

IN THE SUPREME COURT OF THE STATE OF LOUISIANA

DOCKET NUMBER 2009-KA-477

IN THE INTEREST OF AHMAD JACKSON

Direct Appeal of the State of Louisiana
from the Juvenile District Court for the Parish of Orleans
Case Number 2008-106-02 DQ F
Honorable Mark Doherty, Presiding

**MOTION FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE*
IN SUPPORT OF AHMAD JACKSON, RESPONDENT**

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Comes now undersigned counsel, on behalf of the National Juvenile Defender Center and Juvenile Law Center and respectfully moves for leave to file this *Brief of Amici Curiae*, pursuant to Rule VII, Section 12 of the Louisiana Supreme Court in support of the position Ahmad Jackson in his *Brief on Appeal*, that juveniles facing serious punishment should be granted jury trials. As grounds for seeking leave to file the attached *Conditionally Filed Amici Brief*, counsel states as follows:

1. Pursuant to Rule VII, Section 12(3) of the Louisiana Supreme Court, the National Juvenile Defender Center (NJDC) and Juvenile Law Center (JLC) has substantial, legitimate interests that will likely be affected by the outcome of the case and which interests will not be adequately protected by those already party to the case. NJDC's mission is to ensure excellence in juvenile defense and promote justice for all children. In service to that mission, NJDC, a national organization, helps juvenile defense attorneys improve their capacity to address practice issues, improve advocacy skills, build partnerships, exchange information, and participate in the national debate over how our society should treat children accused of crime. NJDC offers a wide range of integrated services to juvenile defenders, including training, technical assistance, advocacy, networking, collaboration, capacity building and coordination.

2. As lead author and investigator in over twenty assessments of the juvenile defense delivery systems in states and counties across the country, including three assessments in Louisiana in 2001, 2002, and 2006, NJDC promotes best practices in juvenile indigent defense to ensure quality representation in urban, suburban, rural and tribal areas.

3. The 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. JLC believes 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.

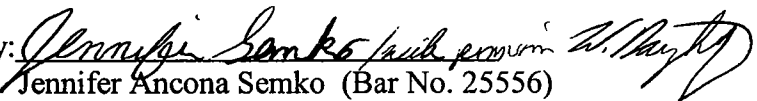
4. Seven years ago, this Court ruled, in *In re D.J.*, 817 So.2d 26 (La. May 14, 2002), that “a trial by jury in a juvenile proceeding is not constitutionally required under the applicable due process standard in juvenile proceedings.” 817 So.2d at 34. In reaching its holding, this Court relied on the plurality decision in *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971), the sentencing disparities between juvenile and adult court, and its conclusion that the “vast majority of states,” *id.*, at that time did not provide jury trials to juveniles.

5. The brief of *Amici Curiae* will address *D.J.*'s continuing relevance in light of disturbing revelations concerning serious deficiencies in Louisiana's juvenile defense delivery system and juvenile detention facilities in the last seven years, the growing national trend toward granting juveniles the right to trial by jury in certain circumstances, and the fact that *McKeiver*, a plurality decision with no shared rationale, leaves open the question of whether due process requires juveniles to have jury trials.

6. *Amici* believes that due process requires that the respondent be given a jury trial. The serious nature of the consequences faced by respondent if he is adjudicated delinquent, as well as the harmful effect that incarceration will have on respondent at his young age, especially in light of the deficiencies in Louisiana's juvenile detention facilities.

7. Further, *amici* believes that extending respondent the due process right to a jury trial comports with the principles set forth by the United States Supreme Court in *In re Gault*, 387 U.S. 1 (1967) and will further the rehabilitative goals of the Louisiana juvenile justice system.

WHEREFORE, the National Juvenile Defender Center and Juvenile Law Center respectfully asks this Court to accept the *Conditionally Filed Brief of Amici Curiae*, in support of Ahmad Jackson.

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CERTIFICATE OF SERVICE

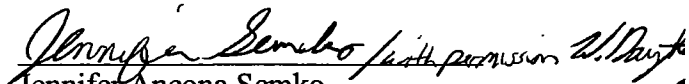
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LAW CENTER IN SUPPORT OF AHMAD JACKSON, RESPONDENT**

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INTRODUCTION

Amici curiae, the National Juvenile Defender Center (NJDC) and the Juvenile Law Center (JLC), are national organizations committed to instilling best practices and policies with regard to juvenile justice and juvenile defense. Drawing from our experience working with defenders and evaluating courts around the nation, *amici* offer insights about juvenile justice systems as they evolve and respond to state and national trends in courts and communities. *Amici* argue that the growing punitive nature of juvenile courts and laws, and evolving recognition of the due process owed in light of these developments, mandate reconsideration of Louisiana's denial of jury trials to children like A.J.

ARGUMENT

I. IN LIGHT OF THE PERSISTENT DEFICIENCIES IN LOUISIANA'S JUVENILE JUSTICE SYSTEM, AND A GROWING TREND AMONG STATES TO GRANT JURY TRIALS TO JUVENILES FACING SIGNIFICANT CONSEQUENCES, THIS COURT MUST RE-EVALUATE ITS RULING IN *IN RE D.J.*

Seven years ago, this Court ruled, in *In re D.J.*, 817 So.2d 26 (La. May 14, 2002), that “a trial by jury in a juvenile proceeding is not constitutionally required under the applicable due process standard in juvenile proceedings.” 817 So.2d at 34. In the intervening years, persistent deficiencies in Louisiana’s juvenile justice system, as well as a state trend toward granting juveniles the right to trial by jury in certain circumstances, leave this Court no choice but to re-evaluate its holding in *In re D.J.* and grant Louisiana’s juveniles the right to a jury trial.

To reach its holding in the case below in the case below, this Court relied on the United States Supreme Court’s plurality decision in *McKeiver*, as well as the sentencing disparities between juvenile and adult courts. It followed the “vast majority of states,” *id.*, that, at the time that D.J. was handed down did not provide jury trials to juveniles. However, it is now clear that each of these reasons fails to support this Court’s ruling in *D.J.*

A. As *McKeiver v. Pennsylvania* Is a Plurality Opinion without a Clear Majority Rationale, the Issue of Whether Juveniles Facing Delinquency Proceedings Have the Right to a Jury Trial Remains an Open Question.

In *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971), the United States Supreme Court, in a plurality decision, announced that juveniles facing delinquency charges have no federal right to a jury trial under either the Sixth or Fourteenth Amendments. The *McKeiver* opinion has been criticized by scholars since it was handed down,¹ with some commentators even going so far as to call it “context-dependent,”² “ripe for overruling,”³ and “suspect and outdated.”⁴ While Justice Blackmun’s opinion in *McKeiver* is generally cited as the opinion of the Court, the plurality and concurring opinions actually do not share a common rationale, and leave unsettled the question of whether juveniles facing delinquency proceedings have the right a jury trial.

McKeiver, surprising, halted what had been a steady progression in the introduction of criminal due process rights into juvenile delinquency proceedings. The Court’s three significant juvenile delinquency 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 fulcrum for Fourteenth Amendment analysis of the minimum due process protections required in

¹ See e.g., Gerald P. Hill, *Revisiting Juvenile Justice: The Requirement for Jury Trials in Juvenile Proceedings under the Sixth Amendment*, 9 FLA. Coastal L. Rev. 143, 158-160 (2008); Jason Abbott, Note, *The Use of Juvenile Adjudications under the Armed Career Criminal Act*, 85 B.U. L. Rev. 263, 269-271 (2005); 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, 1147-1168 (2003); Sara E. Kropf, Note, *Overturing McKeiver v. Pennsylvania: The Unconstitutionality of Using Prior Convictions to Enhance Adult Sentences Under the Sentencing Guidelines*, 87 Geo. L.J. 2149, 2169-2181 (1999); Thomas Geraghty, *Justice for Children: How Do We Get There?*, 88 J. Crim. L. & Criminology 190, n. 75 (1997); Susan E. Brooks, *Juvenile Injustice: The Ban On Jury Trials for Juveniles in the District of Columbia*, 33 U. Louisville J. Fam. L. 875, 887-899 (1995); Korine L. Larsen, Comment, *With Liberty and Juvenile Justice For All: Extending the Right to a Jury Trial to the Juvenile Courts*, 20 Wm. Mitchell L. Rev. 835 (1994).

² Mark R. Fondacaro, Christopher Slobogin, and Tricia Cross, *Reconceptualizing Due Process in Juvenile Justice: Contributions from Law and Social Science*, 57 Hastings L.J. 955, 969 (2006).

³ Feld, *supra* n. 1, 1224 (stating that “[a]s every commentator and many courts have noted, *McKeiver*’s uncritical and out-dated plurality decision is ripe for overruling”).

⁴ Steven A. Drizin, *Are Juvenile Courts A Breeding Ground for Wrongful Convictions?*, 34 N. Ky. L. Rev. 257, 307 (2007)(commenting that “[d]ecades of case law and studies on jury versus judicial factfinding make the *McKeiver* plurality opinion seem even more suspect and out-dated”).

juvenile proceedings.⁵ As the Court stated in *Kent*, though juvenile proceedings are not identical to criminal trials, they are not unmoored from constitutional constraints; on the contrary, they “must measure up to the essentials of due process and fair treatment.” 383 U.S. at 562. The Court expounded upon this conviction in *Gault*, issuing both an admonishment that “neither the Fourteenth Amendment nor the Bill of Rights is for adults alone,” 387 U.S. 1, 13, and a stinging rebuke of current juvenile court practice, announcing that “[u]nder our Constitution, the condition of being a boy does not justify a kangaroo court.” 387 U.S. 1, 28. In *Winship*, the Court went on to observe that “[c]ivil labels and good intentions do not themselves obviate need for criminal due process safeguards in juvenile courts.” 397 U.S. 358, 365-66. Against this backdrop, *McKeiver*’s determination that the fundamental fairness test does not “constitutionally require” trial by jury seems dissonant. 403 U.S. at 545.

One year after *Gault* was decided, the Supreme Court held in *Duncan v. Louisiana*, 391 U.S. 145 (1968), that due process requires extending to adult criminal defendants the right to trial by jury in serious criminal cases. 391 U.S. at 154. The Supreme Court did not define the precise parameters of what constituted a “serious” offense. But in *Duncan*, the defendant was convicted of simple battery, a misdemeanor punishable under Louisiana law at the time by a maximum of two years’ imprisonment and a \$300 fine. *Id.* at 146. The defendant received a sentence of 60 days and a \$150 fine. Using the maximum potential sentence as the measure of the seriousness of the offense, the Court found that the Louisiana courts had erred in denying the defendant his constitutional right to a jury trial. In *Baldwin v. New York*, 399 U.S. 66 (1970), the Supreme Court drew the line between petty and serious offenses at six months and held that the right to a jury trial attaches where an offense carrying a maximum prison term of more than six months.

⁵ See *Kent v. U.S.*, 383 U.S. 541 (1966) (holding that due process requirements apply to transfer 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 adjudicatory hearings in delinquency cases); *In re Winship*, 397 U.S. 358 (1970) (holding that fundamental fairness requires proof beyond a reasonable doubt in delinquency adjudications).

In contrast to *Duncan*, *McKeiver* fails to give the appropriate value to a jury trial. In the opinion announcing the judgment of the Court, Justice Blackmun, joined by Chief Justice Burger and Justices White and Stewart, discussed concerns that jury trials might jeopardize the intimate, informal, rehabilitative vision of the juvenile justice system, remaking it into a “fully adversary process,” *id.*, that, rather than fixing the system’s deficiencies, would “tend once again to place the juvenile squarely in the routine of the criminal process.” *Id.* at 547. Justice Blackmun also surveyed the nation’s legislation, caselaw, and statutes to gauge the national mood concerning juvenile jury trials. He found support for declining to extend juries to juvenile trials there, as well; when *McKeiver* was announced, only ten state statutes provided for jury trials under certain circumstances, while thirty-three states and the District of Columbia explicitly denied juveniles jury trials. *Id.* at 547. Finally, Justice Blackmun lodged an administrative concern that 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.

Remarkably, the *McKeiver* plurality acknowledged that the reality of juvenile court fell far short of the ideal to which the Court so fiercely hewed, so that children were in fact not receiving the individualized, rehabilitative attention they deserved. The plurality enumerated a litany of the juvenile justice system’s profound shortcomings. *Id.* at 544. But, even in the face of “all these disappointments,” the plurality concluded that the system was not so damaged as to require the Court to jettison the ideal of the intimate, informal, rehabilitative juvenile justice system altogether. *Id.* at 545. As one scholar has stated, *McKeiver* based its decision on “juvenile courts’ ‘rhetoric’ rather than their ‘reality.’” 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, 1150 (2003).

The concurrences shared no common ground with the plurality. Justice White agreed that juries were not constitutionally required in delinquency proceedings, because the primary goal of the juvenile justice system was treatment, and because the “the consequences of adjudication [in juvenile court] are less severe than those flowing from verdicts of criminal guilt.” *Id.* at 553. Justice Harlan concurred in the judgment, steadfast in his conviction that *Duncan v. Louisiana*, 391 U.S. 145 (1968), wrongly extended the right to trial by jury to state proceedings. Justice Brennan concurred with the judgment as to the Pennsylvania case, and dissented with the judgment as to the North Carolina case.

The precedential value of the *McKeiver* decision is limited since the plurality and concurring opinions share no common rationale. The Court has stated 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 the judgment of the Court alone.

B. Persistent Deficiencies Have Plagued Louisiana’s Juvenile Court System since *In re D.J.*

The *D.J.* Court “recognize[d] that the Louisiana juvenile justice system is far from perfect.” 817 So.2d at 34. Since *D.J.* was decided, several reports on Louisiana’s juvenile justice system have proven the Court’s observation all too true. Not only has Louisiana’s juvenile court system retained many of the deficiencies that the *McKeiver* Court discussed, but it has steadily become more punitive. In 2001, in *In the Interest of Darrell Johnson*, Juvenile Court, Orleans Parish, No. 00-298-01-Q-B, June 14, 2001,

page 7, the trial court stated that harsher punitive legislative provisions had “overtaken the precepts and principles of the original mission of juvenile court.” Eight years later, the trial court in *In the Interest of Ahmad Jackson* makes the same observation. See *In the Interest of Ahmad Jackson*, Juvenile Court, Orleans Parish, No. 2008-106-02-DQ-F, January 28, 2009, p. 2 (hereinafter “Judgment”)(stating, “After ten years on the bench, this court cannot continue to indulge the legal fictions of juvenile court: that jail does not mean jail; that juvenile crime is not juvenile crime; that a proceeding that uses armed guards and shackles is actually civil; or that liberty means one thing for adults and something else for juveniles.”)

In June 2001, the American Bar Association Juvenile Justice Center (ABA) released *The Children Left Behind: An Assessment of Access to Counsel and Quality of Representation in Delinquency Proceedings in Louisiana*.⁶ This comprehensive report was the consummation of a six-month investigation by the ABA and a host of national and local experts on Louisiana’s juvenile indigent defense system. One year later, in 2002, the ABA issued a follow-up report, titled *The Children Left Behind Annual Update 2002: A Review of the Status of Defense for Louisiana’s Children and Youth in Delinquency Proceedings*. The update confirmed that the most significant findings and recommendations of the original report persisted. Four years later, in 2006, at the request of Caddo Parish’s Children and Youth Planning Board (Board), the National Juvenile Defender Center assessed the access to counsel and quality of representation for children in Caddo Parish.

These reports painted a very bleak picture of juvenile justice in Louisiana. Some of the more disturbing pre-trial findings included an extremely high incidence of waiver of counsel among children, many of whom waive without speaking to a lawyer or understanding the critical consequences of their decision; an extremely high use of pleas to handle cases of juvenile delinquency, even those of a serious

⁶ The Children Left Behind is available on the web at <http://www.njdc.info/pdf/LAreport.pdf>, and The Children Left Behind: An Annual Update 2002 is available on the web at <http://www.njdc.info/pdf/louisianaupdate.pdf>.

nature, and frequently without counsel; an alarming lack of advocacy on the part of many juvenile defenders due to crushing caseloads, lack of a full-time practice, inadequate resources, lack of training and supervision, and a juvenile justice culture that presumes guilt and places little value on zealous representation.

Other examinations of Louisiana's indigent defense system revealed similar findings. In September 2006, the National Legal Aid and Defender Association (NLADA), in a report to the Louisiana State Bar Association and the Louisiana Bar Foundation, found that "each of the[] pre-existing defender deficiencies [it identified] was even more pronounced in the delivery of the right to counsel to children in juvenile cases."⁷ NLADA's recommendations to the Orleans Parish Indigent Defense Board, which NLADA pared down to cover only "the most pressing issues to be addressed, rather than a full laundry list of changes needed to transform the office and its representation of low-income clients," included creation of a juvenile division devoted to defending New Orleans' youth. *In Defense of Public Access to Justice: An Assessment of Trial-Level Indigent Defense Services in Louisiana 40 years after Gideon*, a 2004 NLADA report, stated that, "Despite reform efforts, significant challenges remain in protecting the right to counsel for both adults and juveniles." *In Defense of Public Access to Justice*, (NLADA, Washington, D.C.), March 2004, p. 3.

While *D.J.* acknowledged that Louisiana's juvenile justice system had problems, it is critical to note that these problems persist. Because of these issues, Louisiana's youth are being denied equal justice, while the lines between the juvenile and adult criminal justice systems continue to erode.

⁷ A Strategic Plan to Ensure Accountability and Protect Fairness in Louisiana's Criminal Courts, (NLADA, Washington, D.C.), Sep. 22, 2006, at iv.

C. The National Trend of Granting Jury Trials in Cases with Comparatively Punitive Sentencing Schemes Requires a Re-Examination of *State in the Interest of D.J.*

In the decades since the *McKiever* decision, state juvenile code provisions across the country have become more punitive. The purportedly benevolent nature of the juvenile justice system underwent permanent changes in the 1990s when legislators reacted to a sharp increase in juvenile violent crime that gave rise to the notion of a “super-predator,” a term elevated to prominence by ever-increasing attention by the media.⁸ See Ernestine S. Gray, *Symposium: Children, Crime and Consequences: Juvenile Justice in American Articles: The Media—Don’t Believe the Hype*, 14 STAN. L. & POL’Y REV. 45 (2003); James Forman, Jr., *Community Policing and Youth as Assets*, 95 J. CRIM. LAW & CRIMINOLOGY 1, 24 (2004). As one commentator has noted, a substantive and procedural convergence between juvenile and criminal courts “has transformed juvenile courts from nominally rehabilitative welfare agencies into scaled-down, second-class criminal courts for young people.” Barry Feld, *Violent Youth and Public Policy: A Case Study of Juvenile Justice Law Reform*, 79 MINN. L. REV. 965, 966 (1995).

These legislative changes included: changes to the purpose clause of juvenile codes to include goals of punishment, accountability and public safety; opening delinquency proceedings to the public; requiring juvenile’s fingerprints and other identifying information to become part of either an adult or juvenile database; opening juvenile court records to the public, victims, schools, prosecutors, law enforcement and social agencies; and requiring sex offender registration for juveniles adjudicated for certain sex offenses. See OJJDP, *State Legislative Responses to Violent Juvenile Crime: 1996-97*

⁸ See also John J. DiIulio Jr., *The Coming of the Super-Predators*, WEEKLY STANDARD, Nov. 27, 1995, at 23 (coining the term “super-predator”); Editorial, “No Kid Gloves for Teen Criminals,” NEW YORK POST, March 7, 1995, at p. 22 (“Treating young offenders differently from adults - offering them light punishment and numerous opportunities for rehabilitation - made sense in an earlier era when juvenile delinquency meant little more than stealing hubcaps or joy-riding in stolen cars. Today’s juvenile delinquents aren’t petty thieves or pranksters - they’re hardened criminals, many if not most beyond hope of meaningful ‘rehabilitation.’”); see generally Franklin E. Zimring, *Youth Violence* 6-7 (1998).

Update. Harsher disposition or sentencing schemes became more prevalent, such as mandatory terms of commitments for certain types of serious offenses. States also began to enact “blended sentencing” laws or Extended Juvenile Jurisdiction statutes.

Louisiana fell in step with this trend, enacting a series of legislative provisions that changed the fundamental character of Louisiana’s juvenile courts. For example, discarding the traditional confidentiality of the juvenile court, Louisiana’s juvenile court proceedings are now open to the general public under a broad array of circumstances. The 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(I), and the district attorney has discretion to publicly release the complete names of accused children. La. Ch. C. Art. 412(H)(1). 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). These types of changes render *McKeiver*’s underlying premise untenable today.

More recently – and perhaps in response – a countervailing trend has developed, in which states have determined that juveniles facing these increasingly procrustean measures have the right to trial by jury. Currently, a total of twenty-one states and the District of Columbia provide jury trials to juveniles in varying circumstances. Eleven states provide jury trials to juveniles as a matter of law.⁹ In the remaining ten states and the District of Columbia,¹⁰ jury trials are permitted in situations where the juvenile is subject to enhanced penalties.¹¹

⁹ Alaska (*R.L.R. v. State*, 487 P.2d 27 (Alaska 1971)); Kansas (*In re L.M.*, 186 P.3d 164 (Kan. 2009)); Massachusetts (Mass. Gen. Laws. Ch. 119, § 55A (2009)); Michigan (Mich. Comp. Laws § 712A.17 (2009)); Montana (Mont. Code Ann. § 41-5-102 (2008)); New Mexico (N.M. Stat. § 32A-2-16 (2009)); Oklahoma (Okla. Stat. tit. 10, § 7303-4.1 (2009)); South Dakota (S.D. Codified Laws § 26-7A-34 (2008)); Texas (Tex. Fam. Code Ann. § 54.03 (2007)); West Virginia (W.Va. Code § 49-5-6 (2009)); and Wyoming (Wyo. Stat. Ann. § 14-6-223 (2008)).

¹⁰ In the District of Columbia, the family court has jurisdiction over traffic offenses arising out of juvenile matters. Juveniles have a right to a jury trial for traffic offenses with maximum penalties that are over six months. D.C. Code § 16-705; *see*

Some states have enacted statutory provisions for jury trials for youth who remain in juvenile court and are subject to severe consequences, like A.J. A.J. is charged with aggravated rape pursuant to article 897.1, which requires juvenile life, or incarceration until the offender's twenty-first birthday. If A.J. had been charged with the same offense in Colorado or Illinois, he would have had the right to a jury trial. *See* Colo. Rev. Stat. 19-2-601(5)(a)(1); *see also* 705 Ill. Comp. Stat. §§ 405/5-815(d), (f) and 405/5-820(d), (f) (2009).

Other states have considered this same question, whether fundamental fairness requires that juveniles have jury trials to balance the liberty interest imperiled by the increasingly punitive consequences in juvenile court through challenges in court. Two other state supreme courts have also recently addressed this issue. While the Washington Supreme Court declined to extend the right to trial by jury to juveniles charged with serious offenses, *Washington v. Chavez*, 180 P.3d 1250, 1254 (Wash. 2008), the Supreme Court of Kansas held in *In re L.M.*, 186 P.3d 164 (Kan. 2008) that juveniles have a constitutional right to a jury trial under the Sixth and Fourteenth Amendments of the United States Constitution as well as under the Kansas State Constitution, abrogating its prior holding in *Findlay v. State*, 235 681 P.2d 20 (Kan. 1984).

e.g., D.C. Code § 50-2201.05b (fleeing from law enforcement officer in motor vehicle subject to penalty of imprisonment of not more than 5 years or fine of not more than \$5000 or both).

¹¹ Arkansas (Ark. Code Ann. § 9-27-325 (2009) (granting jury trial for juveniles subject to enhanced penalties)); Colorado (Colo. Rev. Stat. § 19-2-107 (2009) (aggravated juvenile offenders and juveniles who have committed crime of violence have right to jury trial)); Connecticut (Conn. Gen. Stat. §§ 46b-133c and 46b-133d (2009) (granting right to jury to serious juvenile repeat offenders and serious sexual offenders)); District of Columbia (D.C. Code §§ 16-705; Sup. Ct. Admin. Order 06-03 (family court shall have jurisdiction over traffic matters arising from juvenile charges)); Idaho (Idaho Code Ann. § 20-509 (2009) (juveniles aged 14 years and older accused of enumerated violent offenses and offenses related to controlled substances near schools have a right to jury trial)); Illinois (705 Ill. Comp. Stat. §§ 405/5-810, 5-815 and 5-820 (2009) (jury trial right given to juveniles subject to enhanced penalties, habitual juvenile offenders and violent juvenile offenders)); Minnesota (Minn. Stat. § 260B.130 (2009) (jury trial right for juveniles subject to enhanced penalties); New Hampshire (N.H. Rev. Stat. Ann. § 169-B:19 (2009) (right to jury trial if juvenile may be sentenced to adult facility or sentenced past age of majority)); Ohio (Ohio Rev. Code Ann. § 2151.35 (2009) (jury trial for serious youthful offenders)); Rhode Island (R.I. Gen. Laws § 14-1-7.3 (2008) (jury trial right for certified juveniles)); Virginia (Va. Code Ann. § 16.1-241 (2009) (juveniles 14 years or older adjudicated of felonies are given jury trial in adult court and can be given juvenile or adult sentence)).

In *L.M.*, the sixteen-year-old respondent was charged with and convicted of one count of aggravated sexual battery and one count of possession of alcohol. *L.M.* requested a jury trial, but was denied his request by the court. After a bench trial, the court found *L.M.* guilty, sentenced him as a Serious Offender I to a term of 18 months in a juvenile correctional facility, stayed the sentence and placed *L.M.* on probation until he was 20 years old. *L.M.* was also ordered to complete sex offender treatment and register as a sex offender in accordance with statute. 186 P.3d at 464-465.

Highly significant to the Kansas Supreme Court were changes made to the Kansas juvenile justice code since *Findlay v. State*, 681 P.2d 20 (Kan. 1984), the Kansas Supreme Court's prior decision on the jury trial issue, which brought the juvenile code more in line with the corresponding adult criminal statute. In the revised code, the focus shifted markedly towards "protecting the public, holding juveniles accountable for their behavior and choices, and making juveniles more productive members of society," and away from rehabilitation and the state's parental role in providing guidance, control and discipline to the juvenile. 186 P.3d at 466. The Kansas Supreme Court also noted that the revised code incorporated adopted language traditionally reserved for adult criminal proceedings, including "sentencing" instead of "disposition," and "incarceration" instead of "detention." *Id.* at 467. The legislature had also removed some of the protective provisions of the juvenile system, allowing a juvenile respondent's official file to be open to the public unless a judge orders it to be closed, and permitting juvenile records to be subject to the same disclosure requirements as those of adults. The Kansas Supreme Court pointed out that such provisions were key considerations for the plurality in *McKeiver*. *Id.* at 469.

In light of these changes, the *L.M.* court found that the benevolent character of the juvenile justice system had been so eroded that it could not be distinguished from the adult system. Because the juvenile court in Kansas was now patterned after the adult court, the Kansas Supreme Court found that

McKeiver and Findlay v. State, 681 P.2d 20 (Kan. 1984), the Kansas Supreme Court's prior decision on the jury trial issue, were no longer binding precedent. *Id.* at 469-70.

The number of states that have enacted jury trial rights for juveniles subject to the increased penalties, and certainly the Kansas Supreme Court's decision in *In re L.M.*, have great significance to this case. Both this Court in *D.J.* and the United States Supreme Court in *Duncan* and *McKeiver* gave weight to the number of states that had enacted jury trial provisions.¹² Louisiana should follow Kansas' example and find that due process requires that juveniles subject to Louisiana's increasingly punitive system must be given a right to a jury.

D. Article 897.1 of the Louisiana Children's Code Is Sufficiently Punitive And Conditions Of The State's Jails Are So Severe That Each Supports Provision of the Right to Jury Trial in Juvenile Delinquency Proceedings.

In *D.J.*, this Court pointed to *D.J.*'s comparatively shorter sentence to bolster its position that fundamental fairness did not require the extension of the right to trial by jury to juvenile respondents. However, *In re D.J.* did not directly address whether this Court would grant the right to trial by jury in the case of a child petitioned for a charge that would subject the child to mandatory commitment, as fourteen-year-old A.J. would be.

According to Article 897.1, if he is found guilty of aggravated rape, A.J. must be committed to a juvenile detention facility until he is 21 years old, or juvenile life. He would not be eligible for less restrictive services, and would also not be eligible for any modification of his sentence, such as early release, if his rehabilitative goals were achieved prior to his 21st birthday. LA. CH. CODE ANN. arts. 801,

¹² In its extension of jury trial to all criminal defendants charged with serious offenses, the Supreme Court in *Duncan* noted as significant the large number of states that provided this right, as had been the case in English common law. A review of states' laws was also an important component of the Supreme Court's decision in *McKeiver*. In his plurality opinion, Justice Blackmun observed that at that time (1971), ten states (Colorado, Kansas, Michigan, Montana, Oklahoma, South Dakota, Texas and West Virginia) provided a statutory right to jury trial in delinquency proceedings in certain circumstances. Justice Blackmun also stated that it was "more than passing interest that at least 28 states and the District of Columbia deny the juvenile a right to a jury trial in cases such as these" and that five other states did so by judicial decision. 403 U.S. at 548-49.

897.1, 909. This mandatory commitment of a youth of such a young age as A.J., in combination with the documented abuses at Louisiana juvenile detention facilities should be “constitutionally cognizable as *de facto punishment*.” Steven A. Dixon, *The Worst of Both Worlds: Punishments and Procedures for Children in Louisiana*, 30 S.U. L. REV. 329, 337 (2003).

The nature of the incarceration A.J. would face clearly displays the seriousness of the punishment inherent in the mandatory commitment. This Court should also consider the effect that such incarceration will have on A.J if he is adjudicated delinquent of the aggravated rape, charged and sentenced to spending his formative years in a juvenile detention facility.

Louisiana’s juvenile detention facilities have been subject to much scrutiny for many years because, as Justice Bernette Johnson stated in her dissenting opinion in *D.J.*, Louisiana’s juvenile prisons are become increasingly like adult prisons. 817 So. 2d 26, 37 (La. 2002). In 1995, Human Rights Watch conducted a study of the conditions of confinement at Louisiana’s detention centers in 1995 and concluded that “substantial numbers of children in the state training institutions are regularly physically abused by guards, are kept in isolation for long periods of time, and are improperly restrained by handcuffs.” Human Rights Watch, *Children in Confinement 1* (1995). The detention facilities have also been the subject of highly-publicized federal lawsuits and consent decrees addressing the poor conditions. The Jena Correctional Center for Youth was forced to shut its doors in April, 2000, due to “unsafe, violent and inhuman” violent. Dixon, *The Worst of Both Worlds* at 331. The juvenile correctional center in Tallulah has also been at the center of controversy with well-documented instances of physical abuse against the children held there. See Butterfield, F., *Profits at a Juvenile Prison Earned at a Chilling Cost*, THE NEW YORK TIMES, July 15, 1998 at A1. Juvenile court judges have even removed youth from this facility due to its brutal conditions. Dixon, *The Worst of Both Worlds* at 333. Just this year, the Juvenile Justice Project of Louisiana (JJPL) has filed suit against Richard Winder, the

head of New Orleans's Department of Human Services, and facility leaders, on behalf of juveniles awaiting trial at the New Orleans juvenile detention center. JJPL alleges that "the facility has rats and mold, lacks adequate educational services and trained staff and keeps young people in their cells for at least 20 hours a day." See *New Orleans Juvenile Detention Center's Lawsuit Receives Class Action Status*, Associated Press, February 24, 2009; see also *Complaint, J.D. v. Nagin*, No. 07-9755 (E.D. La. Dec. 21, 2007).

Research in adolescent development and psychology has found that for youth generally, institutional placement has little rehabilitative effect. Elizabeth Scott and Laurence Steinberg, *RETHINKING JUVENILE JUSTICE 23* (Harvard University Press 2008). Developmental psychologists consider the period between the ages of twelve and seventeen as a crucial time of human development. During this period, there are rapid and dramatic changes to a person's physical, intellectual, emotional and social capabilities. Adolescence is a time of great malleability, when experiences can have a great impact on the course of development. It is also a period when there is a great deal of variability between individuals at this stage, as well as within individuals.¹³ See Laurence Steinberg and Robert G. Schwartz, *Developmental Psychology in Youth on Trial 24* (Thomas Grisso and Robert G. Schwartz, eds., University of Chicago Press 2000).

During this developmental stage, "there is the very real risk that the justice system can do more harm than good And the negative consequences of careless sanctioning may last longer for a child

¹³ The developmental differences are reaffirmed by neuroscience that verify that because of the way in which their brains develop, children actually cannot think like, act like, or make decisions like adults. Neuroscientists now know that each region of the brain matures at a different rate, starting with the back and moving towards the front. Brain development is not complete until the mid-twenties, with the frontal lobes, the parietal lobes, and the temporal lobes, all of which are required for abstract reasoning, maturing last. See Abigail A. Baird & Jonathan A. Fugelsang, *The Emergence of Consequential Thought: Evidence from Neuroscience*, (2004) 359 *Phil. Transactions Royal Soc'y B: Biological Scis.* 1797, 1798. See also *Roper v. Simmons Brief of Amicus Curiae*, American Medical Association, et al., (July 19, 2004) at 11-23 (available at <http://abanet.org/crimjust/juvus/simmons/ama.pdf>).

(and for society) than they would for an adult.” David E. Arredondo, *Principles of Child Development and Juvenile Justice*, 5 J. CENTER FOR FAMILIES, CHILD. & CTS. 127, 127 (2004). The fact that a youth’s character is still in the process of forming makes him much more susceptible to the harms of prolonged detention. When a child is in an incarceratory setting during this formative period, that child is “adapting to incarceration and in institution, not to the community from which she came and to which she will return.” *Id.* at 133. It is public safety concerns, then and not concerns stemming from the youth’s rehabilitation, that drives the mandatory commitments, such as articulated in Art. 897.1. Scott & Steinberg, *RETHINKING JUVENILE JUSTICE* 233.

The punitive nature of the A.J.’s likely disposition if he is adjudicated involved, given the long period of incarceration and the impact it would have on him given his young age and stage of development, puts his case squarely into the circumstances where fundamental fairness requires a jury trial. As one scholar has observed, though delinquents in the juvenile system may not be receiving the same punishment as those of older offenders in other courts, “the lower dose does not change the fundamental character of the medicine.” Frank Zimring, *Penal Proportionality* in *YOUTH ON TRIAL* (Thomas Grisso and Robert Schwartz, eds. Univ. of Chicago Press 2000). The mandatory commitment A.J. would face if found guilty is of such a punitive nature that fundamental fairness requires that the right to jury trial should be extended to him and to other juveniles similarly situated.

II. GRANTING THE RIGHT TO A TRIAL BY JURY TO JUVENILES WILL BOLSTER, NOT UNDERMINE, THE REHABILITATIVE PURPOSE OF JUVENILE JUSTICE SYSTEM.

The rehabilitative purpose of the juvenile justice system in Louisiana will not be undermined by granting A.J. the right to a jury trial. Indeed, the extension of this due process safeguard, consistent with the Supreme Court’s principles in *Gault*, acts as both a due process and rehabilitative counterweight to the trend among states to include accountability and public safety as purposes of the juvenile courts.

The eleven jurisdictions that have adopted jury trials in all juvenile proceedings are instructive examples.¹⁴ These states continue to maintain juvenile justice systems separate from the adult criminal system and still cite rehabilitation as a goal of their juvenile courts.¹⁵ The eleven other jurisdictions that grant juveniles the right to trial by jury in circumstances where they face increased penalties also continue to distinguish between the juvenile and adult court and have adopted these measures as a way to maintain rehabilitative aspects of juvenile court.

In addition to providing a much needed due process safeguard, particularly in situations such as A.J.'s where a finding of guilty will result in mandatory commitment, a right to a jury trial furthers the rehabilitative goals of the juvenile justice system. For a child involved in the delinquency system, his or her interaction can be rehabilitative in that it presents an "opportunity for society to demonstrate its values and to articulate its expectations of its members." Arredondo, *Principles of Child Development* at 129. Child development research provides hard science support for the prescient words of the *Gault* Court, when it stated that providing due process protections could further the rehabilitative purposes of juvenile court because "the actuality of fairness, impartiality and orderliness – in short, the essentials of due process – may be a more impressive and more therapeutic attitude so far as the juvenile is concerned." 387 U.S. at 26.

In *D.J.*, this Court revealed a misunderstanding of Louisiana's distinction between the adjudication and disposition stages when it erroneously concluded that a jury trial right would "tend to destroy the flexibility of the juvenile judge as the trier of fact, [by disallowing] the judge to take into consideration social and psychological factors, family background, and education in order to shape the disposition in the best interest of both the child and society." *D.J.*, 817 So. 2d at 32-33. Having a jury

¹⁴ See *supra* fn.3.

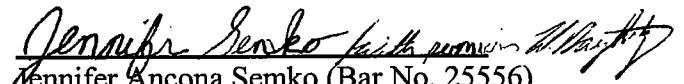
¹⁵ See Alaska Code § 47.12.010; Kan. Stat. Ann. § 38-1601 (2009); Mass. Gen. Laws. Ch. 119, § 53 (2009); Mont. Code Ann. § 41-5-1502 (2009); N.M. Stat. § 32A-2-2 (2009); Okla. Stat. tit. 10, § 7301-1.2 (2009); S.D. Codified Laws § 26-7A-6 (2009); Tex. Fam. Code Ann. § 51.01 (2009); W. Va. Code § 49-1-1 (2009); Wyo. Stat. Ann. § 14-6-201 (2009).

decide whether an offense was actually committed will not affect the court's ability to develop a nuanced, individualized disposition that aims to rehabilitate the juvenile. In the same way that the extension of the right to counsel, to proof beyond a reasonable doubt, to confrontation, and silence have not hindered the trial court's ability to rehabilitate juveniles in the delinquency system, having a jury, and not a judge, preside over that guilt or innocence phase of a factfinding will not hinder the trial judge's ability to fashion a individualized and nuanced disposition appropriate to the child's needs.

III. 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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