IN THE COURT OF COMMON PLEAS OF LEHIGH COUNTY

COMMONWEALTH OF PENNSYLVANIA :

V. : No. CP 39 CR 0055-1994

HARVEY MIGUEL ROBINSON :

MEMORANDUM OF LAW OF AMICUS CURIAE JUVENILE LAW CENTER IN SUPPORT OF DEFENDANT'S PRE-TRIAL MOTION TO EXCLUDE DEFENDANT'S JUVENILE ADJUDICATIONS OF DELINQUENCY FROM THE RE-SENTENCING HEARING

INTEREST AND IDENTITY OF *AMICUS CURIAE*

Juvenile Law Center, founded in 1975, is the oldest multi-issue public interest law firm for children in the United States. Juvenile Law Center advocates on behalf of youth in the child welfare and criminal and juvenile justice systems to promote fairness, prevent harm, and ensure access to appropriate services. Recognizing the critical developmental differences between youth and adults, Juvenile Law Center works to ensure that the child welfare, juvenile justice, and other public systems provide vulnerable children with the protection and services they need to become healthy and productive adults. Juvenile Law Center works to align juvenile justice policy and practice, including state sentencing laws, with modern understandings of adolescent development and time-honored constitutional principles of fundamental fairness. Juvenile Law Center participates as *amicus curiae* in state and federal courts throughout the country, including the United States Supreme Court, in cases addressing the rights and interests of children. Juvenile Law Center writes here to express our concern that the use of juvenile

adjudications in adult capital sentencing violates the Constitution, weakens the reliability of the adult sentencing scheme, and undermines the rehabilitative focus of the juvenile courts.

SUMMARY OF ARGUMENT

Amicus Curiae asks this Court to exclude Defendant's juvenile delinquency adjudications from his re-sentencing hearing. United States Supreme Court case law makes clear that defendants have a right to a jury determination on any fact that increases a sentence beyond the statutory maximum. *Apprendi v. New Jersey*, 530 U.S. 466 (2000). Using a juvenile adjudication violates this right. Moreover, using juvenile adjudications to enhance an adult sentence contradicts the United States Supreme Court's longstanding recognition of the differences between adults and juveniles. Through more than six decades of jurisprudence, the Court has recognized that youth are different from adults; they are less mature, more vulnerable to external pressure, and more capable of redemption and growth. The juvenile justice system has historically functioned with these differences in mind – indeed the very determination that there was no right to a jury trial in juvenile court rests on those premises. *See McKeiver v. Pennsylvania*, 403 U.S. 528, 545-51 (1971); *In the Interest of J.F.*, 714 A.2d 467, 473 (1998) The use of juvenile adjudications to enhance adult sentences years later fundamentally undermines the notion of a separate, protective juvenile court system.

Moreover, juvenile adjudications obtained in the absence of a jury may lack the reliability of convictions in criminal courts. This systemic risk of unreliability is a result of several factors, which include not only the absence of jury trials, but also a juvenile court culture that discourages and sometimes precludes zealous and adversarial advocacy, and a heightened possibility that some of the evidence introduced in juvenile court, such as juvenile confessions,

may itself be unreliable. Given these systemic flaws, it is fundamentally unfair to allow the use of juvenile adjudications to enhance adult sentences. When the adjudication is being used to support the imposition of the death penalty, these structural concerns are even more weighty. *See, e.g., Ake v. Oklahoma,* 470 U.S. 68, 77-83 (1985) (emphasizing the vital importance of reliable fact-finding in capital cases); *Leonel Torres Herrera v. Collins,* 506 U.S. 390, 405 (1993)("We have… held that the *Eighth Amendment* requires increased reliability of the process by which capital punishment may be imposed.") (citing *McKoy v. North Carolina,* 494 U.S. 433 (1990); *Eddings v. Oklahoma*, 455 U.S. 104 (1982); *Lockett v. Ohio*, 438 U.S. 586 (1978) (plurality opinion)).

ARGUMENT

I. Using Juvenile Adjudications to Enhance Adult Criminal Sentences Ignores the Unique Nature of the Juvenile Justice System

In 1967, the United States Supreme Court ruled that a defendant's right to have his innocence or guilt determined by a jury is "a fundamental right, essential for preventing miscarriages of justice and for assuring that fair trials are provided for all defendants." *Duncan v. Louisiana*, 391 U.S. 145, 157-58 (1967). Four years later, however, it declined to extend that right to children tried in juvenile court. *McKeiver v. Pennsylvania,* 403 U.S. 528 (1971). At the core of the *McKeiver* decision was the desire to preserve the juvenile court's uniquely "intimate, informal, protective" atmosphere, *Id.*; *In re Gault*, 387 U.S. 1, 16 (1967), and to promote the important rehabilitative function of the juvenile court. As the *McKeiver* Court explained,

> We are particularly reluctant to say. . . that the [juvenile justice] system cannot accomplish its rehabilitative goals. . . . We are reluctant to disallow the States to experiment further and to seek in new and different ways the elusive answers to the problems of the young, and we feel that we would be impeding that experimentation by imposing the jury trial.

403 U.S. at 547. To equate the juvenile and adult systems, the Court continued, "chooses to ignore it seems to us, every aspect of fairness, of concern, of sympathy, and of paternal attention that the juvenile court system contemplates." *Id.* at 550. Justice White further explicated the difference between the adult and juvenile systems:

> Guilty defendants are considered blameworthy; they are branded and treated as such, however much the State also pursues rehabilitative ends in the criminal justice system. For the most part, the juvenile justice system rests on more deterministic assumptions. Reprehensible acts by juveniles are not deemed the consequence of mature and malevolent choice but of environmental pressures (or lack of them) or of other forces beyond their control.).

Id. at 551-52 (White, J., concurring). To preserve the differences between these systems, the Court concluded that juvenile proceedings would be exempt from the jury trial right. Pennsylvania Courts have applied the same reasoning. *See, e.g., In the Interest of J.F.*, 714 A.2d 467, 473 (1998) (holding that no jury right attaches to juvenile delinquency proceedings because they are distinct from adult proceedings, and emphasizing that "[n]otwithstanding increasing evidence of instability in our society and the resultant changes in our system of juvenile justice, 'we must never forget that in creating a separate juvenile system, the [legislature] did not seek to 'punish an offender but to salvage a boy [sic] who may be in danger of becoming one.'") (internal citations omitted).

In 2000, the United States Supreme Court reaffirmed the importance of the jury trial right in *Apprendi v. New Jersey*, holding that every fact used to enhance a criminal sentence beyond the statutory maximum, except prior criminal convictions, must be found by a jury. 530 U.S. 466 (2000). Rejecting the argument that other factors, found with more limited constitutional protections, could be used to enhance the defendant's criminal sentence, the Court wrote:

> If a defendant faces punishment beyond that provided by statute when an offense is committed under certain circumstances but not others, it is obvious that both the loss of liberty and the stigma attaching to the offense are heightened; it necessarily follows that

> the defendant should not – at the moment the State is put to proof of those circumstances – be deprived of protections that have, until that point, unquestionably attached.

Id. at 484. This decision has since been heralded as establishing the jury trial right as part of the "fundamental triumvirate of procedural protections intended to guarantee the *reliability* of criminal convictions." *United States v. Tighe*, 255 F.3d 1187, 1193 (9th Cir. 2001) (emphasis added); *see also Cunningham v. California*, 549 U.S. 270 (2007); *United States v. Booker*, 543 U.S. 220 (2005); *Blakely v. Washington*, 542 U.S. 296 (2004); *Ring v. Arizona*, 536 U.S. 584 (2002).

The instant case highlights an intolerable tension between *McKeiver* and *Apprendi*. By using a prior juvenile adjudication which was obtained through a proceeding in which the defendant had no right to a jury trial to enhance a capital sentence, the Court would undermine the distinct qualities of the juvenile court, and use the outcome of a less formal – and quite possibly less reliable– proceeding to impose the most serious adult punishment available.

A. Because a Juvenile Adjudication is not a Fact Found by a Jury, it Cannot be Used to Enhance a Defendant's Sentence Beyond the Statutory Maximum

In *Apprendi*, the United States Supreme Court established a bright line rule underscoring the crucial importance of the jury right. "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum" triggers the jury right. 530 U.S. at 490. When faced with novel factual circumstances following *Apprendi*, the Supreme Court has consistently applied *Apprendi*'s bright-line rule. Indeed, the Court has clarified that although a single statute might contemplate both a life sentence and a sentence of death, when the law also requires a finding of aggravating factors before the death penalty may be imposed, the jury right attaches. *Ring v. Arizona*, 536 U.S. 584, 609 (2002).

The one exception to the jury requirement set forth in *Apprendi* is the use of "prior convictions" in a sentencing determination. The Supreme Court allows the prior convictions exception because "unlike virtually any other consideration used to enlarge the possible penalty for an offense . . . a prior conviction must itself have been established through procedures satisfying the fair notice, reasonable doubt, and jury trial guarantees." *Jones v. United States*, 526 U.S. 227, 249 (1999). Moreover, Supreme Court case law suggests that even a finding of prior convictions may now warrant jury protections. Indeed, the case that established that rule, *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), was a bare 5-4 majority opinion, with Justice Thomas among the justices who signed the majority opinion. Since then, however, Justice Thomas admitted that he was wrong in *Almendarez-Torres*, having made "an error to which I succumbed . . . ." *Apprendi*, 530 U.S. at 520, (Thomas, J., concurring). Still more recently, Justice Thomas dissented from the denial of certiorari in *Rangel-Reyes v. United States*, 547 U.S. 1200, 1202 (2006), observing that "it has long been clear that a majority of [the United States Supreme Court] now rejects [the *Almendarez-Torres*] exception." The constitutional doubt cast even on the exception regarding prior convictions – which as a practical matter are unlikely to be contested – emphasizes the importance of the jury right.

The jury right is central to our system of justice not only because it promotes reliability in fact-finding, but also because it acts as a buffer against arbitrary government action. As the Supreme Court has explained,

> [a] right to jury trial is granted to criminal defendants in order to prevent oppression by the Government. . . . Providing an accused with the right to be tried by a jury [gives] him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased or eccentric judge . . . Fear of unchecked power . . . [finds] expression in the criminal law in this insistence upon community participation in the determination of guilt or innocence.

Duncan v. Louisiana, 391 U.S. 145, 155-56 (1968). To impose capital punishment on a defendant based on facts found in juvenile court absent the jury right imposes the most serious criminal punishment available without the most basic constitutional protections.[1]

As Defendant's motion sets forth, although state and federal appellate courts across the country have split on the question of whether juvenile adjudications may be used in light of *Apprendi*, these cases do not involve the use of juvenile adjudications to support a death sentence – a situation which, according to the United States Supreme Court, calls for the most heightened standards for ensuring reliability. Defendant's Motion at 12. We write here separately to underscore that the jurisdictions that allow the use of such adjudications fail to recognize the unique nature of the juvenile justice system and the essential role of the jury trial in the "prior conviction" exception. *Compare, e.g.*, *Tighe*, 255 F.3d 1187, *and State v. Brown*, 879 So. 2d 1276 (La. 2004) (both holding that nonjury juvenile adjudications cannot be used to increase a defendant's sentence beyond the statutory maximum), *with United States v. Smalley*, 294 F.3d 1030 (8th Cir. 2002), *and State v. Weber*, 149 P.3d 646 (Cal. 2009) (both holding that a nonjury juvenile adjudication can be so used). The issue has been well-analyzed by legal scholars. *See, e.g.*, Barry C. Feld, *The Constitutional Tension Between Apprendi and McKeiver: Sentence Enhancements Based on Delinquency Convictions and the Quality of Justice in Juvenile Courts*, 38 Wake Forest L. Rev. 1111 (2003); Joseph I. Goldstein-Breyer, *Calling Strikes Before He Stepped to the Plate: Why Juvenile Adjudications Should Not Be Used to Enhance Subsequent*

[11]Legislatures across the country have recognized this. As a result, those states with laws exposing juveniles to potential adult consequences through blended sentencing or youthful offender statutes grant juveniles the right to a jury trial. *See* Ark. Code Ann. § 9-27-325 (West 2010); Colo. Rev. Stat. § 19-2-107 (West 2010); Conn. Gen. Stat. §§ 46b-133c and 46b-133d (West 2010); Idaho Code Ann. § 20-509 (West 2010); 705 Ill. Comp. Stat. 405/5-810 (West 2010); Kan. Stat. Ann. §§ 38-2347 and 38-2357 (West 2010); Minn. Stat. § 260B.130 (West 2010); N.H. Rev. Stat. Ann. § 169-B:19 (West 2010); Ohio Rev. Code Ann. § 2151.35 (West 2010); R.I. Gen. Laws § 14-1-7.3 (West 2010); Va. Code Ann. § 16.1-241 (West 2010). Illinois has taken this one step further, giving juveniles the right to jury trials in proceedings that could result in determinate sentences of confinement in juvenile correctional institutions until their twenty-first birthdays. *See* 705 Ill. Comp. Stat. 405/5-815 and 5-820.

Adult Sentences, 15 Berkeley J. Crim. L. 65 (2010); Ellen Marrus, *"That Isn't Fair, Judge": The Costs of Using Prior Juvenile Delinquency Adjudications in Criminal Court Sentencing*, 40 Hous. L. Rev. 1323 (2004).

Because the juvenile adjudication at issue here was obtained without a jury, the use of the adjudication cannot fall into the "prior conviction" exception to the *Apprendi* rule, and may not constitutionally be used to enhance an adult sentence.

B) Juvenile Court Findings Made in the Absence of a Jury may be Less Reliable than Adult Criminal Convictions to Which the Jury Trial Right Attaches

Since *McKeiver*, most states, including Pennsylvania, have continued to deny juveniles the right to a jury trial in juvenile court.[2] The particular nature of juvenile court proceedings, however, can render these judge-made findings unreliable.

The jury trial right is premised in part on the view that the collective decision-making that characterizes jury fact-finding produces more reliable determinations than judicial fact-finding alone. The jury model's central virtue is its ability to bring people "from different walks of life…into the jury box," thereby ensuring that a "variety of different experiences, feelings, intuitions and habits" inform the jury's decision-making. *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 18 (1955). Social scientists have discovered that this richness of perspective is what makes juries such excellent triers of fact; by exchanging ideas and learning from each other's experiences, jurors can construct a multi-faceted, deep understanding of the case being tried. *See* Guggenheim and Hertz, *supra*, at 576. This collective perspective is simply not

[2] Juveniles currently have the right to request a jury trial in fourteen states: Alaska, Colorado, Kansas, Massachusetts, Michigan, Minnesota, Montana, New Mexico, Oklahoma, South Dakota, Tennessee, Texas, West Virginia, and Wyoming. *See R.L.R. v. State*, 487 P.2d 27 (Alaska 1971); Col. Rev. Stat. § 19-2-107 (2010); *In re L.M.*, 186 P.3d 164, 110, 172 (Kan. 2008); Mass. Gen. Laws ch. 119, § 55A (2007); Mich. Comp. Laws § 712A.17 (2007); Minn. R. Juv. Del. P. 20.02 (2010); Mont. Code Ann. § 41-5-1502 (2007); N.M. Stat. § 32A-2-16 (2007); Okla. Stat. tit. 10, § 7303-4.1 (2007); S.D. Codified Laws § 26-7A-34 (2007); *Arwood v. State*, 463 S.W.2d 943 (Tenn. Ct. App. 1970); Tex. Fam. Code Ann. § 54.03 (2007); W.Va. Code § 49-5-6 (2007); Wyo. Stat. Ann. § 14-6-223 (2007).

present in judicial fact-finding. Indeed, empirical studies have found that judges and juries do not reach equivalent results; judges are more likely to convict than juries. *See* Harry Kalven Jr. & Hans Zeisel, *The American Jury* 107 (2d ed. 1971).

Concerns about judicial fact-finding may be heightened in juvenile court because juvenile court judges are exposed to prejudicial, inadmissible evidence to a significantly greater extent than criminal court judges. Like many criminal judges, of course, they are exposed to withdrawn guilty pleas, as well as confessions that are the subjects of pre-trial suppression hearings. This information alone is so prejudicial that it cannot always be ignored during the merits stage, even by the most conscientious of judges. *See, e.g.*, *Arizona v. Fulminante*, 499 U.S. 279, 313 (1991) (Kennedy, J., concurring in the judgment) (describing "the indelible impact a full confession may have on the trier of fact"); *United States v. Walker*, 473 F.2d 136, 138 (D.C.. Cir. 1972) (stating that although a "judge is presumed to have a trained and disciplined judicial intellect…even the most austere intellect has a subconscious").

Unlike criminal court judges, however, juvenile court judges often receive additional inadmissible background information that may skew their perception of a defendant's guilt or innocence. In many jurisdictions, for instance, a juvenile court judge may be exposed at a pre-trial detention hearing to a youth's "social history" file, documenting the youth's prior record of police contacts and delinquency adjudications. Barry C. Feld, *Criminalizing Juvenile Justice: Rules of Procedure for the Juvenile Court*, 69 Minn. L. Rev. 141, 240 (1984). When the same judge later presides over that juvenile's trial, his perception of the juvenile's guilt or innocence may be influenced by his detailed knowledge of the juvenile's history. Similarly, juvenile court judges often gain access to information about a juvenile's family background, whether through the social history file or through the judge's own previous experience presiding over the

adjudications of family members. Steven A. Drizin & Greg Luloff, *Are Juvenile Courts a Breeding Ground for Wrongful Convictions?*, 34 N. Ky. L. Rev. 257, 305-06 (2007). A child who comes from a family of known "troublemakers" may fare worse before a judge who is familiar with that fact. Indeed, some scholars have noted that in such scenarios, juvenile judges may be more likely to adjudicate children delinquent simply in order to channel them towards court-ordered treatment, in the belief that treatment would help them escape their family's influence. Guggenheim and Hertz, *supra*, at 570.

Further, because much youth crime involves group activity, juvenile court judges frequently preside over joint trials of multiple co-defendants, including some who have confessed and implicated other co-defendants, *see id.* at 571, or over the trials of youth whose co-defendants have already entered guilty pleas before that same judge. Drizin & Luloff, *supra*, at 305. Even if some judges are able to set such facts aside, not every judge can or does. *See* Kalven Jr. and Zeisel, *supra*, at 107 (identifying the existence of facts that only the judge knew as a statistically significant reason for disagreement between judges and juries).

The risks inherent in the absence of a jury right are compounded by the informal nature of juvenile proceedings. Since its inception, the juvenile justice system has fostered an informal, non-adversarial culture that downplays and even discourages zealous advocacy. *See McKeiver*, 403 U.S. at 545 (holding that the jury right would not apply in juvenile court to prevent imposing the "fully adversary" character of adult criminal trials on juvenile proceedings. This culture is rooted in the *parens patriae* underpinning of the juvenile court, which views the court as a benevolent actor seeking to promote children's "best interests" and welfare. *See* Feld, *supra*, at 187. Unfortunately, in many juvenile courts, this informal atmosphere leads to less reliable fact-finding. *See* Jeremy H. Hochberg, *Should Juvenile Adjudications Count as Prior Convictions for*

Apprendi purposes?, 45 Wm. & Mary L. Rev. 1159, 1172 n.79 (2004) ("Since the court's decisions are often driven by the best interests of the child rather than the child's guilt or innocence, juvenile adjudications may not be reliable for the purpose of establishing a juvenile's guilt"), *available at* http://scholarship.law.wm.edu/wmlr/vol45/iss3/.inadequate representation.

Similarly, many juvenile courts discourage zealous advocacy, viewing it as "antithetical to rehabilitation." Katayoon Majd & Patricia Puritz, *The Cost of Justice: How Low-Income Youth Continue to Pay the Price of Failing Indigent Defense Systems*, 16 Geo. J. on Poverty L. & Pol'y 543, 555. By discouraging juvenile defense attorneys from zealously subjecting the State's claims to the full-blown "crucible of meaningful adversarial testing," *United States v. Cronic*, 466 U.S. 648, 656 (1984), this culture makes reliability a secondary concern. The problem is exacerbated when attorneys, believing that their client will be best served by submitting to the consequences of a juvenile adjudication, fail to research and investigate cases even when the client requests it. *See* Barbara Fedders, *Losing Hold of the Guiding Hand: Ineffective Assistance of Counsel in Juvenile Delinquency Representation*, 14 Lewis & Clark L. Rev. 771, 794-95 (2010). In effect, accurate fact-finding and the child's constitutional rights are subordinated to the attorney's or court's perception of the child's best interests and need for treatment. *See* Majd & Puritz, *supra*, at 555. (describing reports that juvenile courts and judges place a "premium" on "maintaining a friendly atmosphere" that discourages some attorneys from filing motions or pursuing defenses).

Moreover, while juveniles have a long-established constitutional right to counsel in juvenile proceedings, *In re Gault*, 387 U.S. 1 (1967), the adequacy of such representation has been a persistent concern for scholars and practitioners alike. *See* Fedders, *supra*, at 791-95; Drizin & Luloff, *supra*, at 283 (2007); ABA Juvenile Justice Ctr., Juvenile Law Ctr., and Youth

Law Ctr., *A Call for Justice: An Assessment of Access to Counsel and Quality of Representation in Delinquency Proceedings* 5-12 (1995); Nat'l Juvenile Defender Ctr., *Illinois: An Assessment of Access to Counsel & Quality of Representation in Delinquency Proceedings* 48-60 (Oct. 2007); *see also* Nat'l Juvenile Defender Ctr., *Assessments*, http://www.njdc.info/assessments.php (last visited Oct. 1, 2010) (presenting assessments of nineteen states that report the need for reform on issues related to timing of appointment of counsel, frequency of waiver, attorney compensation, supervision and training, and access to investigators); Judith B. Jones, U. S. Dep't of Justice Office of Juvenile Justice & Delinquency Prevention, *Juvenile Justice Bulletin* 2 (Jun. 2004) (acknowledging that competent juvenile defense counsel will help defendants avoid self-incrimination, protect their constitutional rights, and mount an adequate defense).

A lack of resources and time constraints often leave children's lawyers overburdened and ill-prepared to provide adequate representation. *See* Majd & Puritz, *supra*, at 559-60.[3] In juvenile courts across the country, attorneys often fail to do any factual investigation, including interviewing witnesses, visiting crime scenes, or hiring investigators. *Id.* at 558 (describing how defenders "often must represent clients without the most basic tools" like computers, internet access and necessary investigators, social workers or paralegals). Similarly, some lawyers practicing in juvenile court fail to file pre-trial motions, prepare for dispositional hearings and bench trials, or even meet with their clients outside of court appearances. Fedders, *supra* at 792-93. Attorneys rely heavily on the defendant and his or her parents to identify and produce any

[3] An increase in the publication of, and national attention to, aspirational guidelines for access to counsel in juvenile court serves as acknowledgement of a broken system. *See* Nat'l Juvenile Defender Ctr. & Nat'l Legal Aid & Defender Assoc., *The Ten Core Principles for Providing Quality Delinquency Representation* (Jul. 2008), *available at* http://www.njdc.info/pdf/10_Core_Principles_2008.pdf (recognizing that legal representation of children is a specialized area of law and the right to counsel can be fully implemented only if there is resource parity and ongoing training); Nat'l Council of Juvenile & Family Court Judges, *Juvenile Delinquency Guidelines: Improving Court Practice in Juvenile Delinquency Cases* 105 (2005), *available at* http://www.ncjfcj.org (calling for greater role of counsel in juvenile court).

necessary witnesses. Rarely will counsel have the resources to hire an investigator to examine the merits of the case. *See* Drizin & Luloff, *supra* at 2859-90.[4]

Even more troublesome, despite the vital role attorneys play in juvenile court, many children still appear entirely without counsel. Even forty years after *Gault*, many states still allow juvenile defendants to waive these rights.[5] Inst. Jud. Admin. A.B.A., *Juvenile Justice Standards Annotated: A Balanced Approach* 255 (Robert E. Shepherd, Jr. ed., 1996). These waivers are frequently accepted even when the child does not adequately understand what "waiver" means or how an attorney might assist him or her,[6] Drizin & Luloff, *supra*, at 285, and even though "juveniles as a class are ill-equipped to understand, manage, or navigate the complexities of the modern juvenile (or adult) justice system." Marsha Levick & Neha Desai, *Still Waiting: The Elusive Quest to Ensure Juveniles a Constitutional Right to Counsel at All Stages of the Juvenile Court Process*, 60 Rutgers L. Rev. 175, 182 (2007).

The nature of the evidence regularly introduced against children poses yet another barrier to reliable fact-finding in juvenile court. The United States Supreme Court has recognized that juveniles are categorically less mature, less able to weigh risks and long-term consequences, more vulnerable to external pressures, and more compliant with authority figures than are adults. *Roper v. Simmons*, 543 U.S. 551, 569 (2005); *Graham v. Florida*, 130 S. Ct. 2011, 2030 (2010). These youthful traits make juveniles particularly susceptible to the pressures of even a standard

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[4] Defenders who represent youth must possess specialized skills and a sophisticated understanding the ever-expanding body of research and case law about normative adolescent development. Frequently, however, juvenile court is dismissed by attorneys as "kiddie court"– merely a training ground for adult criminal court. This revolving door through juvenile court leaves young people with the most inexperienced attorneys and inhibits defenders' development of expertise in juvenile matters. Majd & Puritz, *supra*, at 556-58.

[5] The absence of counsel from juvenile proceedings is of particular concern given the high rates of juvenile guilty pleas. *See* Fedders, *supra*, at 795; Wallace J. Mlyniec, *In re Gault at 40: The Right to Counsel in Juvenile Court—A Promise Unfulfilled*, 44 No. 3 Crim. L. Bull. 371, 394 (2008) (summarizing studies of four states estimating that approximately ninety percent or more of delinquency cases were resolved by plea).

[6] In a recent study of ninety-nine appeals challenging a juvenile's waiver of right to counsel, roughly eighty resulted in the adjudication being overturned. Mary Berkheiser, *The Fiction of Juvenile Right to Counsel: Waiver in the Juvenile Courts*, 54 Fla. L. Rev. 577, 609 (2002).

police interrogation by falsely confessing. *See Corley v. United States*, 129 S. Ct. 1558, 1570 (2009) (stating that "there is mounting empirical evidence that these pressures [associated with custodial interrogation] can induce a frighteningly high percentage of people to confess to crimes they never committed") (citing Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N. C. L. Rev. 891, 906-07 (2004)); Saul Kassin et al., *Police-Induced Confessions: Risk Factors and Recommendations*, 34 L. & Hum. Behav. 3 (2010) *available at* http://www.springerlink.com/content/ 85vh322j085784t0/fulltext.pdf (noting that juveniles' developmental differences put them at special risk for false confessions in the interrogation room); *In re Gault*, 387 U.S. at 52 (stating that "authoritative opinion has cast formidable doubt upon the reliability and trustworthiness of 'confessions' by children"). In fact, a recent empirical study of proven wrongful convictions of youth has found that juveniles are twice as likely as their adult counterparts to confess to crimes they did not commit. *See* Joshua A. Tepfer, Laura H. Nirider, & Lynda M. Tricarico, *Arresting Development: Convictions of Innocent Youth*, 62 Rutgers L. Rev. (2010). Unfortunately, these false confessions often result in wrongful adjudications and convictions, since confession evidence is considered "the most compelling possible evidence of guilt." *Miranda v. Arizona*, 384 U.S. 436, 466 (1966) (citing *Mapp v. Ohio*, 367 U.S. 643, 685 (1961) (Harlan, J., dissenting)).

Concerns about the use of unreliable evidence against juveniles include more than the problem of false confessions. Not only are juveniles more likely than adults to give false confessions during police questioning, but they are also more likely to implicate others falsely – frequently other children. *See* Tepfer, et al, *supra*. Similarly, juveniles are more likely to make unreliable eyewitness identifications, as they are more easily influenced by subtle efforts by law enforcement officers to steer the child toward a particular individual. Drizin & Luloff, *supra*, at

276; Elizabeth S. Scott & Laurence Steinberg, *Adolescent Development and the Regulation of Youth Crime*, 18 The Future of Child. 15 (2008). Collectively, these findings may blunt the reliability of substantial amounts of the evidence routinely relied upon in juvenile court.

While these obstacles to reliable fact-finding in juvenile court are neither universal nor irremediable, research has shown that some juvenile court judges "often convict on evidence so scant that only the most closed-minded or misguided juror could think the evidence satisfied the standard of proof beyond a reasonable doubt"). Martin Guggenheim & Randy Hertz, *Reflections on Judges, Juries, and Justice: Ensuring the Fairness of Juvenile Delinquency Trials*, 33 Wake Forest L. Rev. 553, 564 (1998). The concerns are sufficiently weighty to justify the exclusion of juvenile adjudications from the adult sentencing calculus.

II. Using Juvenile Adjudications to Enhance Adult Criminal Sentences Ignores Both the Settled Differences Between Juveniles and Adults and the Justifications for a Separate Juvenile Justice System

As Justice Felix Frankfurter wrote more than fifty years ago, "[C]hildren have a very special place in life which law should reflect. Legal theories and their phrasing in other cases readily lead to fallacious reasoning i[f] uncritically transferred to determination of a state's duty towards children." *May v. Anderson*, 345 U.S. 528, 536 (1953) (Frankfurter, J., concurring). Accordingly, for more than sixty years, the United States Supreme Court has strictly adhered to the notion that juvenile status informs legal status. *See Graham v. Florida*, 130 S. Ct. 2011 (2010); *Roper v. Simmons*, 543 U.S. 551 (2005); *In re Gault*, 387 U.S. 1 (1967); *Kent v. United States*, 383 U.S. 541, (1966); *Gallegos v. Colorado*, 370 U.S. 49 (1962); *Haley v. Ohio*, 332 U.S. 596 (1948).

Most recently in *Roper v. Simmons* and *Graham v. Florida*, the Supreme Court recognized that the Cruel and Unusual Punishments Clause of the Eighth Amendment requires

that juvenile offenders, whose personal and developmental attributes sharply distinguish them from adults, be spared the harshest adult sentences. In prohibiting the execution of juvenile offenders in *Roper*, the Court recognized that the differences between children and adults have been confirmed by decades of psychological and cognitive development research. Relying on that research, the Court concluded that, as compared to adults, juveniles have a "lack of maturity and an undeveloped sense of responsibility"; they "are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure"; and their character is not yet "as well formed as that of an adult." *Roper*, 543 U.S. at 569-70. For those reasons, it determined that juveniles are categorically less culpable and more capable of rehabilitation and redemption than adults. *Id.* at 570-71. Last term, in *Graham*, the Court struck sentences of life without parole for juvenile offenders in non-homicide cases, reaffirming the rationale underlying *Roper*. The Court wrote that "[n]o recent data provide reason to reconsider the court's observations in *Roper* about the nature of juveniles…. [D]evelopments in psychology and brain science continue to show fundamental differences between juvenile and adult minds." *Graham*, 130 S. Ct. at 2026.

In a case analogous to the instant proceeding, the Supreme Court of South Dakota recently adopted the reasoning of *Graham* in declining to consider a criminal defendant's prior juvenile adjudication at sentencing. Reiterating that "from a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed[,]" *Graham*, 130 S. Ct. at 2026-27 (quoting *Roper*, 543 U.S. at 570), the court explained:

> Indeed, changes in a defendant's circumstances, such as age, "may render the earlier uncharged act too remote and legally irrelevant." Edward J. Imwinkelried, 2 Uncharged Misconduct Evidence § 8:8 (Rev. ed. 1998). Thus, a "time lapse could be fatal to admissibility of the evidence if the defendant was a callow teenager at the time of the

> earlier crime." *Id.* "Because of the considerable changes in character that most individuals experience between childhood and adulthood, behavior that occurred when the defendant was a minor is much less probative than behavior that occurred while the defendant was an adult." *State v. Barreau*, 651 N.W.2d 12, 23 (Wis. Ct. App. 2002) (citations omitted) (error to admit prior offense committed when defendant was a minor).

State v. Fisher, 783 N.W.2d 664, 674 (S.D. 2010). As the court recognized, to permit "remote and legally irrelevant" prior juvenile adjudications to influence adult sentencing fails to adequately account for the key distinctions between juveniles and adults.

Permitting the use of juvenile adjudications to enhance subsequent criminal sentences is also at odds with *McKeiver*'s assumptions about the protective and benevolent nature of juvenile court. As the Louisiana Supreme Court held in *State v. Brown*, it is "contradictory and fundamentally unfair to provide youths with fewer procedural safeguards in the name of rehabilitation and then to use adjudications obtained for treatment purposes to punish them more severely as adults." 979 So. 2d 1276, 1288 (La. 2004).

Indeed, using juvenile adjudications to enhance adult sentences erodes the boundaries between juvenile and adult courts. Juvenile courts rest on the fundamental and settled differences in culpability between children and adults. Even as recent state legislative changes have narrowed the jurisdiction of juvenile court and pushed more juveniles into the adult system, no state has dismantled its separate juvenile justice system, in recognition of the unique characteristics of youth. Using delinquency adjudications years later to enhance an adult's sentence "put[s] an effective end to what ha[d] been the idealistic prospect of an intimate, informal protective proceeding." *McKeiver*, 403 U.S. at 545.

Further erosion of the boundaries between juvenile and criminal courts would doom *McKeiver's* holding that jury trials are not constitutionally required in juvenile proceedings. To deprive juveniles of adult procedures but then impose adult consequences upon them is

untenable under our constitutional scheme. The Louisiana Supreme Court recognized this conflict, deeming it "contradictory and fundamentally unfair" to deny juveniles the full panoply of adult procedural safeguards in juvenile court but then to equate their juvenile adjudications with adult convictions for the purpose of adult sentencing. *State v. Brown*, 979 So. 2d at 1288.

Once youth have relinquished procedural protections in favor of a less punitive juvenile justice system, they must be assured the benefit of that bargain. Non-jury juvenile adjudications cannot later be used to impose severe adult sentences. This is particularly true when the sentence at issue is the death penalty, a penalty "different in kind from any other punishment imposed under our system of justice," *Gregg v. Georgia*, 428 U.S. 153, 188 (1976), and one in which procedural protections and factual reliability are of the utmost importance. S*ee e.g., Zant v. Stephens*, 462 U.S. 862, 884-85 (1983).

CONCLUSION

For the foregoing reasons, *Amicus Curiae* Juvenile Law Center respectfully request that this Court exclude Defendant's juvenile delinquency adjudications from the re-sentencing hearing.

Respectfully submitted,

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