination to use the prior conviction for either enhancement of a subsequent charge or a sentence.

2. Due Process Hazards: The Delivery of Legal Services

Rule 24 of the Juvenile Court Rules requires the court to appoint a guardian ad litem to protect the best interests of the child in a delinquency proceeding under certain circumstances. Rule 24.01 states: “If the parent, legal guardian or legal custodian is

188. Id. at 532.
189. Id. at 535 (citing United States v. Selva, 559 F.2d 1303, 1305–06 (5th Cir. 1977)).
190. Id. at 535–36.
191. Id. at 535 (quoting Hardy v. United States, 375 U.S. 277, 280 (1964)).
192. State v. Nordstrom, 331 N.W.2d 901, 904–05 (Minn. 1983) (“This provision for either a verbatim record or a petition is included to satisfy the constitutional requirement that a plea to a misdemeanor offense punishable by incarceration must be shown on the record to be knowingly and voluntarily entered.”).
194. See State ex rel. Rasmussen v. Tahash, 272 Minn. 539, 545, 141 N.W.2d 3, 8 (Minn. 1966) (citation omitted).
196. MINN. R. JUV. DEL. P. 24.01.
unavailable, incompetent, indifferent to, hostile to, or has interests in conflict with the child’s best interests, a guardian ad litem shall be appointed.” A guardian ad litem has specific legal duties. These duties include investigating the child’s home life, interviewing the adults responsible for his care, and advocating for his best interests. The rules provide several protections for a guardian, underscoring their important role in the administration of justice in juvenile court. The court, in making a determination whether a child made an intelligent and voluntary waiver of various rights, may take into account the appointment of a guardian ad litem.

At the disposition hearing on April 8, 2002, DW’s lawyer asked the court to recognize the guardian ad litem from the CHIPS case and appoint her to the delinquency case on behalf of DW. The actual request read: “Mother’s parental rights were recently terminated, and we’re asking that she be appointed guardian ad litem for all further proceedings as well.” THE COURT: “She may.”

DW was only twelve years old at the time of this hearing. The guardian ad litem never appeared again, and yet her appearance was never excused or waived. Unlike criminal proceedings, where each new offense are generally treated as distinct entities, juvenile proceedings tend to be one continuous disposition, like an adult on probation with new offenses. The guardian ad litem’s presence had been ordered and should have been required.

The court’s failure to protect DW’s interests, and the choice to move the case along, demonstrates a second hazard to due process in juvenile courts—the delivery of legal services. The juvenile justice system seems so invested in moving cases along that most juveniles waive critical constitutional rights without consulting

197. Id.
198. Id. R. 24.02.
199. Id.
200. Guardians enjoy the right to attend all hearings. Id. R. 2.01. Guardians may not be excluded from hearings. Id. R. 2.02. The guardian ad litem appointed in the delinquency proceeding has a right to participate and advocate for the best interests of the child at all hearings. Id. subdiv. 2. The guardian has the right to appointment of counsel. Id. R. 3.07. The child’s lawyer cannot also be the guardian. Id. R. 24.03. The records of the proceedings, otherwise closed to the public, are open to guardians, as they share equal status with the lawyers. Id. R. 30.02.
201. See id. R. 3.04, subdiv. 1; id. R. 18.05, subdiv. 1(C); id. R. 19.04, subdiv. 1(C).
counsel. In 2007 the National Juvenile Defender Center,\(^\text{202}\) reported that half of all children appearing in juvenile delinquency cases appear without a lawyer, and in some jurisdictions this figure was as high as ninety percent.\(^\text{203}\) Without legal representation, and considering the handicap immaturity bears, juveniles are pressed through the system with little real regard to whether they enter pleas which meet the constitutional requirement of being knowing, intelligent, and voluntary.

Similarly, Professor Barry Feld, of the University of Minnesota Law School, observes that the absence of jury trials impacts the administration of justice in a variety of ways. The informality permits an atmosphere in which judges feel less apprehension about allowing juveniles to proceed without a lawyer, which endangers the accuracy and reliability of the fact-finding process. Feld also cites studies which “strongly question the quality of representation that appointed attorneys provide for those delinquents who do receive the assistance of counsel.”\(^\text{204}\)

The delivery of legal services to juveniles suffers even when a lawyer represents the child. Juvenile defenders incessantly complain about overwhelming caseloads. Caseload constraints mean that lawyers can devote very little time to counseling their young clients, who in any case may not understand the court processes, the difficult legal concepts, and give little thought to their own future. Under these circumstances, where resolving cases quickly has priority, “ensuring individualized justice becomes impossible and accurate fact finding becomes irrelevant. . . . The impact on children is devastating: their attorneys have only a few minutes to spend with them, leaving them to go through the process essentially alone.”\(^\text{205}\)

\(^{202}\) “The National Juvenile Defender Center (NJDC) was created in 1999 to respond to the critical need to build the capacity of the juvenile defense bar and improve access to counsel and quality of representation for children in the justice system.” About Us, Nat’l Juvenile Defender Ctr., http://www.njdc.info/about_us.php (last visited Nov. 14, 2010). The NJDC provides a wide range of services to juvenile defenders “to address practice issues, improve advocacy skills, build partnerships, exchange information, and participate in the national debate over juvenile crime.” Id.


\(^{204}\) Feld, supra note 20, at 1169–71 (citations omitted).

\(^{205}\) Puritz & Majd, supra note 203, at 470; see also Katherine Hunt Federle, The
Finally, juvenile court, seen as less important than adult court, is viewed by many as a “training ground.”\(^\text{206}\) Conversely, juvenile court may be thought of as the place lawyers spend the end of their careers, no longer having to worry about trying jury cases.\(^\text{207}\) Puritz noted that “[m]any attorneys representing children may lack the necessary qualifications. Delinquency practice lacks prestige, and many attorneys and judges would prefer to be elsewhere.”\(^\text{208}\)

Ironically, studies by Professor Feld suggest that juveniles who appear without lawyers get “better” outcomes.\(^\text{209}\) While he acknowledges the study’s limitations, his findings and those of others suggest—somewhat surprisingly—that juveniles with counsel are more likely to be incarcerated and to receive other punitive sanctions than those without counsel.\(^\text{210}\) While the causes are difficult to determine conclusively, Feld surmises that the presence of juvenile defense lawyers may antagonize judges, and, conversely, judges may be more lenient towards juveniles who are not represented.\(^\text{211}\)

\footnotesize

Ethics of Empowerment: Rethinking the Role of Lawyers in Interviewing and Counseling the Child Client, 64 Fordham L. Rev. 1655, 1678 (1996) (noting that strong systemic pressures discourage zealous advocacy at all stages of cases).

206. See Barry C. Feld, A Century of Juvenile Justice: A Work in Progress or a Revolution that Failed?, 34 N. Ky. L. Rev. 189, 228 (2007) (describing how public defender’s offices frequently send their least capable and newest attorneys to juvenile cases).


208. Puritz & Majd, supra note 203, at 470.


210. Id. (stating, based on empirical research, that when juveniles are represented in delinquency court, they are less likely to have positive outcomes); see also George W. Burruss, Jr. & Kimberly Kempf-Leonard, The Questionable Advantage of Defense Counsel in Juvenile Court, 19 Just. Q. 37, 41 (2002) (finding that the presence of an attorney consistently increased the likelihood of juveniles receiving out-of-home placements in all settings).

211. Feld, supra note 206, at 228–30 (suggesting that represented juveniles may fare worse than those who are pro se because their lawyers may be inexperienced, incompetent, biased, or overworked, and that judges may punish such juveniles more severely because they believe the presence of counsel insulates them from appellate reversal). It is also possible that Feld’s findings result, at least in part, from selection bias, meaning that juveniles who are likely to either retain or accept appointed counsel may have been charged with more serious offenses, thereby leading to more punitive sanctions for reasons other than those suggested above. See N. Lee Cooper et al., Fulfilling the Promise of In re Gault: Advancing the Role of Lawyers for Children, 33 Wake Forest L. Rev. 651, 658–63 (1998) (discussing the
3. **Due Process Hazards: Failure to Provide Vigorous Defense**

The Ramsey County Juvenile Court failed to protect DW’s rights. The court made an inadequate inquiry into his waivers that resulted in a failure to establish that DW waived his rights knowingly, intelligently, and voluntarily. The Rules of Juvenile Court provide that a child has the right to have a parent, a lawyer, or a guardian ad litem present at any hearing. In fact, the child’s guardian and parent have an independent right to a lawyer in instances where a child may be placed out of his home as a consequence. Without a verbatim recording of the Hennepin County proceedings, we have no way to evaluate the validity of DW’s waiver of his parent, family member, or guardian. There is just no evidence of the required waiver from the March 2002 appearances.

In the second case, the November 2003 assault, DW had both a lawyer and a family member present (his grandfather). DW waived his rights when he pleaded guilty. However, the waiver of trial rights at the arraignment cannot withstand even the simplest of review. The entire waiver consisted of the following:

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systemic causes of ineffective representation in juvenile courts, the many reasons that children waive counsel, and the ways in which the “cumulative effect of these factors is a derogation of juvenile court practice itself”).

212. See, e.g., MINN. R. JUV. DEL. P. 2.03, subdiv. 3 (“The parent, legal guardian or legal custodian of a child who is the subject of a delinquency or extended jurisdiction juvenile proceeding shall accompany the child to all hearings unless excused by the court for good cause shown.”).

213. See, e.g., id. R. 3 cmt. (2006 Main Volume) (“Minn. R. Juv. Del. P. 3.07 implements the rights of a child’s parent(s), legal guardian or legal custodian to participate in hearings affecting the child. After a child has been found to be delinquent and state intervention potentially may intrude upon the parent’s custodial interests in the child, the parent(s) have an independent right to the assistance of counsel appointed at public expense if they are eligible for such services.”).

214. Rule 8 formulates the inquiry the court must make before accepting as valid a waiver of rights and admission. Id. R. 8.04, subdiv. 1. Rule 8 mandates specific procedures and findings that shall be made before accepting a waiver. Id. Among these are satisfaction that the child understands not only the charges and the elements of each charge, but also a factual basis for the plea. Id. The court must also satisfy itself that the child understands all the trial rights waived, including the rights to remain silent, confront and cross-examine witnesses, and the burden of proof. Id. The child must articulate that he understands the power the court has in ordering a disposition. Id. Finally, the court must determine that the juvenile has made a decision based upon his guilt, freely admitted, without pressure or undue influence. Id.
EXAMINATION
BY [defense counsel]: DW, we talked this morning about trial and all the rights that go along with trial; is that right?
A. Yes
Q. Do you have any questions about those?
A. No.
Q. Do you understand that when you plead guilty, you give up your right to a trial and the rights that go along with it?
A. Yes.
Q. That’s what you want to do?
A. Yes.

DW's adjudications demonstrate just some of the ways that the actual practices in juvenile delinquency proceedings fail to meet the standards contemplated by Apprendi. The unique nature of the juvenile court gives reason to question whether juveniles vigorously defend against adjudications as they would against criminal convictions. 215 Children are not mature enough to consume the full meaning of so many important elements of the full juvenile justice process. Typically, children have very little concern for their own future, essentially living only in the moment, especially those children who find themselves in juvenile court in the first place. They will have come to the attention of authorities precisely because they have poor impulse control, inadequate coping skills, and significant cognitive deficits. They may also be poor, without family or shelter, and in critical need of supervision and services. The juvenile referral may be using the child’s “crime” as a device to find the money to provide the services or the authority to impose them.

As noted in the introduction, the goal of juvenile court, the element which gives it its peculiar form and denies the child his right to a jury trial, is rehabilitation rather than punishment. With this goal in mind, many of the professionals in the system, in which a defense lawyer may be absent, but parents, social workers, probation officers, and prosecutors appear, whether the state has met the burden of proof becomes subordinate to the child’s need for the panoply of services the system can offer after a finding of delinquency.

215. Fain, supra note 131, at 522.
As for the child making the decision, he knows that the court may only exercise jurisdiction until he turns eighteen. Whether he pleads guilty to one charge or its lesser offense has very little immediate real consequence to him. “When an adult chooses to plead delinquent to manslaughter instead of murder, he is likely making an informed choice between two distinct and determinate sentences. In juvenile court, however, a juvenile who pleads delinquent may face an indeterminate sentence of commitment until age eighteen, regardless of the offense.”

Also, considering even a high-functioning child’s deference to parents and other authority figures, there exist not insignificant differences in bargaining power in plea negotiations for juveniles and adults. The decision to plead may also be unduly influenced by parents who may want a quick resolution to avoid continuing a series of long days spent waiting for a few minutes of court time in which very little happens, and even less is understood. The desire to bring the process to a quick close may overwhelm the ability to contemplate or realize the possible repercussions to a juvenile adjudication.

As noted, parental influence may have a negative impact on the juvenile. Parents may have interests at odds with the child, sometimes hoping for a court order placing the child in treatment, or, expressing a desire to have the child “tell the truth” and face his consequences.

4. Due Process Hazards: The Pervasiveness of Poor Legal Representation

In both of his cases, DW admitted to the petitions against him at his first opportunity. His admissions moved him closer to his release from custody. It is most unlikely that DW made his waivers with a thought to anything more than his release. DW could have had very little opportunity to discuss his case with anyone. Furthermore, it is unlikely that the barriers of age, class, race, and education could have been surmounted to allow DW meaningful interaction with the professionals trying to help him. These cases hardly represent the due process assurances or reliability

216. Id. at 521.
217. Id. at 521–22 (citations omitted).
envisioned by the Supreme Court in *Apprendi*.

According to Professor Wallace J. Mlyniec, the Lupo-Ricci Professor of Clinical Legal Studies and Director, Juvenile Justice Clinic at the Georgetown University law school, an investigation by the National Juvenile Defender Center revealed that one of the primary impediments to quality, effective representation in the juvenile court system was staggering caseloads. His report

219. According to its website, The National Juvenile Defender Center (NJDC) was created in 1999 to respond to the critical need to build the capacity of the juvenile defense bar and to improve access to counsel and quality of representation for children in the justice system. In 2005, the National Juvenile Defender Center separated from the American Bar Association to become an independent organization. NJDC gives juvenile defense attorneys a more permanent capacity to address practice issues, improve advocacy skills, build partnerships, exchange information, and participate in the national debate over juvenile crime. NJDC provides support to public defenders, appointed counsel, law school clinical programs and non-profit law centers to ensure quality representation in urban, suburban, rural and tribal areas. NJDC offers a wide range of integrated services to juvenile defenders, including training, technical assistance, advocacy, networking, collaboration, capacity building and coordination.

indicated:

Many of the states assessed had caseloads that were staggeringly high. Staggering caseloads make it impossible for lawyers to perform even the most basic tasks associated with effective lawyering. Clients were not consulted, investigations did not take place, motions were not filed, allegations were not contested, treatment plans were not developed, and unnecessary transfers to adult courts occurred. Clients remained incarcerated for extended periods of time, services were not provided to clients, and clients never had viable defenses presented. Moreover, lawyers had no time to attend training programs in order to improve their skills.  

Particularly discouraging are the recent observations by Professor Barbara Fedders, of the University of North Carolina at Chapel Hill School of Law, regarding the “Nature and Pervasiveness of Substandard Legal Representation.” Fedders reports that Gault stimulated many institutions to promulgate practice guidelines for juvenile defenders. Despite the flurry of activity, time has shown that lawyers in juvenile court do not defend their clients with the vigor exercised by lawyers defending adults. Studies conducted across the country reveal that these lawyers do not interview witnesses or visit crime scenes. They generally under-prepare their cases through general inaction, file few
pretrial motions, do not prepare for disposition hearings, and juvenile lawyers are untutored in the skills of trying a case to a judge rather than a jury. They do not consult with their clients, they violate their duty of loyalty and confidentiality, and they misinform their clients, tending to believe that a disposition will lead to services and interventions that the client needs anyway.

Many juvenile defendants are victims of ineffective assistance of counsel. This can result from factors such as poor investigation, infrequent use of motions, high caseloads, over-reliance on pleas, a juvenile court culture of wanting to ‘help’ juveniles, and a general lack of training among attorneys on youth and adolescents.

5. Due Process Hazards: Little Post-Conviction Review

At the time we began to defend DW, his right to review his juvenile adjudications had passed. DW, like most juveniles, did not even know that he could have returned to juvenile court for relief, or sought review of his adjudications on appeal. Collateral attack remained his only remedy. Like many juveniles, DW had little understanding of his legal rights to relief.

Although due process requires that a juvenile adjudicated delinquent have the same access to appeal as a criminal defendant in the jurisdiction, and every state grants a statutory right to appeal, far fewer juvenile cases are appealed than are adult cases. Moreover, post-conviction relief is a statutory right, not a constitutional right, and not every state affords juveniles that right.

Especially where a juvenile’s punishment may only be community service, or a very brief stay at an out-of-home placement, there is little incentive to pursue post-adjudication remedies. Also, juveniles, already insecure and unsure about

226. Id. at 792–93.
227. See id. at 793 (stating that a larger number of attorneys for juveniles do not meet with their clients outside of court proceedings).
228. See id. at 794 (stating many times attorneys will have a confidential conversation in front of a juvenile client’s parents).
229. See id.
230. See, e.g., id. at 795 (reiterating that substandard lawyering negatively affects a youth’s case at both the adjudicatory and dispositional phases).
231. Drizin & Luloff, supra note 168, at 289.
232. Id. at 294.
233. See Donald J. Harris, Due Process v. Helping Kids in Trouble: Implementing the
pursuing their right to trial counsel, are less aware and even less assertive in securing their right to appeal.  

VI. CONCLUSION

DW’s prosecution demonstrates the need to change Minnesota law. The difference between a conviction for a misdemeanor and a felony is vast. It is unfair to prosecute someone for a felony based upon juvenile adjudications from childhood. Children just do not have the mental development necessary to make the legal decisions that have this important of an impact on their future. As a society we limit the decision-making power of children due to their immaturity. It hardly seems reasonable to hold them to these choices.

The juvenile court system is not designed to prompt children to fight adjudication. As Justice Stewart observed in his dissent in Gault:

Juvenile proceedings are not criminal trials. They are not civil trials. They are simply not adversary proceedings. Whether treating with a delinquent child, a neglected child, a defective child, or a dependent child, a juvenile proceeding’s whole purpose and mission is the very opposite of the mission and purpose of a prosecution in a criminal court. The object of the one is correction of a condition. The object of the other is conviction and punishment for a criminal act.

Next time the opportunity arises, the Minnesota Supreme Court should hold that juvenile adjudications not previously proven to a jury beyond a reasonable doubt may not be used to enhance a criminal charge. The legislature could also amend the statutes to allow enhancements only where there was a jury

234. See id. at 223 (“[C]hildren don’t always understand the consequences of court actions.”).
235. See COALITION FOR JUVENILE JUSTICE, WHAT ARE THE IMPLICATIONS OF ADOLESCENT BRAIN DEVELOPMENT FOR JUVENILE JUSTICE? (2006); see also Terry A. Maroney, The False Promise of Adolescent Brain Science in Juvenile Justice, 85 NOTRE DAME L. REV. 89, 95–103 (2009); Elisa Poncz, Rethinking Child Advocacy After Roper v. Simmons: “Kids are Just Different” and “Kids are Like Adults” Advocacy Strategies, 6 CARDOZO PUB. L. POL’Y & ETHICS J. 273 (2008) (arguing that neither the “kids are just different” nor the “kids are like adults” legal treatment is the best, but rather that both treatments should be used together).
adjudication, which would mean EJJ cases. 237

In the end, the trial court never ruled on DW’s collateral attack. The state offered DW a deal he could not refuse, and DW settled his case.