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

BAER, C.J., TODD, DONOHUE, DOUGHERTY, WECHT, MUNDY, BROBSON, JJ.

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 REVERSAL

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

In this discretionary appeal we address the sentencing implications, for a driving-under-the influence (DUI) conviction, of a defendant's prior acceptance of accelerated rehabilitative disposition (ARD). More particularly, we consider whether such acceptance may constitutionally qualify as a prior offense for sentencing purposes if found by a judge on a preponderance rather than by a jury beyond a reasonable doubt.

In 2018, on the day in question, the police initiated a vehicle stop after observing Appellee driving erratically. The officers noticed an odor of marijuana and alcohol emanating from Appellee and from his car, and they saw drug-related items inside the vehicle. After Appellee failed field sobriety tests, and a breathalyzer showed the presence of alcohol in his system, Appellee was taken into custody and transported to the hospital

for a blood draw. He was ultimately charged and found guilty at a non-jury trial of several offenses, including DUI-general impairment.[1]

Sentencing took place in November 2019. By that time, the court was aware Appellee had previously been charged with DUI in 2015 and elected to resolve that matter through the ARD program. Notably, under the Vehicle Code, ARD acceptance is listed within the definition of a prior offense for purposes of DUI recidivist sentencing:

> **(a) General rule.--** . . . the term "prior offense" as used in this chapter [*i.e.*, Chapter 38 of the Vehicle Code, relating to driving after imbibing alcohol or utilizing drugs] shall mean any conviction for which judgment of sentence has been imposed, adjudication of delinquency, juvenile consent decree, *acceptance of Accelerated Rehabilitative Disposition* or other form of preliminary disposition before the sentencing on the present violation for any of the following:
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> (1) an offense under section 3802 (relating to driving under influence of alcohol or controlled substance); . . .

75 Pa.C.S. §3806(a) (emphasis added). The above applies so long as the prior offense occurred within a ten-year lookback period, *see id*. § 3806(b), which it did here. In compliance with the Vehicle Code, therefore, the court treated the present DUI conviction as a second offense and sentenced Appellee accordingly under Section 3804(a):

> **(a) General impairment.--** . . . an individual who violates section 3802(a) (relating to driving under influence of alcohol or controlled substance) shall be sentenced as follows:
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> (1) For a first offense, to: (i) undergo a mandatory minimum term of six months' probation; (ii) pay a fine of $300; (iii) attend an alcohol highway safety school approved by the department; and (iv) comply with all drug and alcohol treatment requirements imposed under sections 3814 (relating to

[1] *See generally Commonwealth v. Verbeck*, 2021 WL 1328551, at *1 & n.1 (Pa. Super. Apr. 9, 2021) (giving a full list of charges and convictions). DUI-general impairment is defined as driving after consuming enough alcohol to be unable to drive safely, or to have a blood-alcohol content between 0.08% and 0.10%. *See* 75 Pa.C.S. § 3802(a).

> drug and alcohol assessments) and 3815 (relating to mandatory sentencing).
>
> (2) For a second offense, to: (i) undergo imprisonment for not less than five days; (ii) pay a fine of not less than $300 nor more than $2,500; (iii) attend an alcohol highway safety school approved by the department; and (iv) comply with all drug and alcohol treatment requirements imposed under sections 3814 and 3815.
>
> (3) For a third or subsequent offense, to: (i) undergo imprisonment for not less than ten days; (ii) pay a fine of not less than $500 nor more than $5,000; and (iii) comply with all drug and alcohol treatment requirements imposed under sections 3814 and 3815.

75 Pa.C.S. § 3804(a). In particular, the court sentenced Appellee under (a)(2). It imposed a fine of $1,500 and ordered Appellee to undergo a term of intermediate punishment for a period of five years, including an initial period of restrictive intermediate punishment for 120 days in home detention, with the remainder to be served on standard probation.[2] As can be seen from the above, this was a higher penalty than if the ARD acceptance did not qualify as a prior offense and Appellee had been sentenced as a first-time offender.

On appeal to the Superior Court, Appellee initially raised issues unrelated to this appeal. After that tribunal affirmed his judgment of sentence, *see Commonwealth v. Verbeck*, 2020 WL 7259716 (Pa. Super. Dec. 10, 2020) (table) (withdrawn), it granted his request for reconsideration together with leave to brief an additional issue: whether, based on that court's then-recent published decision in *Commonwealth v. Chichkin*, 232 A.3d 959 (Pa. Super. 2020), the county court should have sentenced him on the DUI-general impairment charge as a first-time offender rather than a second-time offender.

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[2] County intermediate punishment is available as a sentencing option for certain non-violent offenders who would otherwise be sentenced to partial or total confinement. *See* 42 Pa.C.S. § 9802 (defining "eligible offender"). *See generally Commonwealth v. Wegley*, 829 A.2d 1148, 1152-53 (Pa. 2003) (discussing the legislative intent behind intermediate punishment and the range of options available under that scheme, as well as its differences from ordinary probation).

By way of background, *Chichkin* addressed the issue presently before this Court. It held that a defendant's prior acceptance into the ARD program could not itself qualify as a sentencing factor in light of the precept, set forth in *Alleyne v. United States*, 570 U.S. 99, 103 (2013), that any fact which by law increases the mandatory minimum sentence for a crime, other than the fact of a prior conviction, is an element of the offense that must be proved to the factfinder beyond a reasonable doubt. *See Chichkin*, 232 A.2d at 967. *Chichkin* observed *Alleyne* was an expansion of the rule announced in *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000), that any fact, other than a prior conviction, which increases the penalty for a crime beyond the otherwise-imposable statutory maximum, must be submitted to a jury and proved beyond a reasonable doubt. According to *Chichkin*, therefore, to invoke the recidivist sentence under the Vehicle Code consistent with *Alleyne* and *Apprendi*, the Commonwealth must, as part of the current proceedings, prove beyond a reasonable doubt that the defendant "actually committed" the previous DUI offense that was resolved through ARD acceptance. *Chichkin*, 232 A.3d at 971.[3] Thus, *Chichkin* declared Section 3806(a) unconstitutional to the extent it "equates a prior acceptance of ARD to a prior conviction for purposes of subjecting a defendant to a mandatory minimum sentence under Section 3804." *Id*. at 968.[4]

Returning to the present case, on reconsideration the Superior Court reaffirmed its

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[3] The Commonwealth did not seek allowance of appeal in *Chichkin*. During the pendency of the present appeal, however, *Chichkin*, which was decided by a three-judge panel, was overruled by an *en banc* panel in two cases filed the same day. *See Commonwealth v. Moroz*, 284 A.3d 227 (Pa. Super. 2022); *Commonwealth v. Richards*, 284 A.3d 214 (Pa. Super. 2022).

[4] In *Chichkin* the defendants had been sentenced under Section 3804(b) instead of 3804(a) because their current DUI offenses involved property damage. *See* 75 Pa.C.S. § 3804(b). That distinction is of no moment because subsections 3804(a) and 3804(b) both rely on Section 3806(a)'s inclusion of ARD within its definition of "prior offense," and *Chichkin* declared Section 3806(a) unconstitutional as applied to prior ARD acceptances.

denial of relief on Appellee's original claims. Citing *Chichkin*, however, it vacated Appellee's judgment of sentence and remanded for resentencing on the DUI-general impairment charge as a first offense. *See Commonwealth v. Verbeck*, 2021 WL 1328551, at *4 (Pa. Super. June 10, 2021) (unpublished decision). This Court granted the Commonwealth's request for further review, in which the Commonwealth framed the question presented as:

> Whether the Superior Court erred in holding for DUI sentencing purposes that the Defendant's conviction was a first offense in ten years as opposed to a second offense in ten years based upon the defective holding in *Commonwealth v. Chichkin*, 232 A.3d 959 (Pa. Super. 2020), that acceptance of ARD could not be treated as a prior conviction?

Commonwealth v. Verbeck, 270 A.3d 1098 (Pa. 2022) (*per curiam*).

As previously explained, the Superior Court recently overruled *Chichkin* in *Moroz* and *Richards*. *See supra* note 3. The court held that recidivist DUI sentencing which, per Section 3806(a) of the Vehicle Code, includes an ARD acceptance as a prior offense, may take place consistent with *Apprendi/Alleyne*, even where that circumstance is not proved to the fact finder beyond a reasonable doubt. *See Moroz*, 284 A.3d at 233 ("We now hold that the portion of Section 3806(a), which equates prior acceptance of ARD to a prior conviction for purposes of imposing a Section 3804 mandatory minimum sentence, passes constitutional muster."); *Richards*, 284 A.3d at 220 (same). That development does not render this appeal moot or improvident, however, as Appellee's sentence is more lenient than it would be under now-prevailing Pennsylvania law as set forth in *Moroz/Richards*. Even more important, we note that DUI sentencing takes place with some frequency in this Commonwealth, and the *Moroz/Richards* decisions were both decided by a 5-4 vote of the intermediate court's *en banc* panel. These circumstances suggest it would be helpful for this Court to decide the issue without further delay. As the issue has been briefed and argued, we now turn to its merits.

By way of brief overview, when a defendant is charged with DUI under Section 3802 as a first offense in ten years, the attorney for the Commonwealth, subject to certain exceptions, may offer the defendant the ability to resolve those charges through ARD. *See* 75 Pa.C.S. § 3807(a) (relating to eligibility). *See generally* Pa.R.Crim.P. Chapter 3 (governing the procedures pertaining to ARD). ARD is a diversionary program, *see PennDOT v. McCafferty*, 758 A.2d 1155, 1162 (Pa. 2000), which may result in a license suspension, *see* 75 Pa.C.S. § 3807(d), but which is otherwise largely rehabilitative in nature. *See id*. § 3807(b) (relating to evaluation and treatment). *See generally* Pa.R.Crim.P. Ch. 3, Explanatory Cmt. (indicating ARD's primary purpose "is the rehabilitation of the offender").[5]

Upon successful completion of ARD, the defendant may move to dismiss the charges. If the motion is granted, the defendant's arrest record is expunged absent compelling reasons to the contrary. *See* Pa.R.Crim.P. 320 & Comment. *See generally J.F. v. DHS*, 245 A.3d 658, 661-62 (Pa. 2019) (providing an overview of ARD procedures). For its part, PennDOT is notified any time a defendant accepts ARD, and if the defendant maintains a clean driving record for ten years thereafter, PennDOT expunges the ARD record. *See* 75 Pa.C.S. § 1534. This Court has thus noted that the procedural rules

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[5] Not all first-time DUI defendants are given this opportunity. As we have explained:

> Society has no interest in blindly maximizing the number of ARD's passing through the criminal justice system, and the criminal defendant has no right to demand that he be placed on ARD merely because any particular offense is his first. Rather, society, for its own protection, has an interest in carrying out the penalties prescribed by the legislature for drunk driving, except in the cases where even society's representative in the case, the district attorney, acting in conjunction with the court . . . determines that ARD is preferable to conviction because of the strong likelihood that a given criminal defendant will in fact be rehabilitated by an ARD program.

Commonwealth v. Lutz, 495 A.2d 928, 931 (Pa. 1985).

governing the ARD program

> contemplate that ordinarily the defendants eligible for the ARD program are first offenders who lend themselves to treatment and rehabilitation rather than punishment and that the crime charged is relatively minor and does not involve a serious breach of the public trust. The program is intended to encourage offenders to make a fresh start after participation in a rehabilitative program and offers them the possibility of a clean record if they successfully complete the program.

Pa.R.Crim.P. Ch. 3, Explanatory Cmt.; *see also Lutz*, 495 A.2d at 931 (explaining that the ARD rules are based on the belief that in some cases social or behavioral problems can be solved by "treatments" rather than by punishment). At the same time, ARD "is not some trivial mechanism for avoiding a conviction and expunging an arrest record. Rather, it is an intensive process involving personal assessments, safety classes, and addiction treatment, if necessary, all under court supervision for six months to a year[.]" *Whalen v. PennDOT*, 32 A.3d 677, 684 (Pa. 2011). Additionally, because drunk driving is a serious offense and a "life-threatening act," *Lutz*, 495 A.2d at 936, deterring DUI recidivism through penalties that increase in severity with each new offense is an important societal goal, including for individuals who resolve their first DUI charge through ARD. *See generally Birchfield v. North Dakota*, 579 U.S. 438, 465 (2016) (acknowledging states have a compelling interest in creating deterrents to drunk driving). Such individuals

> have chosen to drive drunk after having been placed under court supervision, after having been enrolled in alcohol highway safety school, and after having had their operating privileges suspended. It is rational to conclude that such individuals are less easily deterred from continuing to drink and drive than first time offenders who have had no prior contact with the criminal justice system.

Commonwealth v. Becker, 530 A.2d 888, 892 (Pa. Super. 1987); *accord Commonwealth v. Shawver*, 18 A.3d 1190, 1199 (Pa. Super. 2011) (indicating that drivers who commit a second DUI offense despite the benefits of the ARD program should receive a greater punishment than those who have not had a prior chance to reform).

A defendant's acceptance of ARD does not constitute a conviction. *See Whalen*, 32 A.3d at 681 (citing *Lutz*, 495 A.2d at 933). But such acceptance is deemed to reflect a decision by the defendant not to "dispute[] the commission of the offense" as, for example, the defendant agrees to undergo rehabilitation and to reimburse others for financial losses he or she caused – all of which would make little sense if the offender disputed having committed the offense. *Id*. at 684; *cf. id*. (explaining that, while ARD acceptance does not constitute a guilty plea as such, that "should not . . . obscure the common sense observation that a defendant who actively denies that he committed a violation of law is simply not a likely or promising candidate for ARD"). In this way, although ARD acceptance does not trigger criminal penalties, it does imply a concession by the defendant that he or she, in fact, committed the offense – a circumstance recognized by numerous aspects of the Vehicle Code. *See, e.g.*, 75 Pa.C.S. §§ 3807(d) (relating to the suspension of operating privileges as the result of ARD acceptance), 1542(c) (listing acceptance of ARD as "an offense" for purposes of the Vehicle Code's definition of a "habitual offender" subject to license revocation), 3806(a) (including ARD acceptance within the definition of a "prior offense" for sentencing purposes), 1539(c) (providing that ARD acceptance for a DUI offense constitutes a prior suspension of driving privileges for purposes determining whether the current suspension is a first, second, or third, or subsequent one).[6] The question for present purposes is whether acceptance of

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[6] The Justices supporting affirmance object to the concept that ARD acceptance implies such a concession, *see* Opinion in Support of Affirmance (OISA) at 10 (Todd, C.J.); OISA at 15 (Wecht, J.), but we made this same observation in *Whalen*. In that matter we reviewed the responsibilities associated with ARD and determined that they

> imply that a defendant who accepts ARD has indeed committed a DUI offense . . .. It would make no sense to require, as a condition of participation in ARD, that a defendant compensate those who incurred

(continued…)

ARD thereby falls within the exception to the rule set forth in the *Apprendi/Alleyne* line of cases. Inasmuch as the United States Supreme Court has not analyzed that specific issue, we obtain guidance by reviewing its reasoning reflected in that line of cases and considering how courts in other jurisdictions have ruled on this question.

In *Apprendi*, the defendant fired shots into a residential property, and there was conflicting evidence on whether he did so with a racially-biased motive for purposes of

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> financial losses "as a result of [his or her] actions which resulted in the offense" if, in fact, none of the defendant's actions resulted in the offense.
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> In addition, . . . it is difficult to envision how the primary purpose of ARD – rehabilitation of the offender – could be accomplished if the offender disputed the commission of the offense. . . . [Whalen] is, of course, correct in his assertion that acceptance of ARD does not involve a guilty plea. However, that . . . should not be allowed to obscure the common sense observation that a defendant who actively denies that he committed a violation of law is simply not a likely or promising candidate for ARD.

Whalen, 32 A.3d at 684. Thus, *Whalen* concluded ARD acceptance is logically incompatible with any denial of culpability by the defendant. There simply is no daylight between that conclusion and the concept that ARD acceptance subsumes an implicit concession by the defendant that he or she did commit the offense.

For his part, Justice Wecht speculates that innocent drivers are being charged with DUI and choosing ARD over going to trial. *See* OISA at 19-20 & n.74. He cites no data, empirical or otherwise, to support such conjecture. In any event, it is just as easy to speculate that some prior convictions were obtained through a guilty plea by innocent drivers who chose to plead guilty to a lesser charge rather than going to trial and risking a conviction on a more serious charge – and indeed Justice Wecht goes to some length to make that very point. *See id*. at 21-23. None of that makes any difference, however, as a driver who previously pled guilty or accepted ARD, even though innocent, is still subject to recidivist sentencing on a new DUI conviction; he is not entitled to relitigate the prior charges no matter how they were resolved, and he is subject to same sentencing consequences whether a prior ARD is proven to the jury or the judge. The main difference is that if the prior ARD is proven to the jury, then the jury would become aware of prior-bad-acts evidence in addition to the Commonwealth's proofs of guilt on the present DUI charge. To the extent Justice Wecht objects to ARD being the basis for recidivist sentencing, his disagreement is with the General Assembly.

the state's hate-crime sentencing enhancement. He pleaded guilty to possessing a firearm for an unlawful purpose, and at sentencing the judge found the presence of a biased motive by a preponderance of the evidence, which raised his punishment. The Supreme Court held that such procedure violated the defendant's constitutional rights – namely, his Sixth Amendment right to trial by jury, combined with his right to due process of law as guaranteed by the Fourteenth Amendment[7] – and that the state's decision to label the provision as a sentencing factor was of no relevance. *See Apprendi*, 530 U.S. at 476. The Court ultimately concluded, as a general precept:

> 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.

Id. at 490. The "statutory maximum" under *Apprendi* is the highest sentence a judge can impose based only the facts reflected in the jury's verdict or admitted by the defendant. *See Blakely v. Washington*, 542 U.S. 296, 303 (2005).

Subsequently, in *Alleyne*, the Supreme Court held this principle applies with equal force to facts which increase the mandatory minimum sentence. *See Alleyne*, 570 U.S. at 108. That Court has reaffirmed this holding in multiple contexts in the years since *Apprendi* was decided. *See Ring v. Arizona*, 536 U.S. 584 (2002) (sentence of death); *Blakely v. Washington*, 542 U.S. 296 (2005) (sentence in excess of the standard range under the state's sentencing guidelines); *United States v. Booker*, 543 U.S. 220 (2005) (same under the federal sentencing guidelines); *Cunningham v. California*, 549 U.S. 270 (2007) (state determinate sentencing scheme exposing defendant to elevated sentence); *Southern Union Co. v. United States*, 567 U.S. 343 (2012) (imposition of criminal fines);

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[7] The Sixth Amendment jury right applies to the states via the Fourteenth Amendment. *See Duncan v. Louisiana*, 391 U.S. 145, 162 (1968); *Parker v. Gladden*, 385 U.S. 363, 364 (1966). Due process requires the government to prove every element of a crime beyond a reasonable doubt. *See In re Winship*, 397 U.S. 358, 364 (1970).

United States v. Haymond, 139 S. Ct. 2369 (2019) (revocation of supervised release and imposition of a prison term).[8]

The *Apprendi* rule's exclusion of prior convictions was based largely on the Court's decision two years earlier in *United States v. Almendarez-Torres*, 523 U.S. 224 (1998). In that matter, the defendant illegally reentered the United States after having been deported following his conviction of aggravated felonies. His illegal reentry would ordinarily have triggered a maximum prison term of two years, but Congress had authorized a penalty of up to 20 years if the deportation followed an aggravated-felony conviction. The Court focused its analysis on whether that statutory provision simply authorized an enhanced penalty for the existing crime, or whether it was instead an element of a new crime, in which case it would have had to appear in the indictment (which it did not). *See Hamling v. United States*, 418 U.S. 87, 117 (1974). Because the subject matter of the provision was recidivism, the Court held it was a sentencing factor, not an element of a separate crime. The Court expressed that recidivism "is as typical a sentencing factor as one might imagine." *Almendarez-Torres*, 523 U.S. at 230; *see id*. at 241 (same); *id*. at 243 (same). In this respect, the Court highlighted that the fact the

[8] One exception is *Oregon v. Ice*, 555 U.S. 160 (2009), where the Supreme Court upheld a state enactment governing whether multiple sentences should be run concurrently or consecutively. The statute made concurrent sentences the default but it gave the sentencing court discretion to run them consecutively upon a judicial finding of certain facts – such as that the offenses did not arise from the same continuous course of conduct, or if they did, that the offense showed the defendant's willingness to commit more than one offense or created a risk of independent harm to a different victim. *See id*. at 165. The Court reasoned that, even though such facts did not consist of prior convictions, the choice between concurrent and consecutive sentences historically fell within the domain of state legislatures and not that of the jury. *See id*. at 169; *see also id*. at 170 (stating the scope of the Sixth Amendment jury right "must be informed by the historical role of the jury at common law"). As such, it did not implicate *Apprendi*'s "animating principle" which is to preserve the jury's "historic role as a bulwark between the State and the accused at the trial for an alleged offense." *Id*. at 168.

defendant had recidivated "does not relate to the commission of the [present] offense, but goes to the punishment only[.]" *Id*. at 244 (quoting *Graham v. West Virginia*, 224 U.S. 616, 629 (1912)) (emphasis removed). Additionally, in discussing Congress's likely intent underlying the sentencing enhancement, the Court observed that any contrary interpretation, whereby the fact of the prior offense would be considered an element of the present crime which must be proved to a jury, would risk unfairness to the defendant because evidence of the defendant's prior bad acts would have to be introduced at trial. *See id*. at 234-35.

In this line of cases, the facts which, under the Sixth Amendment (in conjunction with due process), must be proved to a jury beyond a reasonable doubt pertain to the commission of the present offense, and not to the defendant's prior record. These include such items as the defendant's conduct and *mens rea*, as well as any attendant circumstances which the criminal statute makes relevant. This is evident in at least two ways. First, and most obvious, the rule by its terms excludes prior offenses as facts that must be proved to a jury. Second, the Supreme Court has repeatedly stated its conclusions in terms which speak of the aggravating facts that a jury must find as constituting a new, more serious offense. *See, e.g.*, *Alleyne*, 570 U.S. at 114-15 ("When a finding of fact alters the legally prescribed punishment so as to aggravate it, the fact necessarily forms a constituent part of *a new offense* and must be submitted to the jury.") (emphasis added); *People v. Black*, 161 P.3d 1130, 1144 (Cal. 2007) (noting Apprendi has treated the crime together with its sentencing enhancement as the equivalent of "a single, greater crime") (internal quotation marks omitted). Because the defendant is, in effect, on trial for that more serious offense relative to which the Sixth Amendment jury right has full effect for every element, the focus on the defendant's conduct in committing *this* offense is consistent with the "core concern" underlying the *Apprendi* rule: "to reserve

to the jury the determination of facts that warrant punishment for a specific statutory offense[.]" *Southern Union*, 567 U.S. at 349 (internal quotation marks and citation omitted).

This is confirmed by a review of the Supreme Court cases in which the *Apprendi* rule has been applied to invalidate a sentence based on judicial fact-finding. In all such cases, the facts in question have related to the commission of the current offense. They have never related to the defendant's record of prior conduct. Thus, the Supreme Court has invalidated sentences where the sentencing judge found that: a defendant convicted of possessing a firearm for an unlawful purpose acted with racial animus, *see Apprendi*, 530 U.S. at 471; a defendant convicted of felony murder was the actual killer and a major participant in the armed robbery, the offense was carried out to obtain money, and it was committed in an especially heinous, cruel, or depraved manner, *see Ring*, 536 U.S. at 594-95; a defendant convicted of kidnapping involving domestic violence and use of a firearm acted with deliberate cruelty, *see Blakely*, 542 U.S. at 300-01; a defendant convicted of drug possession possessed a certain quantity of crack cocaine at the time of the offense in addition to the drugs the jury found him to have possessed, *see Booker*, 543 U.S. at 235; a defendant convicted of continuous sexual abuse of a child engaged in violent conduct when committing the offense, *see Cunningham*, 549 U.S. at 275; a defendant corporation convicted of knowingly storing hazardous waste without a permit violated the statute for a specific number of days, *see Southern Union*, 567 U.S. at 347; and a sex offender knowingly possessed child pornography while on supervised release following imprisonment, *see Haymond*, 139 S. Ct. at 2374. The same can be said of cases in which the Supreme Court acknowledged an *Apprendi* violation but deemed it

waived or harmless,[9] as well as all of the examples Appellee provides. *See* Brief for Appellee at 14 (citing cases involving the age of the victim, the proximity of the crime to a school, and the quantity of drugs possessed).

This is not to say that no facts concerning the offender may ever be encompassed by the rule.[10] But during the quarter-century beginning with *Almendarez-Torres* and continuing to the present day, the Supreme Court has never considered factors relating to recidivism, as opposed to the commission of the present crime, an essential part of the "bulwark between the State and the accused" that *Apprendi* is designed to preserve, *Ice*, 555 U.S. at 168, in light of its view that recidivism is "a traditional, if not the most traditional, basis for *a sentencing court's* increasing an offender's sentence." *Almendarez-Torres*, 523 U.S. at 243 (emphasis added). Not only does the fact of recidivism not pertain to the crime itself, but "unlike virtually any other consideration used to enlarge the possible

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[9] *See United States v. Cotton*, 535 U.S. 625 (2002) (holding defendants, who were convicted of possession with intent to distribute a "detectable amount" of cocaine had waived their objection to indictment's failure to state the quantity of the drugs which was found by the sentencing court and which enhanced the statutory maximum penalty, and such failure was not plain error); *Washington v. Recuenco*, 548 U.S. 212 (2006) (where the defendant was convicted of assault with a deadly weapon, and the sentencing judge found that that weapon was a firearm, holding that the *Blakely* error inherent in such judicial finding was not "structural").

We note that, in *Schriro v. Summerlin*, 542 U.S. 348 (2004), the Court acknowledged *Ring* had invalidated Arizona's capital sentencing statute to the extent it allowed a judge to find aggravating circumstances, and one such circumstance was the existence of a prior felony conviction involving use or threatened use of violence. *See id*. at 350. However, *Ring* did not involve that aggravator, and in *Schriro* the Court ultimately upheld the death sentence on the basis that *Apprendi* did not apply retroactively to cases already final on direct review. Thus, in the unique capital sentencing arena, a finding of a prior history of violent offenses may be subject to the *Apprendi* rule. But *Almendarez-Torres* clearly evidences that in other contexts, the fact of recidivism does not fall within that rule.

[10] The Supreme Court has declined to endorse an offense/offender distinction in the *Apprendi* context. *See Cunningham*, 549 U.S. at 291 n.14.

penalty for an offense . . ., a prior conviction must itself have been established through procedures satisfying the fair notice, reasonable doubt, and jury trial guarantees," *Jones v. United States*, 526 U.S. 227, 249 (1999), or through a voluntary waiver of those rights, *e.g.*, via a guilty or *nolo contendere* plea. *See Brady v. United States*, 397 U.S. 742, 748 (1970) (recognizing a guilty plea is the defendant's waiver of his right to a trial before a judge or jury and his consent that a judgment of conviction may be entered).

Indeed, in explaining why prior convictions are exempt from the general rule, *Apprendi* made two salient observations. First, and consistent with the above, it noted that recidivism does not pertain to the commission of the present crime, whereas the biased-motive inquiry at issue in that case went "precisely to what happened in the 'commission of the offense.'" *Apprendi*, 530 U.S. at 496 (quoting *Almendarez-Torres*, 523 U.S. at 230). *Apprendi*'s second observation also directly relates to the present controversy. The Court recognized that

> there is a vast difference between accepting the validity of a prior judgment of conviction entered in a proceeding in which the defendant had the right to a jury trial and the right to require the prosecutor to prove guilt beyond a reasonable doubt, and allowing the judge to find the required fact under a lesser standard of proof.

Id.

A defendant charged as a first-time DUI offender is under no legal compulsion to accept ARD and, as such, enjoys the full panoply of constitutional rights attendant to a criminal prosecution. By the time such a defendant accepts ARD, he has been advised of the charges against him, and a preliminary hearing has been held or voluntarily waived. He has had a chance to obtain a lawyer or have one appointed for him, and to review pretrial discovery. Even if he is offered the option of resolving charges through ARD, he is under no obligation to do so and may assert his right to have the Commonwealth prove every element of the offense beyond a reasonable doubt. If he applies to resolve the

charges through ARD, any information he supplies in connection with that application cannot be used against him for any purpose (other than prosecution for giving false information). *See* Pa.R.Crim.P. 311(B). Assuming the defendant wishes to proceed with ARD, Section 3806(a) puts him on notice that successful completion of the program will count as a "prior offense" in the event he re-offends. *See Commonwealth v. Robertson*, 186 A.3d 440, 446 (Pa. Super. 2018) (observing courts presume defendants are aware of the statutory law relating to the crime with which they are charged). He thus voluntarily accepts that state of affairs as a necessary corollary to a benefit he presently receives by avoiding criminal penalties.[11] Furthermore, during the proceedings, a court hearing is held with the defendant's counsel present in which the court ensures that the defendant understands and agrees to the terms of the program. *See* Pa.R.Crim.P. 312, 313. The court then holds an off-the-record inquiry into the underlying facts at which time interested parties, including the defendant and the victim (if any), may present information. Again, the information the defendant gives during that hearing may not be used against him. If at the end of the hearing, the court agrees that ARD is appropriate, the record is opened and the defendant states affirmatively whether he accepts the conditions and agrees to comply with them. *See id*. An ARD participant who violates the conditions of the program is returned to the *status quo ante*, see Pa.R.Crim.P. 318(c), and retains the same constitutional rights as before. *See, e.g.*, Pa.R.Crim.P. 318, 600(A)(2)(c) (relating to prompt trial after ARD termination), 1013(I) (same for municipal court); *accord* Brief for Appellee at 24.

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[11] Justice Wecht observes this purported awareness is not sufficient to waive a defendant's Sixth Amendment rights. *See* OISA at 17. Neither is it necessary. *See* Pa.R.Crim.P. 590 & cmt.; *Commonwealth v. Williams*, 732 A.2d 1167, 1184 & n.11 (Pa. 1999). Regardless, ARD is not a criminal prosecution. Thus, no valid Sixth Amendment waiver is required for ARD acceptance to comply with due process. *See* discussion *infra* at 21-22.

As discussed above, the defendant's successful completion of the ARD program is not technically a conviction, but it is part of the defendant's record of prior conduct unrelated to the present offense; it arose after Appellee, who 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, voluntarily waived that right in favor of ARD acceptance. For purposes of the court's recidivism inquiry, then, it is substantially similar to a conviction based on a guilty plea in the sense that the defendant's actions in waiving his constitutional rights and accepting ARD lend sufficient reliability to those proceedings to satisfy due process. *Cf. United States v. Smalley*, 294 F.3d 1030, 1032-33 (8th Cir. 2002) ("[W]e conclude that 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.").[12]

In light of the above, if the defendant re-offends, it would make little sense to read *Apprendi* as requiring that the fact of his earlier ARD acceptance must be proved to a jury beyond a reasonable doubt. Imposing such a requirement would raise the risk of unfairness the Supreme Court expressly sought to avoid in *Almendarez-Torres* because prior-bad-acts evidence would have to be put before the jury. *See Almendarez-Torres*, 523 U.S. at 234-35. It would make even less sense to require the Commonwealth to prove guilt of the prior charge beyond a reasonable doubt, as *Chichkin* held. Nothing in

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[12] *Smalley* disagreed with the result reached by a sister circuit in *United States v. Tighe*, 266 F.3d 1187 (9th Cir. 2001), which held the use of juvenile adjudications as sentence enhancers violates *Apprendi* where such adjudications do not afford a jury-trial right and a beyond-a-reasonable-doubt burden of proof. *See id*. at 1194. Both courts focused on whether the defendant at the prior proceeding was afforded adequate process. *See also United States v. Jones*, 332 F.3d 688, 696 (3d Cir. 2003) (favoring *Smalley* over *Tighe*); *Commonwealth v. Lee*, 260 A.3d 208, 217-18 (Pa. Super. 2021) (following *Jones*).

the *Apprendi* line remotely suggests such a mandate. Notably, the Supreme Court has "warned against 'wooden, unyielding insistence on expanding the *Apprendi* doctrine far beyond its necessary boundaries.'" *Ice*, 555 U.S. at 172 (quoting *Cunningham*, 549 U.S. at 295 (Kennedy, J., dissenting)). To help reviewing courts perceive the doctrine's "necessary boundaries," the Court added that "the jury-trial right is best honored through a principled rationale that applies the rule of the *Apprendi* cases within the central sphere of their concern." *Id*. (internal quotation marks and citation omitted). In turn, the central sphere of the *Apprendi* cases' concern is to prevent encroachment by sentencing judges upon facts historically found by the jury. Where that concern is not implicated, the Supreme Court has declined to apply the *Apprendi* rule. *See Ice*, 555 U.S. at 169; *see also Dillon v. United States*, 560 U.S. 817, 828-29 (2010) (finding *Apprendi* inapplicable to facts found by a judge at a retroactive sentence-reduction hearing permitted by an amendment to the federal sentencing guidelines, where the sentence-reduction process was not constitutionally compelled, and thus, there was no threat to the jury's traditional domain). For its part, even the Supreme Court has not applied *Apprendi*'s "any fact" rule in an absolutist fashion, as in *Ice* the Court held it *was* permissible for the judge to find facts, other than the fact of a prior conviction, which increased the defendant's aggregate sentence. *See Ice*, 555 U.S. at 173 (Scalia, J., dissenting) (pointing out the majority was not applying the *Apprendi* rule literally).[13]

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[13] The Sixth Amendment also allows judges deciding whether to apply an enhanced penalty under the Armed Career Criminal Act, 18 U.S.C § 924 (ACCA), to find facts *about* prior convictions, and not just the fact *of* the prior conviction, based on such items as the conviction record, indictments, verdict slips, plea agreements, plea colloquy transcripts, and jury instructions. *See A.L. v. Pennsylvania State Police*, 274 A.3d 1228, 1234-35 (Pa. 2022) (describing the "modified categorical approach" used by federal courts for ACCA sentencing). Judicial records of "conclusive significance" may be consulted in this regard. *Shepard v. United States*, 544 U.S. 13, 25 (2005) (plurality); *Kirkland v. United States*, 687 F.3d 878, 885 (7th Cir. 2012) (concluding from *Shepard* that *Apprendi*'s (continued…)

The bottom line is that, in ascertaining whether a recidivist sentencing statute violates the rule of *Apprendi/Alleyne*, reviewing courts need not place controlling weight on whether the earlier proceeding that makes the defendant a repeat offender was technically a "conviction." If it was a conviction, it clearly falls outside the *Apprendi* rule. But where the prior offense was resolved via a statutory diversionary program aimed at rehabilitation, courts should then ask whether the challenged procedure in the present matter assigns to a judge a decision that "traditionally belonged to the jury." *Ice*, 555 U.S. at 172; *accord State v. Rourke*, 773 N.W.2d 913, 920 (Minn. 2009); *Cruz v. Smith*, 2009 WL 816749, at *10 n.15 (S.D.N.Y. 2009). Here, the judge's role under Sections 3804(a) and 3806(a) of the Vehicle Code entails making a finding as to the number of prior offenses committed by the defendant. Ascertaining whether the defendant's record includes a previous ARD acceptance is no more the type of determination traditionally made by a jury than assessing whether the defendant has a prior DUI conviction.

Appellee objects on the basis that ARD acceptance does not reflect a finding of guilt, and he references numerous decisions in this and other jurisdictions suggesting penalties may not be assessed absent a finding of guilt. *See* Brief for Appellee at 17-22. Not only are some of those holdings based on specific statutory features, *see, e.g., Khan v. State Bd. of Auctioneer Exam'rs*, 842 A.2d 936, 950 (2004) (noting the Auctioneer and Auction Licensing Act only authorized reciprocal discipline where the out-of-state proceeding involved a specific finding of guilt), his argument overlooks that the present DUI conviction does reflect a finding of guilt. He thus conflates legal prerequisites for an

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recidivism exception includes findings *about* prior convictions "traceable to a prior judicial record of conclusive significance"). Such facts include a determination of which elements contained in a state criminal statute were necessarily implicated by the defendant's earlier conviction, *see A.L.*, 274 A.3d at 1235, as well as whether two or more prior offenses were committed on different occasions. *See Kirkland*, 687 F.3d at 886 (citing cases).

original civil or criminal penalty with those relating to sentence enhancements.

Appellee also relies on *J.F. v. DHS*, 245 A.3d 658 (Pa. 2021), but that case is materially distinguishable. In *J.F.*, the Administrative Agency Law gave a parent seeking to challenge a founded report of child abuse the "right to be heard" in an administrative hearing, albeit subject to the proviso, established in case law, that the parent could not use such a hearing to collaterally attack a prior judicial determination of guilt that formed the basis for the report. This Court held the no-collateral-attack rule does not apply to ARD acceptance because the ARD process does not include a recorded evidentiary hearing in which the person is able to employ the usual adversarial tools such as cross-examination and the presentation of favorable evidence, and an ARD court does not undertake to resolve the issues reflected in such a report. *See id*. at 673. Our decision rested on the administrative appellate rights supplied by statute, and while a founded report of child abuse gives rise to civil consequences such as limitations on employment, it does not result in criminal penalties. Even assuming *J.F*. can be seen as upholding rights that mirror procedural due process, which guarantees notice and a reasonable opportunity to be heard, *see Bundy v. Wetzel*, 184 A.3d 551, 557 (Pa. 2018), the dispute had nothing to do with recidivism; in other words, it involved procedures relating to consequences of the present conduct, not a prior offense. That being the case, the factors discussed above, such as whether the fact of recidivism is a determination historically made by juries, were not at issue.

Finally, Appellee references precedent indicating that prior arrests may not be used as a basis to enhance a defendant's sentence. *See* Brief for Appellee at 23-24 & n.9. Under the Vehicle Code, arrests alone do not comprise the basis for a finding of recidivist conduct, whereas ARD acceptance does. Relative to unadjudicated arrests, moreover, the policy justifications for enhanced penalties based on ARD acceptance

(summarized above) do not apply, nor does the defendant waive any rights in exchange for beneficial treatment by the government.

We pause here to comment on the basis offered by the Justices favoring affirmance for *Apprendi*'s prior-conviction exception. They direct attention almost exclusively to the circumstance that such convictions are presumed to have occurred after the defendant benefitted from the protections guaranteed by the Sixth Amendment. *See, e.g.*, OISA at 6 (Todd, C.J.); OISA at 10 (Wecht, J.). And that is certainly "*one* basis" for viewing prior convictions as constitutionally distinct. *Jones*, 526 U.S. at 249 (emphasis added). But an exclusive focus on that factor cannot be reconciled with the Supreme Court's decision in *Ice*, where the fact which resulted in an enhanced sentence was not a prior conviction, nor was it required by due process or the Sixth Amendment to be proved to a jury beyond a reasonable doubt. Justice Wecht notably explains that the *Ice* Court reached its conclusion because the concurrent-versus-consecutive-sentences decision was historically governed by legislation and not by juries. *See* OISA at 7 n.37. He thus references the limits to the historical role of juries in explaining why *Ice* found that the *Apprendi* rule did not apply to a non-conviction fact which increased the defendant's punishment. We do the same thing here.

An exclusive focus on the constitutional safeguards of the prior proceedings also suffers from theoretical difficulties. Suppose the person convicted of the present offense defends against recidivist sentencing on the grounds of mistaken identity, *i.e.*, that he is not the same person who was convicted of the earlier crime.[14] Then, even though the defendant in the earlier case enjoyed the full panoply of Fifth and Sixth Amendment rights, the identity of the prior defendant is a factual issue that must be resolved before an

[14] *See generally People v. Epps*, 18 P.3d 2, 5-7 (Cal. 2001) (positing various bases on which the fact of the prior conviction may be challenged, including mistaken identity and fabricated, insufficient, inaccurate, or inauthentic records).

enhanced sentence may be imposed. If one focuses solely on the procedural benefits of the earlier conviction, it is unclear that any principled reason exists why *that* factual issue need not be submitted to a jury and proved beyond a reasonable doubt, while all other factual issues which impact upon sentencing must be so submitted and so proved. More precisely, there is no evident basis in logic to support the concept that the *contested fact of a prior conviction* need not be found by a jury beyond a reasonable doubt, but the *contested fact of a prior ARD acceptance* must be.[15]

Although the procedural protections associated with ARD acceptance are lower than those prerequisite to criminal convictions, *see* OISA at 7-8 (Todd, C.J.); OISA at 16 (Wecht, J.), there is no present dispute they are sufficient to satisfy due process in relation to ARD – which does not involve criminal punishment. In this respect, the federal appellate courts have largely eschewed a singular focus on the term "conviction" and have instead looked to the adequacy of the procedural safeguards associated with the earlier adjudication in ascertaining whether it falls within the exception to *Apprendi*. Most frequently, federal courts have taken that approach in considering whether a prior juvenile adjudication can be used for recidivist sentencing notwithstanding that the prior offense was proved to a judge based on a lower standard of proof than beyond a reasonable

[15] The Justices supporting affirmance do not attempt to resolve this logical difficulty, and Justice Wecht criticizes our raising it because such circumstances are not before this Court. *See* OISA at 11 n.47. But our holding in this matter can only make a practical difference when the prior ARD acceptance is contested, because it is only then that the question of to whom it must be proved has any relevance. Notably, the jury trial guarantee as construed in *Apprendi* only has meaning in relation to contested facts. *See Cunningham*, 549 U.S. at 275 (facts admitted by the defendant do not come within the *Apprendi* rule); *Commonwealth v. Dixon*, 255 A.3d 1258, 1264 (Pa. 2021) (same). It is thus appropriate, for purposes of resolving the issue before this Court, to ask whether there is any meaningful difference, constitutionally speaking, between a *contested* prior ARD and a *contested* prior conviction. We are not aware of any and, as explained, the Justices supporting affirmance have not suggested one.

doubt. The vast majority have ruled that juvenile adjudications can be so used because the earlier procedure satisfied due process. *See United States v. Matthews*, 498 F.3d 25, 35 (1st Cir. 2007); *United States v. Jones*, 332 F.3d 688, 696 (3d Cir. 2003); *United States v. Wright*, 594 F.3d 259, 264 (4th Cir. 2010); *United States v. Crowell*, 495 F.3d 744, 750-51 (6th Cir. 2007); *Welch v. United States*, 604 F.3d 408, 428 (7th Cir. 2010); *United States v. Smalley*, 294 F.3d 1030, 1032-33 (8th Cir. 2002); *United States v. Burge*, 407 F.3d 1183, 1191 (11th Cir. 2005); *see also State v. Hitt*, 42 P.3d 732, 740 (Kan. 2002). *But see United States v. Tighe*, 266 F.3d 1187, 1194 (9th Cir. 2001) (reaching the opposite conclusion). Any distinction drawn between a juvenile adjudication and an ARD acceptance on the basis that only the former reflects proven conduct, *see, e.g.*, OISA at 7-8 (Todd, C.J.), runs headlong into the conclusions we reached in *Whalen*, *see supra* note 6 – and more fundamentally, it reflects a mere policy difference with the General Assembly as to whether ARD acceptance should constitute a valid basis for elevated sentencing in a subsequent DUI prosecution.

These observations raise the question of why the *Apprendi* Court viewed the fact of a prior conviction as having less stringent proof requirements than other facts impacting upon a defendant's punishment. Again, the Justices favoring affirmance propose the exception for prior convictions exists primarily because of the constitutional guarantees inherent in the criminal proceedings from which the previous convictions arose, *see* OISA at 6 (Todd, C.J.); *see also* OISA at 13-14 (Wecht, J.), that is, because of the constitutional validity of the prior conviction. As explained, however, the validity of the earlier conviction is only material at sentencing *if the fact of the conviction is assumed* – and it cannot be assumed where it is contested. And where it is contested, under *Apprendi* its existence *still* only needs to be proved to a judge by a preponderance. Thus, if *Apprendi* is understood to predicate the exception for prior convictions solely, or even primarily, on

their assumed validity, the decision contains an internal disconnect because it avoids explaining how the *fact* of a prior conviction, if contested, stands on a different footing from any other contested fact.[16]

The explanation, then, must lie in the *Apprendi* Court's other observation concerning why prior convictions are qualitatively different from other contested facts affecting punishment. The Court explained that "recidivism 'does not relate to the commission of the offense' itself"; it contrasted this with New Jersey's biased-purpose inquiry, which went "precisely to what happened in the commission of the offense." *Apprendi*, 530 U.S. at 490 (internal quotation marks omitted). It thus recognized that the fact of recidivism stands apart from other contested facts, and does not represent an element of the present offense, because it does not pertain to the defendant's conduct in committing the present offense, which is primarily what juries are empaneled to decide. *Accord Almendarez-Torres*, 523 U.S. at 244 (observing "recidivism . . . *goes to the punishment only*, and therefore . . . may be subsequently decided") (emphasis in original, internal quotation marks and citation omitted).[17]

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[16] Justice Wecht suggests that the fact the police included the phrase "2nd OFFENSE" in the charging document indicates the fact of the first offense is an element of the current offense that must be proved to a jury. *See* OISA at 13. But the police could have included that same phrase if Appellee's first DUI charge had been resolved by a criminal conviction. *See generally Almendarez-Torres*, 523 U.S. at 244 ("[A] charge under a recidivism statute does not state a separate offense, but goes to punishment only.") (quoting *Parke v.Raley*, 506 U.S. 20, 27 (1992)). Consistent with the above, this raises the question of why, logically, the first conviction, if contested, should not be considered an element of the present offense, whereas the earlier ARD acceptance should be so considered. It is insufficient to proffer that the prior conviction was obtained in compliance with the Sixth Amendment.

[17] A second distinguishing feature a prior ARD acceptance shares with a prior conviction is that it is essentially binary in nature, either it occurred or it did not, and its existence can be gleaned from "prior judicial records" of "conclusive significance." *Shepard*, 544 U.S. at 25; *see supra* note 13. In this regard, factual disputes over prior adjudications are (continued…)

In sum, then, we would hold that, under Sections 3804 and 3806 of the Vehicle Code, a defendant's prior ARD acceptance may constitutionally be treated by the sentencing court as a prior offense.[18] As with a prior conviction, such acceptance is a matter of public record, it has nothing to do with the facts and circumstances of the present offense, and the associated procedural safeguards, which, again, have not been challenged here, are presumed to satisfy due process. The Commonwealth must still establish the existence of the prior ARD acceptance via certified records or by whatever other means of proof the Commonwealth wishes to use. In the present controversy, Appellee has never disputed that the Commonwealth carried that burden at sentencing.

Accordingly, we would reverse the order of the Superior Court and remand the matter for reinstatement of Appellee's judgment of sentence.

Justices Dougherty and Brobson join this opinion in support of reversal.

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likely to involve arguments over the validity and significance of court records, a topic with which judges are more familiar than lay juries. Hence, the institutional advantage juries ordinarily enjoy in resolving disputed factual issues is reduced in relation to such records. *Compare People v. Montoya*, 141 P.3d 916, 923 (Colo. Ct. App. 2006) (upholding enhanced sentencing based on a judicial finding that the defendant was on probation or parole when he committed the present offense, as that finding was based on "prior judicial records" of "conclusive significance"), *with State v. Bray*, 160 P.3d 983, 990 (Or. 2007) (holding that whether a defendant's criminal record establishes "persistent involvement in similar offenses" must be submitted to the jury, as that inquiry involves inferences to be made from the number and frequency of prior convictions; as such, it cannot be ascertained solely from prior judicial records).

[18] *Accord Brown v. State*, 2017 WL 89059, at *7 (Del. Super. Jan. 7), *adopted by* 170 A.3d 148 (Del. 2017) (table) (rejecting a defendant's *Apprendi*-based claim and holding that, for purposes of Delaware law, a Pennsylvania DUI "moves [him] into the category of repeat offender"); *see also State v. Laboy*, 117 A.3d 562, 568 (Del. 2015) (indicating a program of DUI rehabilitation falls under the *Apprendi* exception for prior convictions); *State v. Tapedo*, 2003 WL 22283150 (Kan. Ct. App. 2003) (same under Kansas law); *cf. People v. Owens*, 59 N.E.3d 187 (Ill. Ct. App. 2016) (concluding that a prior license revocation based on a DUI is the functional equivalent of a prior conviction).