IN THE SUPREME COURT OF THE STATE OF LOUISIANA

DOCKET NUMBER 2001-KA-2149

IN THE INTEREST OF DARRELL JOHNSON

Direct Appeal of the State of Louisiana
from the Juvenile District Court for the Parish of Orleans
Case Number 00-298-01-QB, Section "B"
Honorable C. Hearn Taylor, Judge Presiding

BRIEF OF AMICI CURIAE JUVENILE LAW CENTER, CHILDREN & FAMILY JUSTICE CENTER, CHILDREN'S LAW CENTER, INC. LOUISIANA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, NATIONAL CENTER FOR YOUTH LAW, THE SENTENCING PROJECT, SOUTHERN CENTER FOR HUMAN RIGHTS, UNIVERSITY OF THE DISTRICT OF COLUMBIA JUVENILE LAW CLINIC, AND YOUTH LAW CENTER

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INTERESTS OF AMICI CURIAE

Amici curiae are leading organizations in this country that work on behalf of children and adolescents at risk, particularly young people in the juvenile and criminal justice systems. In the past thirty years amici have seen fundamental changes in the nature of juvenile court proceedings. The juvenile court has been transformed from one equally concerned with the "best interests of the child" and the "protection of the public" to one which more closely resembles the adult criminal court in its orientation towards punishing juvenile offenders and holding them accountable to their

victims. Amici join this brief out of a concern that unless juveniles are provided jury trials, that they will be receiving what the Gault Court described as the worst of both worlds: "neither the protections accorded adults nor the solicitous care and regenerative treatments postulated for children." 387 U.S. 1, 18 n.23 (1967).

Juvenile Law Center

The Juvenile Law Center (JLC) is one of the oldest legal service firms for children in the United States, founded in 1975 to advance the rights and well being of children in jeopardy. JLC pays particular attention to the needs of children who come within the purview of public agencies – for example, abused or neglected children placed in foster homes, delinquent youth sent to residential treatment facilities or adult prisons, or children in placement with specialized services needs. JLC works to ensure children are treated fairly by systems that are supposed to help them, and that children receive the treatment and services that these systems are supposed to provide. We believe the juvenile justice and child welfare systems should be used only when necessary, and work to ensure that the children and families served by those systems receive adequate education, and physical and mental health care. JLC is a non-profit public interest firm. Legal services are provided at no cost to our clients.

Children and Family Justice Center

The Children and Family Justice Center is a holistic children's law center, a clinical teaching program at Northwestern University School of Law's Legal Clinic and a research and policy center engaged with a major urban court, the Juvenile Court of Cook County, in its effort to transform itself into an outstanding and vital community resource. The Northwestern University Legal Clinic

has represented children in juvenile and criminal proceedings since its founding in 1969. Today, seven clinical staff attorneys provide legal representation for poor children, youth, and parents in a wide variety of matters, including juvenile delinquency, juvenile transfer, criminal, domestic violence, abuse and neglect, adoption, custody, special education, school suspension and expulsion, immigration and political asylum, and appeals. The staff attorneys supervise second and third year law students in the representation and team with the Center's social worker and the social work students whom she supervises.

Children's Law Center, Inc.

The Children's Law Center, Inc. is a non-profit legal service center for children incorporated in Kentucky in 1989 to protect the rights and entitlements of children and youth through quality legal representation, research and policy development, and through training and education for youth, parents and professionals about the rights of children. For twelve years, it has been a driving force in Kentucky for the rights of youth in the juvenile justice and child welfare systems, and in the education arena. It has successfully litigated conditions of confinement and access to counsel issues in class action civil rights in two class action federal lawsuits, and has been involved in long term systemic reform of the indigent juvenile defense system.

Louisiana Association of Criminal Defense Lawyers

The Louisiana Association of Criminal Defense Lawyers (LACDL) is an organization of criminal defense lawyers that includes both public defenders and private practitioners. The membership numbers over 300 attorneys, many of whom regularly represent defendants in juvenile court. The issues presented herein are of importance to the membership of the association.

National Association of Criminal Defense Lawyers

The National Association of Criminal Defense Lawyers (NACDL) is a District of Columbia non-profit corporation with a membership of more than 10,000 attorneys nationwide -- along with 80 state and local affiliate organizations numbering 28,000 members in fifty states. NACDL was founded in 1958 to promote study and research in the field of criminal law and procedure, to disseminate and advance knowledge of the law in the area of criminal justice and practice, and to encourage the integrity, independence and expertise of defense lawyers in criminal cases in the state and federal courts. NACDL is committed to preserving fairness within the American criminal justice system. Among NACDL's objectives are to ensure that appropriate measures are taken to safeguard the rights of all person involved in the criminal justice system and to promote the proper administration of justice.

National Center for Youth Law

The National Center for Youth Law (NCYL) is a private, non-profit legal organization devoted to improving the lives of poor children in the United States. For more than 25 years, NCYL has provided support services to child advocates nationwide and direct representation in cases involving child welfare, public benefits for children and their families, legal issues involving child and adolescent health, fair housing for families with children, and juvenile justice. In particular, NCYL has participated in litigation focused on the needs of youth in the juvenile justice system throughout the country. NCYL also engages in policy analysis, and administrative and legislative advocacy, on both state and national levels.

The Sentencing Project

The Sentencing Project is a national non-profit organization which since 1986 has challenged over-reliance upon the use of jails and prisons and promoted alternatives to incarceration. Its staff, advisors and consultants have closely observed all aspects of the criminal justice and corrections processes. The Sentencing Project has published some of the most widely-read research and information about sentencing and incarceration, including documentation of a highly disproportionate minority representation in the criminal justice system, the unprecedented growth of the American prison population within the last 30 years, and the relative benefits of using therapeutic treatment, rehabilitation, and social programs to reduce crime. In recent years, as direct, non-judicially-reviewed referral to adult criminal court of juvenile-aged defendants has increased, The Sentencing Project has provided guidance to advocates and information to policymakers intended to limit this practice.

Southern Center for Human Rights

The Southern Center for Human Rights (SCHR) is a non-profit legal organization that represents children and adults in death penalty cases and cases challenging unconstitutional conditions of confinement for children and adults. The Southern Center has challenged unconstitutional deprivations of defendants' due process rights in Georgia's criminal justice system and has been committed to improving the provision of indigent defense services for defendants in the adult and juvenile systems. Most recently, the Southern Center and the American Bar Association conducted an assessment of the adequacy of representation for juveniles in delinquency

proceedings in Georgia and found that children's due process rights were not adequately protected in juvenile and that the veil of confidentiality surrounding delinquency proceedings contributes to these violations of their rights.

University of the District of Columbia, Juvenile Law Clinic

Faculty and students in the Juvenile Law Clinic of the University of the District of Columbia David A. Clarke School of Law represent children in delinquency matters, children and parents in neglect and special education matters in the District of Columbia.

Youth Law Center

The Youth Law Center (YLC) is a national public interest law firm with offices in San Francisco and Washington, DC, that has worked since 1978 on behalf of children in juvenile justice and child welfare systems. YLC has worked with judges, prosecutors, defense counsel, probation departments, corrections officials, sheriffs, police, legislators, community groups, parents, attorneys, and other child advocates in California and throughout the country, providing public education, training, technical assistance, legislative and administrative advocacy, and litigation to protect children from violation of their civil and constitutional rights. YLC has worked for more than two decades to promote individualized treatment and rehabilitative goals in the juvenile justice system, protection of due process rights of youth at risk, effective programs and services for youth at risk and in trouble, consideration of the developmental differences between children and adults, and racial fairness in the justice system.

ARGUMENT

Since the United States Supreme Court's plurality decision in McKeiver v. Pennsylvania, 403 U.S. 528 (1971), that the Fourteenth Amendment's concept of fundamental fairness does not require jury trials for juveniles charged with delinquent acts, youth subject to the jurisdiction of the juvenile court have been a constitutional underclass. These youth suffer daily the same stigma of criminal accusation, public opprobrium, loss of liberty, and separation from family and community as adult offenders. Yet, in denying these youth the right to jury trial, they remain today the sole class of persons in our society charged with criminal misconduct, who are denied what Thomas Jefferson called "the only anchor ever yet imagined by man, by which a government can be held to the principles of its constitution."[1]

The McKeiver decision reversed the U.S. Supreme Court's otherwise forward progress toward constitutionalizing the juvenile court, as reflected in the series of cases decided by the Court between 1966-1970 in which it sought to strike a balance between preserving the informal and protective spirit of the original juvenile court while also heeding the demands of the Constitution when individual liberty is at stake.[2] While fully aware that the juvenile court even then had fallen far short of its promise to spare youth the harsh consequences of the criminal justice system, a plurality nevertheless withheld further constitutional protection, rather than let go of its idealized

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[1] Letter From Thomas Jefferson to Thomas Paine (July 11, 1789), in 3 The Writings of Thomas Jefferson 71 (H.A. Washington, ed. 1859).

[2] Beginning with its decision in Kent v. United States, 383 U.S. 541 (1966), the U.S. Supreme Court extended due process protections to juveniles threatened with prosecution in adult court, to In re Gault, 387 U.S. 1 (1967), and In re Winship, 397 U.S. 358 (1970), the Court extended to juveniles most of the procedural due process protections constitutionally required in adult criminal proceedings.

vision of the juvenile court. The price of the McKeiver Court's hesitation has been high. More than a generation of youth have been denied equal justice, while the lines between the juvenile and adult criminal justice systems have been all but obliterated.

Until recently, courts have stood largely mute in the face of sweeping changes to the juvenile court. But in March 2000, a juvenile court judge removed six teenage boys from a Louisiana juvenile prison after finding they had been brutalized by guards, kept in solitary confinement for months and deprived of shoes, blankets, education and medical care. See Fox Butterfield, "Privately Run Juvenile Prison in Louisiana is Attacked for Abuse of Inmates," NY Times, March 16, 2000. Although that particular juvenile facility, Jena, has since closed, it reflected the growing trend to punish, rather than rehabilitate juvenile offenders. And as this Court recognized in In re C.B., 708 So.2d. 391, 396 (La. 1998), an accused child's need for protection at the fact-finding stage – namely a fair and impartial adjudication – becomes increasingly urgent with each blow at the protective shield of the juvenile court. In the instant case, the lower court recognized that in the thirty years since McKeiver, the central tenets of the original juvenile court have been abandoned.

Whatever promise the original juvenile court may have held, it must now give way to the promise of "fundamental fairness" that the Fourteenth Amendment guarantees to youthful offenders in our society. The movement to criminalize the juvenile court threatens that promise. This Court has the opportunity to restore the constitutional equilibrium between that constitutional promise and the reality of the modern day juvenile court.

I. McKEIVER v. PENNSYLVANIA, A PLURALITY DECISION WITH NO MAJORITY RATIONALE, DOES NOT CONCLUSIVELY RESOLVE WHETHER JURY TRIALS ARE CONSTITUTIONALLY REQUIRED IN JUVENILE DELINQUENCY PROCEEDINGS

In McKeiver v. Pennsylvania, the United States Supreme Court, in a plurality decision, stopped short of expanding its extension of due process requirements to juvenile proceedings by declining to hold the Fourteenth Amendment required jury trials in juvenile court. The decision, however, lacked a majority rationale and cannot stand as the definitive resolution of this question.

The Court's three decisions prior to McKeiver – Kent v. United States, 383 U.S. 541 (1966), In re Gault, 387 U.S. 1 (1967), and In re Winship, 397 U.S. 358 (1970) -- established "fundamental fairness" as the touchstone for Fourteenth Amendment analysis of juvenile proceedings. 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). As the Court stated in Kent, juvenile proceedings, 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." Kent, 383 U.S. at 562.

Gault extended this requirement of fundamental fairness to juvenile delinquency adjudications. Gault, 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.'" Gault, 387 U.S. at 27-28. Moreover, the Court has 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 (quoting Gault, 387 U.S. at 36).

One year after Gault was decided, the Court held that the Sixth Amendment right to trial by jury in all criminal prosecutions was incorporated through the Due Process Clause of the Fourteenth Amendment and applied to the states. See Duncan v. Louisiana, 391 U.S. 145 (1968). However, in McKeiver v. Pennsylvania, 403 U.S. 528 (1971), the Court, in a plurality opinion, declined to extend the right to jury trial to juveniles during the adjudicatory hearing.

In the opinion announcing the judgment of the Court, Justice Blackmun, joined by Chief Justice Burger and Justices White and Stewart, found that extension of the jury trial right 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." McKeiver, 403 U.S. at 550. Justice Blackmun declined to equate the two, asserting it would ignore "every aspect of fairness, of concern, of sympathy, and of paternal attention that the juvenile court system contemplates." McKeiver, 403 U.S. at 550. Further, in Justice Blackmun's view, jury trials would impose on the juvenile court "the traditional delay, the formality, and the clamor of the adversary system and, possibly, the public trial," id., without any countervailing benefit to the juvenile court's fact-finding function. Id. at 547.

In his concurrence, Justice White expanded on the prevailing view of the juvenile court at that time. According to Justice White, the benevolent nature of the juvenile court was premised upon the important distinction between adult criminals who were deemed "blameworthy" and juvenile offenders whose reprehensible acts "[were] not deemed the consequence of mature and malevolent choice but of environmental pressures (or lack of them) or of other forces beyond their control." McKeiver, 403 U.S. at 552. For Justice White, the "deterministic assumptions" of the juvenile justice system meant that the system did not "stigmatize the juvenile delinquent by branding him a criminal; his conduct is not deemed so blameworthy that punishment is required to deter him or others."[3] Id. Consequently, Justice White concluded that for juvenile offenders "[c]oercive measures, where employed, are considered neither retribution nor punishment." Id. Justice White continued:

> Supervision or confinement is aimed at rehabilitation, not at convincing the juvenile of his error simply by imposing pains and penalties. Nor is the purpose to make the juvenile delinquent an object lesson for others, whatever his own merits or demerits may be. Nor is the authorization for custody . . . any measure of the seriousness of the particular act that the juvenile has performed. (emphasis added)

Id.

Based on his belief that treatment, not punishment, of children was the primary objective of the juvenile justice system, and his understanding that "the consequences of adjudication [in juvenile court] are less severe than those flowing from verdicts of criminal guilt," id. at 553, Justice White agreed that juries were not constitutionally required in delinquency proceedings.

The concurring opinions of Justices Harlan and Brennan in McKeiver -- at least one of

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[3] As discussed in Section III, infra, Louisiana's enactment of harsher and punitive laws and practices have re-written Justice White's description.

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. In fact, Justice Harlan stated that if he were to accept Duncan as good law, then he "did not see why, given Duncan, juveniles as well as adults would not be constitutionally entitled to jury trials, so long as juvenile delinquency systems are not restructured to fit their original purpose." McKeiver, 403 U.S. at 553.

Justice Brennan, on the other hand, concurring in part and dissenting in part, concluded that a juvenile's right to trial by jury depended on whether that juvenile was afforded the right to a public trial. Therefore, Justice Brennan concurred with respect to the Pennsylvania case (because Pennsylvania law at that time could be read to afford juveniles the right to a public trial), and dissented with respect to the North Carolina case (because North Carolina required closed proceedings).

While Justice Blackmun's opinion in McKeiver has generally been cited as the opinion of the Court, the plurality opinions actually share no common 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 opinions adopt the rationale of Justice Blackmun's opinion, the

McKeiver plurality stands for no more than the judgment of the Court.

Consequently, because no holding can be discerned from the McKeiver plurality, the decision does not definitively answer whether fundamental fairness requires that Darrell Johnson be accorded the right to trial by jury. In the instant case, the lower court recognized that since 1971, dramatic change has occurred to the juvenile court. See In the Interest of Darrell Johnson, Juvenile Court, Orleans Parish, No. 00-298-01-Q-B, June 14, 2001, page 7, [hereinafter "Judgment"] (observing harsher punitive legislative provisions have "overtaken the precepts and principles of the original mission of juvenile court.") The time has come for this Court to finally resolve this critical constitutional issue.

II. ASSUMING *ARGUENDO* THE BLACKMUN-WHITE RATIONALE REPRESENTS THE HOLDING OF THE McKEIVER COURT, McKEIVER'S RULING IS NO LONGER CONSTITUTIONALLY TENABLE WHERE IT IS PREMISED ON A VIEW OF THE JUVENILE COURT THAT IS NOT ACCURATE TODAY

Four members of the McKeiver plurality held that the Fourteenth Amendment's concept of fundamental fairness did not require the extension of the right to jury trial to delinquency proceedings, based on the prevailing view of the juvenile court in 1971 as a rehabilitative and therapeutic institution where a "stalwart, protective" juvenile court judge presided over an "intimate, informal protective proceeding." McKeiver, 403 U.S. at 544, 545. Believing that these features of the juvenile court sufficiently distinguished it from the adult criminal system, the McKeiver plurality concluded that a jury was not necessary either to enhance fact-finding or to serve as a buffer against government oppression in delinquency proceedings.

In the thirty years since McKeiver was decided, however, Louisiana has incorporated

principles of punishment and accountability into its juvenile system -- the two basic hallmarks of the adult criminal justice system. Where the McKeiver Court assumed the juvenile justice system mandated only rehabilitation and treatment for its young offenders, today's juvenile court imposes criminal-like responsibility and accountability on children, as it "punishes" them for their "crimes."

For example, the Louisiana General Assembly recently discarded the confidential features of the historic juvenile court and opened juvenile court proceedings to the general public under a broad array of circumstances. Louisiana's Children Code now requires public notification when a child, regardless of age, is accused of committing a violent crime, La. Ch. C. Art. 412(A), and the district attorney has discretion to publicly release the complete names of accused children. La. Ch. C. Art. 412(I). The Children's Code also requires disclosure of felony-grade delinquency adjudications and dispositions to the principal of any middle and secondary school in which the juvenile is enrolled. La. Ch. C. Art. 412(H). In addition to the required school notification, felony-grade delinquency records are now more accessible to any law enforcement officer. See La. Ch. C. Art. 412(B)-(F) (listing ten exceptions to the rule that juvenile court proceedings not be disclosed). Additionally, the General Assembly has dropped the original goal of the juvenile court to spare the juvenile offender the consequences of criminal behavior, and now permits a juvenile's delinquency adjudication to be used against him in adult criminal proceedings for the purposes of impeachment, determining bail, pre-sentence investigations, and sentencing enhancement, precisely as an adult offender's records would be used.[4]

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[4] Moreover, Louisiana's juvenile justice system has been mired in state and federal litigation, not about treatment such as education and mental health services, but about the state's inability to protect children in juvenile prisons from staff abuse and cruelty. In September of 2000, the state of Louisiana agreed in Federal District Court to settle

These types of changes render McKeiver's underlying premise untenable today.[5] Moreover, the McKeiver plurality's view that juries are not significant to the fact finding process is undermined by research questioning the inherent fairness of the juvenile court judge as fact finder, and by United States Supreme Court holdings in Duncan and Gault.

A. McKEIVER'S PREMISE THAT JUDGES COULD BE AS FAIR AS JURORS IN ASSESSING GUILT OR INNOCENCE IN THE JUVENILE COURT IS OF QUESTIONABLE ACCURACY TODAY

Justice Blackmun's reluctance to impose the jury trial on the juvenile court was further premised on his belief that the jury "would not strengthen greatly, if at all, the fact-finding function" of the juvenile court. McKeiver, 403 U.S. at 547. Although the plurality acknowledged the potential for pre-judgment in the juvenile court due to such factors as relaxed evidentiary standards and repeated appearances by the juvenile before the same judge, this risk was summarily dismissed as "choos[ing] to ignore . . . every aspect of fairness, of concern, of sympathy, and of paternal attention that the juvenile court system contemplates." McKeiver, 403 U.S. at 550.

The plurality did not elaborate on the basis for its belief in the inherent fairness of the

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several lawsuits which charged that teenage inmates in its juvenile prisons were deprived of food, clothing and medical care and were routinely beaten by guards. See Fox Butterfield, "Louisiana Settles Suit, Abandoning Private Youth Prisons," NY Times, September 8, 2000. Admittedly, under the federal court settlement the state has been prohibited from placing inmates at Jena (a privately operated juvenile facility), and the five state-operated juvenile prisons will be inspected by "independent monitors to make sure guards [are] not beating inmates." Id. (emphasis added). But there is little likelihood that children, like Darrell Johnson, who are placed in any of these five juvenile prisons will receive the rehabilitation and treatment envisioned by the McKeiver plurality.

[5] Overwhelmingly, juvenile justice experts suggest that a finding of delinquency today is not substantially different – as measured by the degree of stigma and punishment it confers – from a finding of guilt in a criminal court. See, e.g., Thomas Grisso, The Competence of Adolescents as Trial Defendants, 3 Psychol. Pub. Pol'y & L. 3,4 (1997); see generally, Linda E. Frost & Robert E. Shepherd, Jr., Mental Health Issues in Juvenile Delinquency Proceedings, 11-FALL Crim. Just. 52, 59 (1996).

judicial fact-finder. Admittedly, weighing the comparative accuracy or fairness of judges and juries is probably not susceptible to precise analysis. However, in a recent article by two prominent juvenile court commentators examining dozens of appellate decisions which reviewed juvenile court judges' determinations of delinquency, the authors suggest ample reason to question this essential premise. See generally, Martin Guggenheim & Randy Hertz, Reflections On Judges, Juries and Justice: Ensuring the Fairness of Juvenile Delinquency Trials, 33 Wake Forest L. Rev. 553 (Fall 1998). As Guggenheim and Hertz found, "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." Id. at 563.[6] Importantly, the authors based their conclusion not only on cases of evident bias either against the juvenile or in favor of law enforcement, but also on cases where "even fair-minded judges . . . convict[ed] alleged delinquents on obviously insufficient evidence." Id. at 570. The authors concluded that the problem of flawed fact-finding in the current juvenile justice system is systemic rather than isolated, resting on particular features of the juvenile court that "[skew] the judgment of fair-minded jurists." Id.

In reaching this conclusion, Guggenheim and Hertz highlighted two specific features of the court that impede fair and accurate judicial decision making. These features include:

• Case Related Factors – juvenile court judges are often exposed to inadmissible, extra-record evidence which often points indisputably to the juvenile's guilt. Although appellate courts generally assume that a trial judge disregards inadmissible evidence when deciding the case at trial,

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[6] Although not directly relevant to the issue herein, Guggenheim and Hertz examined judicial fact-finding at other stages of the juvenile court process, such as pre-trial motions to suppress, and found similar cause to question the accuracy and fairness of judicial decision making. Id. at 568.

Guggenheim and Hertz point to empirical evidence (and judges' own acknowledgments) that such highly prejudicial information often taints judicial decision making. Id. at 571. "[I]t strains the imagination to believe that a judge would not be affected by knowledge of a confession, if only at an unconscious level." Id. at 573.

• Individual vs. group dynamics in decision making – social scientific studies show that groups perform better than individuals because the prejudices of individual members of the group are frequently counterbalanced by the more diverse perspectives of all the members of that group that are brought to bear on the evaluation of conduct and motivation. Id. at 575-576. As this Court has previously recognized, a key virtue of the jury model is that it brings people "from different walks of life . . . into the jury box," thus ensuring that "a variety of different experiences, feelings, intuitions and habits" assess the facts and witnesses. United States ex rel. Toth v. Quarles, 350 U.S. 11, 18 (1955). Indeed, "twelve people's experiences and perspectives, rather than a single judge's . . . [increase] the likelihood that witnesses' credibility will be assessed accurately and facts correctly found." Guggenheim & Hertz, supra, at 576. This inherent potential for greater accuracy in group decision making serves the central purpose of the Sixth Amendment's jury trial guarantee, "to create . . . an inestimable safeguard against . . . the compliant, biased or eccentric judge." Duncan v. Louisiana, 391 U.S. at 156.

Additionally, Guggenheim and Hertz determined that judges are more likely than jurors to overlook salient facts, both because members of a group may remember facts forgotten by other members of the group, and because a judge's attention is constantly diverted by the need to resolve pending evidentiary issues and manage the ongoing work of the courtroom. Guggenheim & Hertz,

supra, at 578; see also, Ballew v. Georgia, 435 U.S. 223, 233 (1978).

Finally, Guggenheim and Hertz point to social scientific studies showing "that the give and take of a discussion format promotes accuracy and good judgment by ensuring that competing viewpoints are aired and vetted." Guggenheim & Hertz at 578-579. These studies of juries and other groups demonstrate that group members commonly abandon even the strongest of prejudgments as they are confronted with viewpoints which they did not initially recognize or value. Id. at 579.

B. McKEIVER CAN NO LONGER BE SQUARED WITH THE UNITED STATES SUPREME COURT'S HOLDING IN DUNCAN v. LOUISIANA

Whether or not the transformation of the modern juvenile court has eliminated all distinctions between juvenile and criminal defendants for Sixth Amendment purposes, the "fundamental fairness" analysis of both Duncan and Gault require the extension of the jury trial to Darrell Johnson under the circumstances herein.

In Duncan v. Louisiana, the U.S. Supreme Court extended the constitutional right to trial by jury to criminal defendants subject to state prosecutions, declaring that fundamental fairness in adult criminal proceedings requires both factual accuracy and a buffer against government oppression. The Court stated:

> 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 gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased or eccentric judge . . . Fear of unchecked power . . . found expression in the criminal law in this insistence upon community participation in the determination of guilt or innocence.

Duncan, 391 U.S. at 155-56. 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." Id. at 158.

In accordance with Duncan, the constitutional right to jury trial is only guaranteed to defendants charged with a serious crime or offense. Id. at 159-160. In defining the precise contours of the right to jury trial for criminal defendants, the U.S. Supreme Court has held that an offense carrying a maximum prison term of more than six months is deemed "serious" such that the right to a jury trial attaches. Lewis v. United States, 518 U.S. 322, 326 (1996). "Crimes punishable by sentences of more than six months are deemed by the community's social and ethical judgements to be serious . . . Opprobrium attaches to conviction of those crimes regardless of the length of the actual sentence imposed, and the stigma itself is enough to entitle the defendant to a jury." Id. at 334 (J. Kennedy concurring).

The state's argument that juveniles benefit from "the unique differences between the adult and juvenile systems," State of Louisiana's Brief at 6, turns a blind eye to the deprivation of liberty experienced by juveniles. In the instant case, Darrell Johnson, charged with violation of La. R.S. 14:95.2 and La. R.S. 14(27)30.1, carrying a firearm by a student on school property or in a firearm-free zone and attempted murder, respectively, can be committed to a juvenile institution for eight years.[7] These "objective indications of the seriousness with which society regards the offense," Frank v. United States, 395 U.S. 147, 148 (1969), upon which the U.S. Supreme Court has relied in the past to determine the applicability of right to jury trial, mandate extension of the right here.

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[7] Amici do not mean to denigrate the juvenile court process or to suggest that there are not aspects of the juvenile system which are valuable. But the features of the juvenile system the state has asserted are of unique benefit will not be impaired by extending accused juvenile delinquents the right to a trial by jury.

Under these circumstances, "[t]here is no principled justification for denying to young people the same procedural protections that other citizens receive as a matter of constitutional right." Barry C. Feld, Violent Youth and Public Policy: A Case Study of Juvenile Justice Law Reform, 79 Minn. L. Rev. 965, 1106 n.636, (1995).

CONCLUSION

For the foregoing reasons, this Court should find that the Fourteenth Amendment's concept of fundamental fairness requires the extension of the Constitutional right to jury trial to juveniles charged with delinquent acts.

Respectfully Submitted,

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September 28, 2001

AFFIDAVIT OF SERVICE

BEFORE ME, the undesigned authority, appeared Laval S. Miller-Wilson, to me know personally, who, being duly sworn, did depose and say:

1) That he is an attorney at the Juvenile Law Center in Philadelphia Pennsylvania, and co-author of the Brief of Amicus Curiae.

2) That he reviewed the foregoing application and the attachments thereto, and that the allegations contained therein are truthful; and

3) That on September 28, 2001 he delivered a copy of this application and the attachments thereto via First Class U.S. Postal Service to all parties in this matter and the judge of the trial court, including:

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S/L.Miller-Wilson_____
Laval S. Miller-Wilson

SWORN TO AND SUBSCRIBED BEFORE ME
THIS ___ DAY OF SEPTEMBER, 2001.

_____
NOTARY PUBLIC