IN THE SUPREME COURT FOR THE COMMONWEALTH OF PENNSYLVANIA

No. _____

IN THE INTEREST OF: J.F. (A Minor)

PETITION FOR ALLOWANCE OF APPEAL

PETITION FOR ALLOWANCE OF APPEAL FROM THE SUPERIOR COURT'S ORDER, NO. 494 HARRISBURG 1997, DATED JUNE 2, 1998, AFFIRMING THE TRIAL COURT'S ORDERS , J. No. 88 JD 1997, DATED MARCH 26 AND APRIL 25, 1997, REJECTING J.F.'S CHALLENGE TO THE COURT'S FAILURE TO GRANT HIS REQUEST FOR A JURY TRIAL AND TO THE SUFFICIENCY OF THE EVIDENCE

Attorneys for Petitioner-Appellant J.F.:

Marsha L. Levick
I.D. No. 22535
Juvenile Law Center
801 Arch Street, Suite 610
Philadelphia, PA 19107
(215) 625-0551

Bradley A. Winnick
I.D. No. 78413
Dauphin County Public
Defender's Office, Suite 600
Veterans Memorial Building
112 Market Street
Harrisburg, PA 17108
(717) 255-2746

TABLE OF CONTENTS

TABLE OF CONTENTS, Continued

TABLE OF CITATIONS

CASES

STATUTES

MISCELLANEOUS

REFERENCE TO REPORT OF OPINIONS BELOW

On April 25, 1997, Judge Jeannine Turgeon of the Court of Common Pleas, Dauphin County, Family Division, denied J.F.'s motion for a jury trial. On March 26, 1997, Judge Jeannine Turgeon of the Court of Common Pleas, Dauphin County, Family Division, adjudicated J.F. delinquent of involuntary deviate sexual intercourse. A copy of the Order and Opinion denying J.F.'s motion for a jury trial are attached hereto as Exhibit A.[1] A copy of the order adjudicating J.F. delinquent is attached hereto as Exhibit B.

On June 2, 1998, the Superior Court of Pennsylvania affirmed Judge Turgeon's rulings. A copy of the Order and the Opinion of the Superior Court are attached hereto respectively as Exhibits C and D.

[1] At the time J.F. made his motion for a jury trial before Judge Turgeon, a similar motion on behalf of another minor, G.G., was also pending. Judge Turgeon denied both J.F.'s and G.G.'s motions on April 25, 1997. Judge Turgeon wrote an opinion denying G.G.'s motion, and then incorporated that opinion in her ruling denying J.F.'s motion. In proceedings before the Superior Court, J.F.'s and G.G.'s cases were consolidated. The Superior Court reversed G.G.'s conviction based on the insufficiency of the evidence, and G.G. is not a party to this Petition for Allowance of Appeal.

TEXT OF THE ORDERS IN QUESTION

Judgement

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the Court of Common Pleas of Dauphin County be, and the same is hereby

Affirmed @ 494 HBG 97

Reversed; Appellant Discharged @ 628 HBG 97[2]

STATEMENT OF QUESTIONS PRESENTED

1. Whether, in a case of first impression, the Superior Court erred in holding that the due process clause of the Fourteenth Amendment to the United States Constitution does not require that the juvenile court provide a jury trial to J.F., given that (a) the recent amendments to the Pennsylvania Juvenile Act substantially criminalize the juvenile court and enhance the consequences of a delinquency adjudication; (b) that J.F.'s adjudication will automatically lead to his prosecution as an adult for any subsequent arrest for one of the Act's designated felonies, and; (c) that the juvenile court adjudication will have serious collateral consequences that were not addressed by the U.S. Supreme Court's plurality in McKeiver v. Pennsylvania?

2. Whether the Superior Court erred in not reversing J.F.'s delinquency adjudication for involuntary deviate sexual intercourse based on the insufficiency of the evidence, where the prosecution failed to present any evidence that the alleged offense was anything more than a

[2] As noted in fn. 1, J.F.'s appeal to the Superior Court was consolidated with the appeal of G.G., whose delinquency adjudication was reversed by the Superior Court.

dream by the victim, where the victim did not see her alleged attacker, and where there was no physical evidence of intercourse?

STATEMENT OF THE CASE

J. F. petitions for Allowance of Appeal regarding the Superior Court's June 2, 1998 ruling that, despite extensive amendments to the Juvenile Act of Pennsylvania, 42 Pa. Cons. Stat. Ann. Sec. 6301 et seq., which substantially altered the purpose and character of the Juvenile Court, the Fourteenth Amendment's concept of fundamental fairness does not require that J.F. be afforded the right to a jury trial on the charges of delinquency pending against him. J.F. also petitions for Allowance of Appeal regarding the Superior Court's June 2, 1998 affirmance of his delinquency adjudication for involuntary deviate sexual intercourse, which J.F. challenged on the basis of insufficiency of the evidence. The facts underlying the Petition for Allowance of Appeal are as follows.

On February 2, 1997, J.F. was residing in the home of Donald Mummert, Sr., along with his wife, his stepdaughters, fifteen year old H.P. and her sister Sarah, and Mr. Mummert's two children, Casey and Matt. (Notes of Testimony, dated March 4, 1997, p. 11, lis. 19-25; p. 12, lis. 5-20 [hereinafter "N.T. March 4"].)[3] J.F. had been staying in the home for approximately two weeks. H.P. had never met J.F. prior to that time. When asked if she and J.F. were friends, H.P. replied "sort of." (N.T. March 4, p. 12, lis. 3-4; Notes of Testimony, dated March 18, 1997, p. 4, lis. 10-13 [hereinafter "N.T. March 18"].)

---

[3] Pursuant to Pennsylvania Rule of Appellate Procedure 2151 (b), J.F. was not required to reproduce the record since he is proceeding in forma pauperis. Pursuant to Pennsylvania Rule of Appellate Procedure 1112(d), since Petitioner has applied to continue to proceed in forma pauperis before the Court, no reproduced record has been filed with this Petition.

On the evening of February 2nd, H.P.'s mother was at the hospital with Sarah, who was about to have a baby, and H.P.'s stepfather was in the downstairs portion of the house where he slept. (N.T. March 4, p. 13, lis. 23-25; p. 14 lis. 1-5.). Between approximately 9:00 and 9:30 p.m., H.P., Casey, Matt, and J.F. were in H.P.'s upstairs bedroom playing "Truth or Dare." One example of a "dare" was Casey's agreeing to lift her shirt in front of the others. (N.T. March 18, p. 12, lis. 5-25; p. 13, lis. 1-5.)

After talking, listening to music, and playing "Truth or Dare" for a while, Matt climbed up to the top bunk and H.P. fell asleep on the bottom bunk. J.F., who regularly slept downstairs, left the room and Casey joined Matt in the top bunk to sleep. (N.T. March 18, p. 4, lis. 14-18; N.T. March 4, p. 14, lis. 8-25; N.T. March 4, p. 15, lis. 1-2.)

At some point during the night, according to her testimony on direct examination, H.P. felt rubbing and squeezing on her breasts. (N.T. March 4, p. 16, lis. 6-14.) H.P. further testified that she felt "somebody putting their penis in [her] butt." (N.T. March 4, p. 15, lis. 23-24.) When questioned by the court as to who was touching her, H.P. identified J.F. as the perpetrator. (N.T. March 4, p. 16, lis. 15-24.)

However, on cross-examination, H.P. provided the following unsolicited information:

Q: "So you guys all went to bed?"

A. "Yeah, and I was asleep and I had a dream somebody was like sticking his penis in my butt."

(N.T. March 18, p. 5, lis. 17-19.) H.P. proceeded to testify that she dreamed of rubbing someone's penis. (N.T. March 18, p. 6, lis. 3-6.) She reiterated that this was merely a dream and that she did not wake up. (N.T. March 18, p.6, lis. 7-10.) It was during the dream that she

experienced the anal intercourse. (N.T. March 18, p. 6, lis. 11-14.) H.P. only woke when she rolled off the bed onto the floor. (N.T. March 18, p. 6, lis. 15-17.)

At no point during H.P.'s dream did she see anyone, including J.F., on the bed with her. (N.T. March 18, p.6, lis. 12-14.) She did not see anyone on her bed or in her room upon suddenly waking on the floor. (N.T. March 18, p. 6, lis. 18-19.) In fact, H.P. conceded that she never saw J.F. do anything at all in her room that night. (N.T. March 18, p. 8, lis. 7-12.)

H.P. could only testify that she heard footsteps and saw a shadow on the stairs. (N.T. March 18, p. 6, lis. 18-25.) Rising from the floor, H.P. realized that her pants were slightly down. (N.T. March 4, p. 18, lis. 2-4, 10-11.) She went to the bathroom and discovered that her chest was red and her underwear were wet. (N.T. March 4, p. 19, lis. 8-14.) H.P. did not notice any blood. (N.T. March 18, p. 7, lis. 10-11.)

The next morning, when H.P. and Casey came downstairs to go to school, J.F. was asleep in his room. (N.T. March 18, p. 15, lis. 7-13.) H.P. told Casey that she had had a dream in which J.F. had touched her chest and placed his penis in her buttocks, even though she never saw J.F. in her bed during the dream. (N.T. March 18, p. 8, lis. 5-12.) Casey, who had heard nothing and had slept through the previous night without waking, had no reason to suspect that H.P. was describing more than a dream. (N.T. March 4, p. 24, lis. 12-17.)

H.P. did not tell her mother about what she believed to have occurred until two days later (February 4th), because she was scared. (N.T. March 4, p. 21, lis. 13-14; N.T. March 18, p. 7, lis. 19-22.) H.P. had never experienced a dream involving sex before and it caused her concern, confusion, and fear. (N.T. March 18, p. 9, lis. 12-16; p. 10, lis. 5-11.) H.P. told her mother what J.F. had allegedly done to her, and her mother was understandably upset. (N.T. March 18, p. 10.,

lis. 12-15.) However, the police were not brought in to investigate or speak with H.P. until another three days later (February 7th.) (N.T. March 4, p. 28, lis. 17-21; p. 29, lis. 4-6.) At that point, H.P.'s mother told a patrolman from the Highspire Police Department what had occurred, with H.P. affirming her mother's account. (N.T. March 4, p. 29, lis. 14-16.)

On the same day that H.P. and her mother called the police, they also went to the Harrisburg Hospital emergency room. H.P. was examined by Mary Beth Elensky, a fully certified physician's assistant who had worked in the emergency room for approximately one and a half years. Ms. Elensky was qualified to conduct examinations and take patient histories. (N.T. March 18, p. 16, lis. 6-25; p. 17, lis. 1-18.)

Ms. Elensky conducted a rectal examination of H.P. based upon her complaint of anal rape. H.P. exhibited no tears or lacerations of the rectum, no indications of bleeding or presence of dry blood, and no reports of pain or palpitation to the rectum, all of which are common indicators of anal penetration. (N.T. March 18, p. 18. Lis. 17-25; p. 19, lis. 1-11.) During the examination, H.P. was pleasant and cooperative. (N.T. March 18, p. 19, lis. 22-25.)

On February 8, 1997, J.F. was arrested, and a juvenile petition alleging Rape, Involuntary Deviate Sexual Intercourse, and Aggravated Indecent Assault was filed on February 10, 1997. (See Exhibit E.)

On March 3, 1997, J.F. filed a pre-trial motion for a jury trial in juvenile court, which was orally denied immediately preceding the Adjudication Hearing on March 4, 1997. (N.T. March 4, p. 9, lis. 10-25; p. 10, lis. 1-21.) On March 18, 1997, the court held a continuation of the March 4th hearing. (N.T. March 18, p. 29. Lis. 2-9.) On March 26th, the court issued an Order adjudicating J.F delinquent and finding that J.F. had committed Involuntary Deviate Sexual

Intercourse (attached hereto as Exhibit B), a felony designated under the Juvenile Act as a predicate for direct file prosecution on any subsequent charge for a designated felony. On April 1, 1997, following a disposition hearing, J.F. was committed to the La Sa Quik Sexual Offenders Program.

On April 25, 1997, the trial court issued a written Order and Opinion denying J.F.'s Motion for Jury Trial. (See Exhibit A)

On May 1, 1997, J.F. filed a timely Notice of Appeal with the Superior Court. On June 2, 1998, the Superior Court affirmed the Orders of the trial court adjudicating J.F. delinquent and denying his motion for a jury trial. (See Exhibits C & D)

PETITION FOR ALLOWANCE OF APPEAL

This case involves a matter of public importance to the Commonwealth and, in addition, to the many other states that have expanded the circumstances in which children are automatically tried as adults in criminal court. It also raises a question of first impression in the Commonwealth and in the country: is a juvenile entitled to request a jury trial in juvenile court when 1) the protective features of the juvenile court have been largely eliminated by statutory amendments, and 2) a delinquency adjudication would lead to an automatic adult status merely upon his next arrest for a designated offense? This question requires an examination of the constitutional implications of recent amendments to the Juvenile Act, 42 Pa. Cons. Stat. § 6301 et seq.

The last decade of this century has produced a wave of revisions to state juvenile justice systems nationwide. Across the country, juvenile courts have shifted their emphases from offering a helping hand to imposing a range of punitive sanctions. The indicia of this shift are many. They include lowering the age of juvenile court jurisdiction, opening juvenile courts to the press and public, fingerprinting of juvenile suspects of all ages, disseminating information about adjudicated juveniles to schools and communities. Thirty six states and the District of Columbia now have "statutory exclusions" from juvenile court jurisdiction. Forty-six states and the District of Columbia fingerprint juveniles. Thirty nine states now permit the release of a juvenile's name or picture to the media. Twenty-two states require or permit open juvenile court proceedings. Office of Juvenile Justice and Delinquency Prevention, State Responses to Serious and Violent Juvenile Crime, (1996).

Pennsylvania is no exception to this trend. From 1986 to 1995, the General Assembly systematically chipped away at the protective shield of the juvenile court and erected, in its place, a more stern and less forgiving edifice that increasingly resembles the criminal justice system. In its 1995 Special Session, the General Assembly completed a comprehensive revision of the Juvenile Act. It rewrote the purpose clause, limited the juvenile court's jurisdiction, made it dramatically easier to transfer juveniles to criminal court, and made available previously confidential information about juvenile offenders to the public at large. In sum, these amendments have created a reconfigured juvenile court.

Because the General Assembly has redrawn the contours of the modern juvenile court, the boundaries of constitutional protections must also be redrawn to match the new configuration. Between 1966 and 1971, the United States Supreme Court etched the constitutional limits of the juvenile court as it existed at that time. In a series of decisions beginning with Kent v. United States, 383 U.S. 541 (1966), which extended due process protections to waiver proceedings, through In re Gault, 387 U.S. 1 (1967) and In re Winship, 397 U.S. 358 (1970), where the Court imposed traditional procedural due process protections on the juvenile court more typically associated with criminal proceedings, the Court sought to strike a balance between the benevolent and rehabilitative purposes of the original juvenile court and the demands of the Constitution when individual liberty is at stake. However, in 1971, in McKeiver v. Pennsylvania, 403 U.S. 528 (1971), a majority of the Court declined to extend to juveniles charged with criminal offenses the right to trial by jury, drawing a line at further "constitutionalizing" the juvenile court with the adoption of jury trials.

The recent amendments to the Pennsylvania Juvenile Act compel a reexamination of that line. The need for more complete constitutional safeguards has increased in cases like petitioner's, where the General Assembly has discarded the protective features of the juvenile court. Denying the right to trial by jury to juveniles in petitioner's situation — automatically subject to treatment as an adult on re-arrest based upon his adjudication for one of the Act's "predicate" offenses — can no longer be constitutionally justified. This Court should grant this Petition for Allowance of Appeal to reestablish the constitutional equilibrium between the juvenile court of today and the requirements of fundamental fairness.

REASONS SUPPORTING ALLOWANCE OF THE APPEAL

I. ALLOCATUR SHOULD BE GRANTED BECAUSE THE SUPERIOR COURT ERRED IN HOLDING THAT THE RECENT AMENDMENTS TO THE JUVENILE ACT DO NOT RUN AFOUL OF THE FOURTEENTH AMENDMENT'S REQUIREMENT OF FUNDAMENTAL FAIRNESS IN JUVENILE PROCEEDINGS

A. The Mere Fact That a Child Has No Right To Be Tried In Juvenile Court Is Irrelevant to Whether Recent Amendments to the Juvenile

Act Now Require That a Juvenile Must Have the Right to a Jury Trial

Since the General Assembly's special session on crime in 1995, the Superior Court has had two opportunities to address amendments to the Juvenile Act.

In Commonwealth v. Presley, 455 Pa.Super. 13, 686 A.2d 1321 (1996), the court upheld the constitutionality of Act 13 of the Special Session of 1995, which amended Section 6354 of the Juvenile Act to provide, for the first time in Pennsylvania, that evidence of a delinquency adjudication is admissible in a criminal proceeding if evidence of the same offense would be admissible if committed by an adult. The court in Presley rejected several challenges to Sec. 6354 (b) (4), including Presley's claim that the General Assembly's change in the treatment of delinquency adjudications violated his right to due process. In Commonwealth v. Cotto, 708 A.2d 806 (Pa. Super. 1998)), the court rejected a vagueness challenge and upheld the

constitutionality of new provisions of the Juvenile Act relating to transfer of juveniles to adult criminal court. In rejecting challenges to the new provisions, the court observed that "there is no constitutional guarantee to special treatment for juvenile offenders." Id., citing Commonwealth v. Williams, 514 Pa. 62, 522 A.2d 1058 (1987).

By relying below on its prior holdings in Cotto and Presley, the Superior Court misapplied the balancing test employed by the U.S. Supreme Court in Kent, Gault, Winship and McKeiver. The Superior Court's conclusion that, because the transfer and use-of-records provisions of the new Juvenile Act were constitutional, other consequences and effects of those provisions did not require further constitutional scrutiny, misapprehends the constitutional balancing done by the Supreme Court in Kent, Gault, Winship and McKeiver.

Declaring that there is no constitutional right to the existence of a juvenile court is not dispositive of the issue presented here. If Pennsylvania today abolished the juvenile court and tried all persons charged with criminal offenses in the criminal courts, it would have to provide children tried as adults with the right to jury trials. Admittedly, withdrawing the "statutory privilege" of being tried in juvenile court does not itself violate the Constitution. However, a failure to provide non-adult offenders tried in criminal court with the same procedural safeguards afforded adults would violate the Constitution. The closer the Commonwealth gets to eliminating the special safeguards of the juvenile system, the more process is due to juvenile offenders. Indeed, Cotto and Presley support petitioner's claim, rather than work against it. By upholding two of the recent amendments to the Act which allow for automatic transfer in petitioner's case, and make it easier to use the instant adjudication against him later, Cotto and Presley add weight to the long list of arguments that tip the scales away from McKeiver.

B. Fundamental Fairness Requires That Petitioner be Afforded the Right to Jury Trial

The United States Supreme Court has held that the Due Process Clause of the Fourteenth Amendment applies to juvenile proceedings and requires those proceedings to provide for "fundamental fairness." See Kent v. U.S., 383 U.S. 541 (1966) (holding that due process requirements apply to waiver proceedings); In re Gault, 387 U.S. 1 (1967) (holding that juveniles have right to notice of charges, right to counsel, privilege against self-incrimination, and right to confrontation and cross-examination); In re Winship, 397 U.S. 358 (1970) (holding that fundamental fairness requires proof beyond a reasonable doubt in delinquency adjudications). In Kent, the Supreme Court asserted that proceedings to waive juveniles to adult court, although not necessarily identical to adult criminal trials or even administrative hearings, nonetheless "must measure up to the essentials of due process and fair treatment." 383 U.S. at 562.

Gault extended this requirement of fundamental fairness to juvenile delinquency adjudications. 387 U.S. at 30-31. There the Court found that, because delinquency adjudications can result in loss of liberty and institutional confinement, "it would be extraordinary if our Constitution did not require the procedural regularity and the exercise of care implied in the phrase 'due process.'" Id. at 27-28. Moreover, Gault made clear that:

> [C]ivil labels and good intentions do not themselves obviate the need for criminal due process safeguards in juvenile courts, for "[a] proceeding where the issue is whether the child will be found to be 'delinquent' and subject to the loss of his liberty for years is comparable in seriousness to a felony prosecution."

Winship, 397 U.S. at 365-66 (characterizing and quoting Gault, 387 U.S. at 36).

In McKeiver v. Pennsylvania, 403 U.S. 528 (1971), the Supreme Court concluded, to the contrary, that fundamental fairness did not require the extension of the right to jury trial in

juvenile court adjudicatory proceedings. As set forth in this Petition, Petitioner asserts that McKeiver is not binding on the proceedings below.[4] The recent amendments to the Juvenile Act require a reexamination of the fundamental fairness of denying juveniles the right to trial by jury.

In the opinion announcing the judgment of the Court in McKeiver, Justice Blackmun, joined by Chief Justice Burger and Justices White and Stewart, found that extension of the jury trial right[5] to juveniles was not required by fundamental fairness, unless the Court were to "equate the juvenile proceeding -- or at least the adjudicative phase of it -- with the criminal trial." Id. at 550. Justice Blackmun declined to equate the two because to do so, he asserted, ignored "every aspect of fairness, of concern, of sympathy, and of paternal attention that the juvenile court system contemplates." Id. Further, in Justice Blackmun's view, jury trials would impose on the juvenile court system "the traditional delay, the formality, and the clamor of the adversary system and, possibly, the public trial," id. at 550, without any countervailing benefit to the juvenile court's fact-finding function. See id. at 547.

The concurring opinions of Justices Harlan and Brennan in McKeiver -- at least one of which was necessary to establish a five-justice majority -- were each based on other grounds. Justice Harlan concurred in the judgment because of his underlying belief that Duncan v. Louisiana, 391 U.S. 145 (1968), wrongly extended the right to trial by jury to state proceedings.

---

[4] This Petition raises only the question of whether a juvenile such as J.F. charged under the new provisions designating certain felonies for subsequent direct file prosecution, has a right to trial by jury. See infra Part C. Thus, the Court need not reach the question of whether all juveniles have a right to trial by jury in light of the 1995 amendments to the Juvenile Act.

[5] The Sixth Amendment right to trial by jury in all criminal prosecutions has been incorporated through the Due Process Clause of the Fourteenth Amendment and applied to the states. See Duncan v. Louisiana, 391 U.S. 145 (1968).

Justice Brennan, on the other hand, concurring in part and dissenting in part, ironically concluded that a juvenile's right to trial by jury depended on whether that juvenile was afforded the right to a public trial.

While Justice Blackmun's opinion in McKeiver has often been cited as the opinion of the Court, the plurality opinions actually establish no shared rationale. In other contexts, the Court has asserted that the holding of a plurality opinion is the narrowest ground as to which an agreement among five justices can be inferred. Marks v. U.S., 430 U.S. 188, 193 (1977) (expanding on and quoting Gregg v. Georgia, 428 U.S. 153, 169 n.15 (1976) (opinion of Stewart, Powell, and Stevens, JJ.)) ("When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds . . . .'"). Because neither Justice Harlan's nor Justice Brennan's opinion can, in any way, be squared with Justice Blackmun's opinion, the McKeiver plurality stands for no more than the judgment of the Court. Thus, because no holding can be discerned from the McKeiver plurality, it does not govern this case.

C. Applying, *Arguendo*, Justice Blackmun's Rationale, The Superior Court Erred In Concluding that Recent Amendments to the Juvenile Act Do Not Presently Require Extension of the Right to a Jury Trial to Petitioner

Even if Justice Blackmun's rationale were the holding of McKeiver, that rationale is no longer apt. In the twenty-six years since McKeiver was decided, the General Assembly has repeatedly amended the Act to strip the juvenile court of many of its original benevolent features. The juvenile court can no longer be characterized as a caring institution intended only to

rehabilitate young offenders while it shields them from the consequences of their otherwise criminal behavior.

The Superior Count's contrary view of the 1995 amendments to the Act is myopic. The General Assembly's intention to dislodge "concern" for the child as the "cornerstone" of the Act and replace it with such core criminal justice concepts as incapacitation ("protection of the public") and retribution ("accountability" of the juvenile offender) is reflected clearly throughout the amendments. See 42 Pa. Cons. Stat §§ 6301. These amendments have eroded the protective shield of the court.[6] As amended, the Juvenile Act now requires automatic prosecution of juveniles as adults in the criminal justice system following only one prior delinquency adjudication of certain designated felonies, 42 Pa. Cons. Stat. § 6302; explicitly opens juvenile proceedings to the public for most purposes, 42 Pa. Cons, Stat. § 6336(e); requires disclosure of

---

[6]Governor Tom Ridge convened a special session of the Legislature on January 23, 1995 to address issues of crime and public safety. Specifically, the Legislature was directed to consider "reduction of juvenile crime by reforming the system and laws relating to crime committed by juveniles":

> Perhaps the most difficult challenge we face is juvenile crime. When it comes to the current juvenile justice system, it has become all too clear that good intentions and the current approach just will not work. . . . Without regard for society or even self, without being held accountable, juveniles are committing adult acts of violence like never before.
>
> It is time they be held accountable.
>
> Youth will no longer be an excuse.
>
> I will call upon you to begin the important process of juvenile justice reform. We can start with some basic yet significant steps to open up juvenile court proceedings and remove the obstacles that curtail the use of juvenile records, including fingerprints....
>
> And once and for all, we will treat the worst juvenile offenders like the criminals they are. It is as simple as that. The punishment must fit the crime.

Pa. Legislative Journal - House, No. 1, Jan. 23, 1995 at 5.

delinquency adjudications to the offender's school, 42 Pa. Cons. Stat. § 6341(b.1); authorizes disclosure of juvenile records to the public under certain circumstances, 42 Pa. Cons. Stat. § 6341(b.1); and authorizes the use of a juvenile's delinquency record in any subsequent criminal prosecution, for evidentiary, bail, and sentencing purposes, 42 Pa. Cons. Stat. §§ 6307, 6354. These changes, all of which apply to Petitioner, evidence an abandonment of the court's historic commitment to decriminalizing delinquent behavior in favor of now attaching criminal-like consequences to an adjudication of delinquency.

The 1995 amendments to the Juvenile Act detailed above have elevated the importance of the juvenile court's fact-finding function, and rendered the risk of an erroneous adjudication of much greater significance. This is especially true for juveniles such as J.F. who have been charged with certain designated felonies and who are exposed to direct criminal prosecution for any subsequent charges involving one (or more) of the designated felonies.

In McKeiver, the plurality refused to extend the right to jury trial to juveniles based on its perception of the juvenile justice system as providing a uniquely benevolent and protective forum for resolving criminal charges against children. Justice Blackmun believed that jury trials would threaten these special features of the juvenile court without affording any countervailing benefit to the fact-finding process. 403 U.S. at 547. For Justice Brennan, his concurrence rested on his confidence in the "reservoir of public concern." 403 U.S. at 555. With these distinctive elements removed by the recent amendments, denying juveniles the right to jury trial can no longer be squared with the requirements of fundamental fairness.

D. The Superior Court Erred in Holding That J.F.'s Adjudication Was No Different Than an Adjudication Under the Statutory Scheme Upheld by McKeiver's Plurality

Since the juvenile court can no longer shield juveniles like J.F. from the "criminal consequences of their behavior," accuracy in the juvenile court fact-finding process is of heightened importance. The Superior Court's reliance on the fact that many of the Act's new criminal consequences do not affect Petitioner until after his adjudication as a basis for affirming the trial court misses the point. It is precisely because such serious consequences now attach to a delinquency adjudication that the Constitution requires greater accuracy in the adjudicatory hearing itself. In particular, before exposing J.F. to public condemnation, before imposing stigma on him at school, and before subjecting him to prolonged periods of pre-trial confinement in adult prisons and the possibility of long-term confinement with adults in state correctional facilities, the predicate delinquency adjudication must be obtained in a proceeding that comports with due process.

The value of jury trials in ensuring the accuracy and fairness of criminal convictions has long been recognized. Thomas Jefferson said of the jury trial that he considered it "the only anchor ever yet imagined by man, by which a government can be held to the principles of its constitution."[7] Letter from Thomas Jefferson to Thomas Paine (July 11, 1789), in 3 **The**

---

[7] In fact, as one scholar has noted, preserving the right to trial by jury may have been the most consistent point of agreement between the Federalists and the Anti-Federalists. Alexander Hamilton wrote in Federalist 83:

> The friends and adversaries of the plan of the convention, if they agree in nothing else, concur at least in the value they set upon the trial by jury; or if there is any difference between them it consists in this: the former regard it as a valuable safeguard to liberty, the latter represent it as the very palladium of free government.

Albert W. Alschuler and Andrew G. Deiss, A Brief History of the Criminal Jury in the United

Writings of Thomas Jefferson 71 (H.A. Washington, ed. 1859). The jury elsewhere has been described as the most central idea to our Bill of Rights. See Akhil Reed Amar, Sixth Amendment First Principles, 84 **Geo. L.J.** 641, 681 (1996). See also, Duncan v. Louisiana, 391 U.S. 145, 158 (1967) (The Court held that the right to jury trial is "a fundamental right, essential for preventing miscarriages of justice and for assuring that fair trials are provided for all defendants.")

The right to trial by jury would ensure that J.F. is not subject to criminal-like consequences without first providing him constitutionally mandated procedures sufficient to ensure the accuracy and fairness of the underlying adjudications.[8]

II. THE PETITION FOR ALLOCATUR SHOULD BE GRANTED BECAUSE THE SUPERIOR COURT ERRED IN FAILING TO REVERSE THE DELINQUENCY ADJUDICATION OF PETITIONER J.F., WHERE THE EVIDENCE WAS INSUFFICIENT AS A MATTER LAW TO SUPPORT THE ADJUDICATION

States, 61 **U. Chi. L. Rev.** 867, 870 (1994) (quoting Federalist 83 (Hamilton), in Clinton Rossiter, ed., **The Federalist Papers** 491, 499 (1961)).

[8] Importantly, reversing the Superior Court and extending the right to jury trial to J.F. need not diminish the juvenile court's original rehabilitative purposes with respect to diversion and disposition. To the contrary, it would merely recognize that the juvenile court's fact-finding role has become more prominent as the court imposes more burdens on the adjudicated delinquent; the court's discretion in fashioning dispositions need not be forfeited. The Superior Court erred in concluding that the juvenile court's retention of its historic flexibility in fashioning dispositions lessened J.F.'s due process rights. The Gault Court long ago rejected the notion that fewer safeguards for juvenile offenders could be constitutionally justified by calling the loss of liberty something other than punishment.

The evidence presented by the Commonwealth against J.F. fails to establish that J.F. was responsible for whatever happened to H.P. on February 2, 1997. It fails to establish that anything other than a dream happened to H.P. on that date.

While the testimony of a victim, standing alone, is sufficient to support an adjudication of delinquency for a sex offense, In the Interest of J.R., 436 Pa. Super. 471, 648 A.2d 28 (1994), appeal denied, 540 Pa. 584, 655 A.2d 515 (1995), mere speculation and conjecture cannot serve as a basis for an adjudication of delinquency. Commonwealth v. Mercado, 420 Pa. Super. 588, 617 A.2d 342 (1992).

A review of the evidence presented below necessarily leads to the conclusion that the evidence is legally insufficient to determine either that an assault occurred or that J.F. was the person who allegedly abused H.P.

One must assume that a sexual assault even occurred in order to support J.F.'s adjudication. There is no eyewitness testimony. There is no medical evidence to suggest that H.P. was anally penetrated. (N.T. March 18, p. 18, lis. 17-25; p. 19, lis. 1-11.) Therefore, the adjudication rests upon the testimony of H.P.

H.P. testified that what she experienced was nothing more than a dream:

> Q. "So you guys all went to bed?"
>
> A. "Yeah, and I was asleep and I had a dream that somebody was like sticking his penis in my butt."

(N.T. March 18, p. 5, lis. 17-19.) H.P. went on to testify that the entire alleged encounter was nothing more than a dream. It was a dream that H.P. was rubbing someone's penis. (N.T. March 18, p. 6, lis. 3-10.) It was a dream that someone anally penetrated her. (N.T. March 18, p. 6, lis.

11-14.) From the very first time H.P. asserted this was a dream, she never contradicted herself. She never re-implicated J.F. And, the Commonwealth never introduced other testimony to support the allegation that this was ever anything other than a dream.

In the absence of medical evidence, eyewitness testimony, or even testimony from the alleged victim, the Commonwealth simply cannot establish the occurrence of an assault against H.P. Even were a court to rely exclusively on H.P.'s credibility, it must conclude that the Commonwealth has not satisfied its burden of proving that J.F. assaulted her.

Therefore, given the lack of physical evidence, the testimony of H.P., the presence of other possible actors, and the absence of identifying testimony as to the alleged assailant's identity, the Superior Court erred in holding that the evidence was legally sufficient to support J.F.'s adjudication of delinquency. Accordingly, the adjudication should be reversed.

CONCLUSION

For the reasons set forth above, Petitioner J.F. respectfully requests that this Court grant his Petition for Allowance of Appeal.

Respectfully submitted,

_____

Marsha L. Levick
I.D. No. 22535
Juvenile Law Center
801 Arch Street, Suite 610
Philadelphia, PA 19107
(215) 625-0551

Bradley A. Winnick
I.D. No. 78413
Dauphin County Public
Defender's Office, Suite 600
Veterans Memorial Building
112 Market Street
Harrisburg, PA 17108
(717) 255-2746

Attorneys for Petitioner

Dated: July 2, 1998

PERTINENT LAWS PURSUANT TO RULE OF APPELLATE PROCEDURE 1115(7)

UNITED STATES CONSTITUTION

AMENDMENT XIV, SECTION 1.
All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

JUVENILE ACT, 42 Pa. Cons. Stat. § 6301 et seq.

42 Pa. Cons. Stat. § 6301, PURPOSES

(b) **Purposes. -** This chapter shall be interpreted and construed as to effectuate the following purposes: ... (2) Consistent with the protection of the public interest, to provide for children committing delinquent acts programs of supervision, care and rehabilitation which provide balanced attention to the protection of the community, the imposition of accountability for offenses committed and the development of competencies to enable children to become responsible and productive members of the community.

42 Pa. Cons. Stat. § 6302, DEFINITIONS

Delinquent Act (2)(iii) - [The term shall not include:] Any of the following prohibited conduct where the child was 15 years of age or older at the time of the alleged conduct and has been previously adjudicated delinquent of any of the following prohibited conduct which, if committed by an adult, would be classified as:

(A) Rape as defined in 18 Pa.C.S. § 3121.
(B) Involuntary deviate sexual intercourse as defined in 18 Pa.C.S. § 3123.
(C) Robbery as defined in 18 Pa.C.S. § 3701(a)(1)(i), (ii), or (iii).
(D) Robbery of motor vehicle as defined in 18 Pa.C.S. § 3702.
(E) Aggravated indecent assault as defined in 18 Pa.C.S. § 3125.
(F) Kidnapping as defined in 18 Pa. C.S. § 2901.
(G) Voluntary manslaughter.
(H) An attempt, conspiracy or solicitation to commit murder of any of these crimes as provided in 18 Pa. C.S. §§ 901, 902 and 903.

42 Pa. Cons. Stat. § 6307, INSPECTION OF COURT FILES AND RECORDS

All files and records of the court in a proceeding under this chapter are open to inspection only by: ... (5) A judge or issuing authority for use in determining bail, provided that such inspection is limited to orders of delinquency adjudications and dispositions and petitions relating thereto, orders resulting from dispositional review hearings and histories of bench warrants and escapes.

42 Pa. Cons. Stat. § 6336, CONDUCT OF HEARINGS

(e) **Open Proceedings**. - The general public shall not be excluded from any hearings under this chapter:

(1) Pursuant to a petition alleging delinquency where the child was 14 years of age or older at the time of the alleged conduct and the alleged conduct would be considered a felony if committed by an adult.

(2) Pursuant to a petition alleging delinquency where the child was 12 years of age or older at the time of the alleged conduct and where the alleged conduct would have constituted one or more of the following offenses if committed by an adult:

(i) Murder
(ii) Voluntary manslaughter
(iii) Aggravated assault as defined in 18 Pa.C.S. § 2702(a)(1) or (2) (relating to offenses).
(iv) Arson as defined in 18 Pa.C.S. § 3301(a)(1) (relating to arson and related offenses).
(v) Involuntary deviate sexual intercourse.
(vi) Kidnapping
(vii) Rape
(viii) Robbery as defined in 18 Pa.C.S. § 3701(a)(1)(i), (ii) or (iii) (relating to robbery).
(ix) Robbery of motor vehicle
(x) Attempt of conspiracy to commit any of the offenses in this paragraph.

42 Pa. Cons. Stat. § 6341, ADJUDICATION

(b.1) **School Notification.** - (1) Upon finding a child to be a delinquent child, the court shall, through the juvenile probation department, provide the following information to the building principal or his or her designee of any public, private or parochial school in which the child is enrolled:

(i) Name of the child.
(ii) The delinquent act or acts which the child was found to have committed.
(iii) The disposition of the case.

42 Pa. Cons. Stat. § 6354, EFFECT OF ADJUDICATION

(b) **Effect in subsequent judicial matters.** - The disposition of a child under this chapter may only be used against him:

(1) in dispositional proceedings after conviction for the purposes of a presentence investigation and report if the child was adjudicated delinquent;

(2) in a subsequent juvenile hearing, whether before or after reaching majority;

(3) if relevant, where he has put his reputation or character in issue in a civil matter; or

(4) in a criminal proceeding, if the child was adjudicated delinquent for an offense, the evidence of which would be admissible if committed by an adult.