[J-48-2022]
IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	:	No. 1 MAP 2022
	:	
Appellant	:	Appeal from the Order of the
	:	Superior Court dated April 9, 2021,
	:	reargument denied June 10, 2021,
v.	:	at No. 1947 MDA 2019 Vacating the
	:	Judgment of Sentence of the Court
	:	of Common Pleas of Centre County,
STEVEN LEONARD VERBECK,	:	Criminal Division, dated November
	:	1, 2019 at No. CP-14-CR-0002013-
Appellee	:	2018 and Remanded for
	:	Resentencing.
	:	
	:	ARGUED: September 14, 2022

OPINION IN SUPPORT OF AFFIRMANCE

JUSTICE WECHT **DECIDED: February 28, 2023**

On September 27, 2018, the Commonwealth filed a criminal information charging Steven Verbeck with driving under the influence ("DUI")—general impairment.[1] The Commonwealth specifically designated the DUI—general impairment count as a "2nd OFFENSE."[2] The decision to charge Verbeck as a second-time DUI offender was not a mere formality. That count implicated a provision in the Motor Vehicle Code which mandates increased penalties upon conviction for recidivist DUI offenders.[3] Because these increased penalties are dependent upon proof of a fact—the existence of a "prior

---

1 75 Pa.C.S. § 3802(a).

2 Criminal Information, 9/27/2018, at 1, ct. 3 (capitalization in original). In addition to the general impairment count, the Commonwealth charged Verbeck with five other DUI-related counts, each of which the Commonwealth designated as a "2nd OFFENSE." *Id.* at 1-2, cts. 4-8.

3 75 Pa.C.S. § 3804(a)(2).

offense"—that fact constitutes an "element" of the offense which must be proven to a jury (not a judge) beyond a reasonable doubt.[4] The Supreme Court of the United States has recognized only one narrow exception to this constitutional rule. That narrow exception applies only when the fact/element which boosts the sentence is the fact of a prior criminal conviction.[5]

Subsection 3806(a) of the Motor Vehicle Code defines a "prior offense" for purposes of a second-time DUI offense as including acceptance into the Accelerated Rehabilitative Disposition ("ARD") diversionary program.[6] The ultimate question in this case is whether acceptance into ARD is a "prior conviction"[7] that can compel increased penalties without the formalities required by the Sixth Amendment right to trial by jury, or whether it is a fact, the particulars of which must be proven beyond a reasonable doubt to a jury before it can operate to increase a defendant's sentence. The Opinion in Support of Reversal ("OISR") concludes that ARD is neither of these, but also would hold that ARD still can be considered a "prior offense" which can enhance a person's sentence without violating the Sixth Amendment. Nothing in the Supreme Court's precedents would allow this Court to sidestep the core holdings of the *Apprendi* line of cases in this

---

[4] *Apprendi v. New Jersey*, 530 U.S. 466, 483 n.10 (2000) ("[F]acts that expose a defendant to a punishment greater than that otherwise legally prescribed were by definition 'elements' of a separate legal offense."); *id.* at 490 (concluding that any "facts that increase the prescribed range of penalties to which a criminal defendant is exposed" are elements of the crime).

[5] *Almendarez-Torres v. United States*, 523 U.S. 224, 226-27 (1998); *see also Cunningham v. California*, 549 U.S. 270, 274-75 (2007) ("As this Court's decisions instruct, the Federal Constitution's jury-trial guarantee proscribes a sentencing scheme that allows a judge to impose [an increased sentence] based on a fact, *other than a prior conviction*, not found by a jury or admitted by the defendant.") (emphasis added).

[6] 75 Pa.C.S. § 3806(a).

[7] The OISR concedes that ARD is not a conviction, nor the functional equivalent of a conviction. *See* OISR at 8.

way. In accord with those precedents, I would affirm the Superior Court's order in this case. The decision to enter into ARD is not a prior conviction for *Apprendi* purposes. Instead, the Commonwealth must prove the circumstances of the prior offense to a jury beyond a reasonable doubt before that offense can increase a criminal defendant's sentence.

The Sixth Amendment to the United States Constitution guarantees to those "accused" of a "crime" the right to be tried before an "impartial jury."[8] Independent and impartial juries are a "critical protection of individual liberty."[9] They are not

> *quaint nuances existing today simply for decorative purposes*. They are not to be treated as a mere vestige of a time when criminal justice could be dolled out more leisurely. They may not be readily dispensed with when efficiencies of a modern war on crime dictate. They exist as more than just a right of an individual; they are a conduit for the whole criminal system to find legitimacy by requiring the forces of government to get authorization from a committee of the governed before they may deprive one of "the governed" of life or liberty.
>
> [J]uries, while appearing within the judicial framework, operate with a true and necessary independence from any branch of the government. Indeed, since they are constituted as a tribunal of the people, they operate as a check on the branches of government for which they are the source of authority in the first instance.[10]

The right to trial by jury, "in conjunction with the Due Process Clause, requires that each element of a crime be proved to the jury beyond a reasonable doubt."[11] It was in

---

8 U.S. CONST. amend. VI.

9 Bruce Antkowiak, The Ascent of an Ancient Palladium: the Resurgent Importance of Trial by Jury and the Coming Revolution in Pennsylvania Sentencing, 13 WIDENER L.J. 11, 16 (2003) (discussing, generally, United States v. Gaudin, 515 U.S. 506, 513 (1995)).

10 *Id.* (footnote omitted; emphasis in original).

11 *Alleyne v. United States*, 570 U.S. 99, 104 (2013) (citations omitted).

1999, in *Jones v. United States*,[12] that the Supreme Court first noted its concern that these historical Sixth and Fourteenth Amendment principles raised serious questions regarding the constitutionality of sentencing practices that allowed judges to make factual findings which increased an offender's sentence.

The following year, in *Apprendi*, the Court resolved the concerns that it had raised in *Jones*. At issue in *Apprendi* was a New Jersey statute that allowed a sentencing judge to impose an "extended term" of imprisonment if that judge found by a preponderance of the evidence that the underlying offense was a hate crime, even if that extension resulted in a sentence that exceeded the statutorily prescribed maximum sentence for the underlying offense.[13] The Supreme Court held that the Sixth Amendment prohibits such a sentencing scheme.[14] The Court ruled that the Sixth Amendment requires that "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."[15]

The "rule's animating principle is the preservation of the jury's historic role as a bulwark between the State and the accused at trial for an alleged offense."[16] The *Apprendi* Court examined that historic function in depth, noting that, at the nation's creation, the common law treated elements of the offenses and sentencing factors as equivalents. Criminal offenses tended to be "sanction-specific": there was a particular punishment prescribed for each criminal offense.[17] Criminal indictments had to include

---

12 526 U.S. 227 (1999).

13 *Apprendi*, 530 U.S. at 468-69 (citation omitted).

14 *Id.* at 491.

15 *Id.* at 490.

16 *Oregon v. Ice*, 555 U.S. 160, 168 (2009) (citing *Apprendi*, 530 U.S. at 477).

17 *Alleyne*, 570 U.S. at 108 (citations omitted).

all of the relevant facts that were necessary to prove not only the crime, but also the facts necessary to warrant the imposition of the sentence linked to that offense.[18] Judges were afforded no material discretion in fashioning a sentence. Judges were required to impose the sentence "annexed to the crime" and based upon the facts set forth in the indictment and proven to the jury beyond a reasonable doubt.[19] If a prosecutor believed that a higher sentence than that prescribed by the statute was warranted, that prosecutor was obliged to charge the defendant under a different statute, and then prove to a jury all of the necessary facts to justify the sentence attached to the latter crime.[20] Consistent with the historical practices extant at the times that the Sixth and Fourteenth Amendments were adopted, the *Apprendi* Court held that any "facts that increase the prescribed range of penalties to which a criminal defendant is exposed"[21] are "elements of the crime."[22] The Court declared that the Sixth Amendment does not permit a defendant to be "expose[d] . . . to a penalty exceeding the maximum he would receive if punished according to the facts reflected in the jury verdict alone."[23]

The *Apprendi* Court further held that the rule applies equally to circumstances in which the government mischaracterizes additional findings made by the judge as mere "sentencing factor[s]."[24] Because New Jersey's statutory scheme transferred the jury's fact-finding function to a judge, and reduced the level of proof needed to establish an

---

18 *Apprendi*, 530 U.S. at 478 (citations omitted).

19 *Id.* at 478-79 (citations omitted).

20 *Id.* at 480.

21 *Id.* at 490 (citations omitted).

22 *Alleyne*, 570 U.S. at 111.

23 *Apprendi*, 530 U.S. at 483 (emphasis removed).

24 *Id.* at 492.

element of a crime below the constitutionally required standard,[25] it constituted an "unacceptable departure from the jury tradition that is an indispensable part of our criminal justice system."[26] This was a violation of the Sixth Amendment.

In the years that followed, the Supreme Court proceeded to apply the "long standing common-law practice" that lay at the heart of *Apprendi* to a number of circumstances. The Court invoked *Apprendi* to assess cases involving facts the government must prove to justify the imposition of a death sentence,[27] criteria that permitted upward deviations from the standard range in a state sentencing guideline system,[28] facts triggering elevated sentencing ranges in the then-mandatory federal sentencing guideline system,[29] facts permitting a sentence in the "upper term" of a determinate sentencing scheme,[30] and "judicial factfinding that increase[d] the mandatory minimum sentence for a crime."[31]

In *Apprendi*'s wake, the Supreme Court has consistently reaffirmed its core ruling. In *Ring*, the Court explained that *Apprendi* held that the historical roots of the Sixth Amendment entitled a defendant to "a jury determination that [he] is guilty of every element of the crime with which he is charged, beyond a reasonable doubt."[32] In *Blakely*, the Court addressed the prior crime exception, quoting *Apprendi* directly: "[o]ther than

---

25 *See In re Winship*, 397 U.S. 358 (1970) (holding that due process requires every element of an offense to be proven by the government beyond a reasonable doubt).

26 *Apprendi*, 530 U.S. at 497.

27 *Ring v. Arizona*, 536 U.S. 584, 602, 609 (2002).

28 *Blakely v. Washington*, 542 U.S. 296, 304-05 (2004).

29 *United States v. Booker*, 543 U.S. 220, 243-44 (2005).

30 *Cunningham*, 549 U.S. at 274.

31 *Alleyne*, 570 U.S. at 103.

32 *Ring*, 536 U.S. at 602 (quoting *Apprendi*, 530 U.S. at 477).

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."[33] In *Cunningham*, the Court noted that it "has repeatedly held that, under the Sixth Amendment, any fact that exposes a defendant to a greater potential sentence must be found by a jury, not a judge, and established beyond a reasonable doubt, not merely by a preponderance of the evidence."[34]

In today's case, the OISR would conclude that the ARD-as-prior-offense statute falls outside of the *Apprendi* rule because the provision addresses recidivist conduct "as opposed to the commission of the present crime."[35] The Supreme Court has never drawn this distinction. Nor is there any basis in any of the High Court's opinions that would lead us to conclude that it would do so. To the contrary, in no case in which the Court has articulated and applied the *Apprendi* rule has the Court ever stated that the rule applies only to the facts or circumstances of the offense for which the defendant has been charged and convicted.

It is true, as the OISR avers, that the Supreme Court also has never found that a fact related to a prior incident is the type of fact that must be proven beyond a reasonable doubt in order to comply with the Sixth Amendment.[36] The Supreme Court has never addressed whether facts related to the offender, instead of to the present offense, are exempted from the *Apprendi* line of cases.[37] The question is not settled. The OISR

---

33 *Blakely*, 542 U.S. at 301 (quoting *Apprendi*, 530 U.S. at 490).

34 *Cunningham*, 549 U.S. at 281.

35 OISR at 13.

36 *Id.* at 12-13 (listing cases).

37 In *Ice*, the Supreme Court considered an *Apprendi*-type challenge to an Oregon statute that required trial judges to impose consecutive sentences upon a judicial (not a jury) finding of certain facts. *Ice*, 555 U.S. at 165. The Supreme Court held that the (continued…)

seizes upon the dearth of specific guidance in order to minimize what the Sixth Amendment requires. But the absence of law is not law.

The OISR attempts to resolve the question by cobbling together snippets from the Supreme Court's pre-*Apprendi* cases in an effort to exempt ARD from the strict procedural requirements of the Sixth Amendment. The endeavor is misguided and unconvincing. The OISR cites *Almendarez-Torres* for the proposition that recidivism "is as typical a sentencing factor as one might imagine," and is "a traditional, if not the most traditional, basis for a sentencing court's increasing an offender's sentence."[38] Then, the OISR quotes *Jones v. United States*, in which the Supreme Court explained that, "unlike virtually any other consideration used to enlarge the possible penalty for an offense . . ., a prior conviction must itself have been established through procedures satisfying the fair notice, reasonable doubt, and jury trial guarantees."[39] The OISR's citations beg the question:

---

decision to order sentences to run consecutively to each other did not fall within the scope of the *Apprendi* rule. This was because the decision historically was governed by legislative enactment, not by jury determination. *Id.* at 170. As such, the statute did not implicate traditional Sixth Amendment functions. *Id.* at 168. *Ice* is plainly distinguishable from the instant matter, as consideration of ARD as a prior offense for purposes of increasing an offender's sentence is not historically a legislative function, but instead falls squarely within the Sixth Amendment's "animating principle" of enforcing the jury's traditional "role as a bulwark between the State and the accused." *Id.*

The OISR maintains that its exemption of ARD from the *Apprendi* rule is similar to the Supreme Court's decision in *Ice*, because ARD is a "non-conviction fact" that increases a defendant's punishment. OISR at 21 ("We do the same thing here."). Yet, the OISR makes no attempt to liken ARD to the concurrent-versus-consecutive statute at issue in *Ice*. Nor does the OISR demonstrate that the fact of admission into ARD is a factor historically delegated to legislative policies and enactments, a feature that was essential to the Supreme Court's ruling in *Ice*. *Ice*, 555 U.S. at 170. Instead, the OISR extensively analogizes and synonymizes ARD with a prior conviction, all of which is not only factually and legally incorrect, but also irrelevant if indeed the OISR holds that admission into ARD is neither a prior conviction nor a fact that must be proven to a jury, and instead something akin to the statute at issue in *Ice*.

[38] OISR at 11 (citing *Almendarez-Torres*, 523 U.S. at 230, and 243).

[39] *Id.* at 14 (quoting *Jones*, 526 U.S. at 249).

why would one presume that ARD is a "prior offense?" In the post-*Apprendi* world, these cases do not permit the broad use of any fact or circumstance related to an offender's past conduct. To the contrary, in the wake of *Apprendi*, the Supreme Court has confined those earlier decisions strictly to the circumstance of a formal prior *conviction*. There is little reason to suppose that the Court would extend those pre-*Apprendi* precedents any further. It is more likely that the Court would abrogate those cases rather than extend them.

While the *Apprendi* Court put an end to judicial fact-finding in the sentencing realm, it had no choice but to recognize the exception to its rule for prior convictions.[40] But it did so begrudgingly. Noting that the prior conviction exception constituted an "exceptional departure from the historic practice,"[41] the *Apprendi* Court suggested that *Almendarez-Torres* "arguabl[y] . . . was incorrectly decided."[42] However, because the parties before it did not challenge the exception's "validity," the *Apprendi* Court declined to revisit *Almendarez-Torres* and was obliged to treat that case's holding "as a narrow exception" to the *Apprendi* rule.[43] Perhaps signaling a willingness to reconsider *Almendarez-Torres*, the Supreme Court noted for a second time in *Alleyne* that no one had yet challenged the viability of the prior conviction exception.[44] And, in *Shepard v. United States*, Justice Clarence Thomas noted that a majority of the members of the Court as comprised at the

---

40 *See Almendarez-Torres*, 523 U.S. at 244.

41 *Apprendi*, 530 U.S. at 487.

42 *Id.* at 489.

43 *Id.* at 490.

44 *Alleyne*, 570 U.S. at 111, n.1.

time in 2005 had opined in various decisions that *Almendarez-Torres* was "wrongly decided."[45]

Notwithstanding this evidence that the prior conviction exception stands "on shaky ground,"[46] the OISR not only champions it; it leaps far beyond it, expanding the exception to encompass a *non*-conviction circumstance: ARD. The Supreme Court already has considered recidivism and has limited its use only to formal criminal convictions. The OISR ignores this. It emphasizes "recidivism" while ignoring the Supreme Court's post-*Apprendi* treatment of the prior conviction exception. The OISR's reasoning is untethered to any of the operative and binding text of the relevant Supreme Court opinions. *Almendarez-Torres* addressed prior *convictions*. The exception has never been extended to any fact or circumstance related to an offender's past criminal (or non-criminal) conduct. Unsurprisingly, the Supreme Court consistently has referred to the prior conviction exception as one encompassing only *prior convictions*, nothing more. Not once has the Court indicated that the exception is broader than that. If anything, the Court appears poised to restrict, or eliminate entirely, the exception, not to expand or add to it. There is no reason to believe that the Supreme Court's precedents open the door through which the OISR would walk.

The Supreme Court already has instructed courts on how to assess and categorize a statutory sentencing factor for Sixth Amendment purposes. The general rule bears repeating here: the Sixth Amendment right to a jury trial requires that any fact that increases an offender's sentence must be proven to a jury beyond a reasonable doubt, unless that fact is a prior conviction. The exception arises because the prior conviction

---

[45] 544 U.S. 13, 27 (Thomas, J, concurring in part) (citations omitted).

[46] Meg E. Sawyer, Note, The Prior Convictions Exception: Examining the Continued Viability of *Almendarez-Torres* Under *Alleyne*, 72 WASH & LEE L. REV. 409, 412 (2015).

already resulted from a process imbued with all of the essential constitutional protections.[47] The question in today's case is whether ARD is a "fact," triggering the *Apprendi* rule, or rather a "sentencing factor,"[48] which does not. The OISR answers the question by venturing into new theories and attempting to create new exceptions. This is error. We must follow the Supreme Court's articulated test.

---

[47] The OISR concedes that one reason prior convictions currently are exempted from the *Apprendi* protocol is because they arose only "after the defendant benefitted from the protections guaranteed by the Sixth Amendment." OISR at 21. The OISR then addresses at length the "theoretical difficulties" that arise from focusing upon the constitutional safeguards that exempt prior convictions from factual proof in future prosecutions. Among these "difficulties," the OISR explains, is the possibility that certain aspects of that conviction may be contested later by a defendant and require proof in the future prosecution. Such circumstances are not currently before the Court and should not distort our focus. That said, these purported "difficulties" do not justify creating new exceptions to the *Apprendi* rule. We cannot mischaracterize ARD for *Apprendi* purposes in order to avoid some hypothetical consequence not at issue in this case.

In an effort to show that the procedural safeguards attendant to a criminal conviction are not the only way that a sentencing factor can evade the *Apprendi* rule, the OISR notes that several federal courts have held that the fact of a juvenile adjudication can be used for purposes of determining recidivism without first being found by a jury, notwithstanding that such adjudications require fewer procedural protections as a constitutional matter. OISR at 22. The OISR discerns no reason to distinguish ARD from juvenile adjudications. *Id.* Yet, this conclusion "runs headlong" into the OISR's own assertion that ARD is not a prior adjudication but is instead a sentencing factor similar to that at issue in *Ice*. *See* OISR at 21; *Ice*, 555 U.S. at 170. Moreover, the asserted parallel between ARD and juvenile adjudications is in any event just as inapt as the OISR's comparison of the former to a criminal conviction. It is true that juvenile adjudications are not subject to the constitutional right to a jury trial. But the adjudication nonetheless requires proof of the commission of the offense beyond a reasonable doubt, as well as all of the other constitutional trial rights. An adjudication of juvenile delinquency shares no similarities with a diversionary program such as ARD for purposes of *Apprendi*.

As I explain below, the OISR's maneuverings between prior convictions, juvenile delinquency adjudications, and sentencing factors that escape *Apprendi* are unnecessary, and each of them ignores the Supreme Court's teachings. We must ask only whether "whether the fact constitutes an 'element' or 'ingredient' of the charged offense." *Alleyne*, 570 U.S. at 107 (citations omitted). The OISR's comparisons and ruminations are flawed, and are in any event irrelevant to the ultimate inquiry.

[48] *See Ice*, *supra*, n.37.

In *Alleyne*, the Court explained that the "touchstone for determining whether a fact must be found by a jury beyond a reasonable doubt is whether the fact constitutes an 'element' or 'ingredient' of the charged offense."[49] The dispositive assessment, the Court has noted, is "one not of form, but of effect."[50] "If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact—no matter how the State labels it—must be found by a jury beyond a reasonable doubt."[51] The guiding principle underlying *Apprendi* and its progeny is the constitutional obligation "to reserve to the jury the determination of facts that warrant punishment for a specific statutory offense."[52]

When considering whether the nature of a circumstance is a "fact" or a "sentencing factor," the question is not whether the circumstance relates to the present offense or to a past one, or whether it speaks to the offender or to the offense, or whether it touches upon recidivism or upon future behavior. The question simply is whether it is an "element" or an "ingredient" of the charged statutory offense. This inquiry is consistent with *Apprendi*'s recalibration of modern sentencing procedures to conform to those that were utilized at the nation's founding.[53]

Using the correct legal framework, the answer is obvious. In the criminal information, the Commonwealth expressly charged Verbeck as a second-time DUI

---

49 *Alleyne*, 570 U.S. at 107 (citations omitted).

50 *Apprendi*, 530 U.S. at 494; *Ring*, 536 U.S. at 602 (quoting *Apprendi*, 530 U.S. at 494).

51 *Ring*, 536 U.S. at 602 (citing *Apprendi*, 530 U.S. at 482-83).

52 *Southern Union Co. v. United States*, 567 U.S. 343, 349 (2012) (quoting *Ice*, 555 U.S. at 170).

53 *See Apprendi*, 530 U.S. at 478-80.

offender.[54] Once Verbeck was convicted of this offense as charged, the trial court was bound by law to sentence him to the higher penalties statutorily prescribed for the commission of a second DUI offense under 75 Pa.C.S. § 3804(a)(2). The effect of a jury's verdict on such a charge is to simultaneously convict the second-time offender of DUI and to authorize the imposition of increased penalties for repeat offenders, which is consistent with the criminal practices at the time of the adoption of the Sixth Amendment.[55] Based upon the history and purposes animating the Supreme Court's *Apprendi* line of cases, the "2nd OFFENSE" designation undoubtedly constituted an "element" or an "ingredient" of the offense,[56] and was a "fact" for purposes of the Sixth Amendment that must be proven to a jury beyond a reasonable doubt.

In charging Verbeck as a second-time offender, the Commonwealth was required to prove Verbeck's prior offense beyond a reasonable doubt to the jury in the instant prosecution. In this instance, the alleged prior offense was Verbeck's previous admission into ARD, as authorized by 75 Pa.C.S. § 3806(a). As with all *Apprendi*-type "facts," the *only* way that the Commonwealth could be relieved of its evidentiary burden is if ARD constitutes a prior *conviction*.[57] It unequivocally does not. Indeed, even the OISR agrees.[58]

The "animating principle" of the Sixth Amendment's right to a trial by jury is the criminal defendant's "right to have a jury find those facts beyond a reasonable doubt" that

---

54 Criminal Information, 9/27/2018, at 1, ct. 3.

55 *Apprendi*, 530 U.S. at 478 (citations omitted).

56 *Alleyne*, 570 U.S. at 107 (citations omitted).

57 *See*, *e.g.*, *Blakely*, 542 U.S. at 301 (recognizing prior conviction exception).

58 *See* OISR at 8 ("A defendant's acceptance of ARD does not constitute a conviction.").

operate to increase his or her sentence.[59] For all practical purposes, a prior conviction is exempted from this broad mandate because the circumstances that led to that conviction already have been proven to a jury beyond a reasonable doubt. That conviction, in other words, comes pre-packaged with the protection of all of the constitutional rights that are required to satisfy the Sixth Amendment. ARD, on the other hand, contains the protection of none of those rights, nor any other relevant constitutional rights for that matter.

Prior criminal convictions differ from ARD in a number of other substantive ways as well. The conviction occurs only after the criminal defendant has been represented by competent and effective defense counsel, who reviewed the case, prepared and filed motions, met with the defendant, and vigorously constructed a defense (even if that defense was nothing more than challenging the Commonwealth's proof at trial). The defendant then is afforded a speedy and public trial, at which the Commonwealth must shoulder the burden of proof and must prove each and every element of the charged offenses to the jury (or judge in a bench trial) beyond a reasonable doubt. The defendant is accompanied by his or her attorney, who objects to inadmissible evidence and advocates in the defendant's best interests. The defendant is entitled to confront the witnesses against him or her through cross-examination, to present his or her own witnesses, and to testify on his or her own behalf. Only after all of these constitutional protections have been satisfied, or voluntarily, knowingly, and intelligently waived by the defendant, can a jury convict that defendant. It is because all of these procedural and substantive constitutional safeguards have been provided that such a conviction requires no additional proof to be used to increase a defendant's sentence in a future case.

---

[59] *Ice*, 555 U.S. at 168; *Alleyne*, 570 U.S. at 111 (citing *Apprendi*, 530 U.S. at 484).

Admission into ARD, on the other hand, requires no such constitutional compliance. In *Commonwealth v. Lutz,*[60] we explained the purpose of Pennsylvania's ARD program:

> ARD . . . is a pretrial disposition of certain cases, in which the attorney for the Commonwealth agrees to suspend prosecution for an agreed upon period of time in exchange for the defendant's successful participation in a rehabilitation program, the content of which is to be determined by the court and applicable statutes.
>
> Under the ARD rules, which this Court created in 1972 pursuant to our authority to supervise the lower courts, the district attorney has the discretion to refuse to submit a case for ARD, and if the case is submitted for ARD, the court must approve the defendant's admission. These rules . . . also provide that the defendant must agree to the terms of the ARD, and that after he has completed the program successfully, the charges against him will be dismissed, upon order of court. If he does not complete the ARD successfully, he may be prosecuted for the offense with which he was charged. The district attorney's utilization of ARD is optional under the rules.
>
> The impetus behind the creation of such rules was the belief ... that some "cases which are relatively minor or which involve social or behavioral problems ... can best be solved by programs and treatments rather than by punishment."[61]

ARD is a diversionary program. It is not a trial. When a defendant is identified as an ARD candidate, he or she is proffered ARD conditions, to which he or she must consent. If the defendant accepts those conditions, he or she must appear (with counsel) before a judge and, under oath, agree to them, typically orally and in writing. The judge must accept both the conditions and the defendant's willingness to partake in the diversionary program. Once the defendant's entry into ARD is accepted by the judge, the practical effect of this diversionary program is to hold the criminal case in abeyance until the defendant successfully completes the program, at which point that case is dismissed

---

60 495 A.2d 928 (Pa. 1985).

61 *Id.* at 931 (citations omitted).

and the defendant's record expunged. If the defendant fails to complete the program, the case is listed for trial.

By agreeing to enter ARD and to complete the terms of the program, the defendant is not convicted of any crime. The defendant never admits guilt nor the veracity of any of the facts underlying the charged offense(s). He or she waives no constitutional rights, except the right to a speedy trial due to the length of time it takes to complete the program. There is no trial, there are no witnesses, and there are no defenses. There are no motions to be litigated, no evidence to object to, no witnesses to confront. The Commonwealth has no burden and is required to prove no factual allegations, let alone prove them beyond a reasonable doubt. Put simply, ARD is an opportunity for (mostly) first-time non-violent, minor offenders to be given a chance to clear their criminal records. ARD bears no similarities to a criminal conviction, and cannot be treated as the equivalent thereof.

Although the OISR admits that ARD is not a prior criminal conviction, it nonetheless attempts to draw comparisons between the two in an attempt to demonstrate that ARD should be exempted from the *Apprendi* rule.[62] None of the OISR's arguments are persuasive. The OISR lists some of the protections enjoyed by an ARD defendant, noting that the defendant is not required to participate in ARD, and that, by the time the defendant does enter the program, he or she has been advised of the charges and has had a preliminary hearing. The defendant also is represented by counsel, who can review pretrial discovery.[63] While important, these procedural protections are not what places prior convictions in a separate category for *Apprendi* purposes. That the defendant enjoyed *some* constitutional protections (not including the preliminary hearing, which is

---

62 *See* OISR at 14-15.

63 *Id.*

not constitutionally required)[64] does not mean that ARD can be treated in the same manner as a criminal conviction. Again, with ARD, there is no trial, no jury, no admission or finding of guilt, no cross-examination, and no proof beyond a reasonable doubt. The OISR's identification of some minor pre-trial protections does not erase these undeniable differences.

The OISR suggests that, because the ARD defendant does not have to accept the ARD offer or because he or she has statutory notice that ARD can serve as a prior offense for DUI purposes, ARD can escape the Sixth Amendment's requirements. This too is incorrect. The Sixth Amendment does not simply step aside because a person enters into a diversionary program. Nowhere in the Supreme Court's precedents is there support for the proposition that entering a diversionary program functions as a waiver of the Sixth Amendment in future cases. To the contrary, as noted, the Court's decisions have, at most, tolerated one narrow exception for prior convictions. The Court has expressed no inclination toward expanding that exception or creating a new one to encompass a defendant's decision to opt into a program like ARD. If anything, the Court appears more inclined to do away with any exceptions to the Sixth Amendment's strict requirements.

The argument that section 3806 purportedly provides notice to defendants that entry into ARD will constitute a prior offense for future DUI prosecutions fails to manufacture a valid *in futuro* waiver of the defendant's Sixth Amendment rights. Any waiver of a constitutional right must be knowing, intelligent, and voluntary.[65] A waiver

---

64 *See Coleman v. Alabama*, 399 U.S. 1, 9-10 (1970) (plurality).

65 *See Commonwealth v. Ball*, 146 A.3d 755, 767 (Pa. 2016) (explaining that, although any constitutional right can be waived, "[w]e are unaware of any constitutional right that can be waived by operation of a rule or procedure that does not explicitly provide for the waiver."); *see also Commonwealth v. Goodwin*, 333 A.2d 892, 894 (Pa. 1975) (requiring the waiver of a constitutional right to be "knowing, intelligent and voluntary").

must be a deliberate, conscious act by the defendant.[66] It cannot occur by happenstance or automatically by virtue of a statute. There is no evidence in the record before this Court that Verbeck was provided actual notice at the time he entered into the ARD program to the effect that his participation in ARD would serve as a prior offense in some hypothetical future case. Even then, Verbeck would have had to choose knowingly, intelligently, and voluntarily to waive his future Sixth Amendment rights. He cannot not simply be told now that he did so then, as today's OISR suggests.

The OISR finds no material difference between ARD and a prior conviction because the ARD defendant "had the right to require the Commonwealth to prove his guilt on every element of his first DUI charge to a jury beyond a reasonable doubt," but "voluntarily waived that right in favor of ARD acceptance."[67] The OISR points to no place in this record, or in the ARD record, where Verbeck voluntarily waived the right. That is because there is no evidence of such a broad waiver. Nor does the OISR cite any case from this Court or the United States Supreme Court that supports the idea that entry into ARD, *ipso facto*, constitutes a waiver of any constitutional rights. ARD is a diversionary program pursuant to which the case file is set aside while the defendant completes the conditions. The defendant is not required to waive his right to have the charges proven, nor is the ARD judge required to ask for any such waiver. This is because the right is never actually waived. Like the case file, that right, like all of the other constitutional trial rights, is simply set aside temporarily. If the defendant fails to complete the ARD conditions, those rights are once again available to the defendant. They have never been waived. The OISR's bald, unsupported claim to the contrary is incorrect.

---

66 *See Commonwealth v. Carey*, 340 A.2d 509, 510 (Pa. Super. 1975) (quoting *Johnson v. Zerbst*, 304 U.S. 458 (1938)).

67 OISR at 16.

The OISR even goes a step further, claiming that entry into ARD is "substantially similar" [68] to a guilty plea. The two are nothing alike. In a guilty plea, the defendant executes a lengthy written waiver that explains to the defendant each and every constitutional right that he or she is waiving by pleading guilty, and that notifies the defendant that his or her appellate rights are significantly curtailed by the plea.[69] The trial judge then must colloquy the defendant under oath in open court, to ensure that the defendant is aware of all of his or her rights for a second time, and to certify that the defendant's waiver of all of those rights is knowing, intelligent, and voluntary.[70] ARD requires no such waiver. The defendant must only accept the conditions of the program. After hearing a brief statement of the facts,[71] the judge must formally admit the defendant into the program. The defendant does not waive any of his rights, as he or she must in a guilty plea, except the right to a speedy trial.[72] A guilty plea results in a conviction and a criminal record. Completion of ARD results in a dismissal and an expungement. The two are not "substantially similar" in any way.

Rule 313 of the Pennsylvania Rules of Criminal Procedure requires the ARD judge to hear an off-record summary of the facts.[73] The defendant is not required to accede to the accuracy or veracity of those facts. He or she is not required to admit guilt in any fashion. While the decision to enter ARD reflects a choice not to fight the charges, that decision cannot be taken as a "concession by the defendant that he or she, in fact,

---

68 *Id*.

69 *See generally* Pa.R.Crim.P. 590.

70 *Id.*

71 *See* Pa.R.Crim.P. 313.

72 *See* Pa.R.Crim.P. 312(2).

73 Pa.R.Crim.P. 313(B).

committed the offense."[74] Because the program allows for the expungement of one's criminal record, and allows for the case to be dismissed without the time, expense, and stress of a criminal trial, many undoubtedly choose ARD as a better, safer, and more beneficial option than fighting the charges and risking a more severe penalty, regardless of whether they are guilty or not.

Despite offering no empirical data, scholarship, or social science backing its assertion that only the guilty enter ARD, and despite there being a similar dearth of support in *Whalen* for its even broader assumptions, the OISR nonetheless criticizes my retort to its premise as unsupported conjecture.[75] It is hardly conjecture to acknowledge that not all of those who find themselves ensnared by the criminal legal system are guilty of the crimes charged,[76] or to recognize that some of those charged defendants elect to pursue a path of lesser resistance to resolve the charges against them, including choosing ARD over a prolonged trial. Former Justice Eakin recognized as much in his dissent in *Whalen*. Justice Eakin explained that, while ARD "requires no admission of guilt by the accused nor proof thereof by the prosecution, . . . to state that every person

---

[74] *See* OISR at 8. The OISR goes even further in its attempt to synonymize ARD with a prior conviction by asserting broadly that, pursuant to this Court's similar and factually unsupportable speculation in *Commonwealth v. Whalen*, 32 A.3d 677 (Pa. 2011), it is "logically incompatible" for a defendant to enter ARD and also to maintain his or her innocence of the crimes charged. OISR at 8-9, n.6. The OISR (like the *Whalen* Court) assumes too much. As I explain herein, we have no way of knowing why a person enters into the program. The defendant is not required to admit guilt before his or her admittance. We can only surmise. I cannot subscribe to a constitutional analysis premised—even in part—upon speculation, supposition, and assumption.

[75] *Id.*

[76] *See* The National Registry of Exonerations, https://www.law.umich.edu/special/exoneration/Pages/Exoneration-by-Year.aspx (depicting a year-by-year graph for the 3,371 exonerations that have occurred in the United States since 1989) (last visited January 31, 2023); *see also* Josh Bowers, *Punishing the Innocent*, 156 U. PA. L. REV. 1117, 1124 (2008) ("There is no longer any serious question that innocent people are charged with and convicted of crimes.").

who enters ARD has 'violated' [the DUI statute] is just not accurate."[77] Justice Eakin then astutely recognized that some defendants "facing DUI charges often request ARD, to be sure, for if available, acceptance eliminates mandatory incarceration," which he observed was "not an insignificant consideration."[78]

That some defendants opt not to fight charges despite their innocence needs no empirical support to warrant acknowledgment by this Court. "It is hardly a new observation that guilty pleas may prove attractive to the innocent."[79] The practice already is widely accepted as a common occurrence in the criminal legal system. It is, instead, the OISR's "everyone who enters ARD is guilty" approach that has been disproven over time. It is easy to presume that, in a system that offers "adversarial trials in which anyone accused of criminal activity may contest his guilt," innocent defendants "will in fact contest charges lodged against them."[80] However, the legal annals are replete with instances in which "[i]nnocent defendants may nonetheless [accept plea offers] rather than contest their guilt[.]"[81] "[B]ecause of prior experiences of pressures applied to them as they are processed through the criminal justice system," many innocent individuals "conclude that it is in their best interest to plead guilty although they know they did not commit the crime with which they are charged."[82] For instance, an innocent defendant might elect to plead guilty because of:

---

77 *Whalen*, 36 A.3d at 687 (Eakin, J., dissenting).

78 *Id.*

79 *See* Bowers, *supra* n.76, at 1120.

80 John L. Barkai, Accuracy Inquiries for all Felony and Misdemeanor Pleas: Voluntary Pleas but Innocent Defendants? 126 U. PA. L. REV. 88, 95-96 (1977).

81 *Id.* at 96.

82 *Id.*

> (1) the potentially overwhelming nature of the evidence against him; (2) the disparity in punishment between conviction by plea and conviction at trial; (3) a desire to protect family or friends from prosecution; (4) the conditions of pretrial incarceration; (5) a concern that fuller inquiry at trial may result in disclosure of additional facts which could increase the sentence in the present case or result in additional prosecutions; (6) a desire to expedite the proceedings because of feelings of hopelessness, powerlessness, or despair when faced with the power of the state; (7) pressure from family, friends, or attorneys; and (8) "ignorance, deception, delusion, feelings of moral guilt, or self-destructive inclinations."[83]

While the actual number of innocent defendants who plead guilty is not quantifiable, there can be no real question that "innocent defendants do plead guilty."[84] For many defendants, particularly those facing petty charges, "the best resolution is a quick plea in exchange for a light, bargained-for sentence."[85] "In low-stakes cases plea bargaining is of near-categorical benefit to innocent defendants, because the process costs of proceeding to trial often dwarf plea prices."[86] Simply put, it is well-documented

---

83 *Id.* at 96-97 (citing, *inter alia*, *State v. Reali*, 139 A.2d 300 (N.J. 1958) (a guilty plea was entered after defendant was told by his attorney that his pretrial escape was tantamount to signing a confession); *Cortez v. United States*, 337 F.2d 699 (9th Cir. 1964) (the defendant's guilty plea was entered in exchange for a promise that his pregnant wife would be allowed to plead guilty to a lesser charge); *Kent v. United States*, 272 F.2d 795 (1st Cir. 1959) (a guilty plea was induced by a promise not to prosecute defendant's fiancee); *Newbold v. State*, 492 S.W.2d 809 (Mo. 1973) (the defendant agreed to plead guilty in order to be transferred out of the local jail); *People v. Johnson*, 305 N.Y.S.2d 274 (N.Y. 1969) (defendant's guilty plea was entered in order to obtain treatment for narcotic addiction); *Morgan v. State*, 287 A.2d 592 (Me. 1972) (plea entered to expedite the process to alleviate emotional duress caused by the charges); *People v. Heirens*, 122 N.E.2d 231 (Ill. 1954) (defendant succumbed to pressure from defense attorneys and parents and pleaded guilty); and *State v. Durham*, 498 P.2d 149 (Ariz. 1972) (defendant's plea was based upon emotions rather than a concession of actual guilt)).

84 *Id.* at 97.

85 *See* Bowers*, supra* n.76, at 1120.

86 *Id.* at 1132; *see also id.* at 1134 ("The costs of pleading guilty may prove so comparatively low in minor cases that pleading becomes a reasonable option even before assessing the real danger of trial conviction and subsequent sentence. Like the driver who summarily pays the undeserved traffic ticket, defendants may conclude that the fight is not worth it, especially when they may plead guilty at arraignments, just hours after (continued…)

that guilt is not the only reason that criminal defendants plead guilty. The same undoubtedly holds true for defendants who elect to resolve their cases through diversionary programs. This observation is not remarkable. The OISR's denial of it is.

The OISR itself notes that "[n]one of that makes any difference."[87] Ultimately, I agree. A defendant's reasons for choosing to enter ARD are irrelevant to our *Apprendi* analysis. I do not offer this exploration of a defendant's possible reasons in order to suggest otherwise, but rather to expose the fallacy in the OISR's assumption that entrance into ARD, *ipso facto*, is an admission of guilt. The OISR assumes guilt, while simultaneously discounting any other motive as irrelevant. The OISR cannot have it both ways. ARD is not a prior conviction for *Apprendi* purposes. No amount of speculation by the OISR as to the defendant's motives can change that. A significant number of defendants enter ARD across Pennsylvania each year. It is factually and legally unsupportable to suggest that every one of them did so only because they were guilty of the charge. It is even worse to use that baseless and unprovable assumption as a reason to deny a person his or her Sixth Amendment rights.

ARD is not a prior criminal conviction. The ARD process shares no substantive similarities with a formal criminal conviction. As such, it cannot be treated the same for purposes of the Sixth Amendment. Nor is ARD a sentencing factor historically delegated to legislative policies and enactments. Thus, it can only be a fact for *Apprendi* purposes, and the Commonwealth must prove the circumstances of that earlier offense beyond a reasonable doubt before it may use that offense as a sentencing-enhancing factor. This

---

their arrests. It is small wonder, then, that so many defendants--innocent and guilty--have little interest in engaging in process in these cases and simply wish to "get [them] over with.").

87 OISR at 8-9, n.6.

is not, as the OISR proclaims, a mere disagreement with the General Assembly.[88] The recidivist statute plainly violates the Sixth Amendment.

Justice Donohue joins this opinion in support of affirmance.

[88] *See* OISR at 8-9, n.6.