

No. 19-\_\_

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IN THE  
**Supreme Court of the United States**

HUNTER FUSSELL, an individual,  
*Petitioner,*

v.

STATE OF LOUISIANA,  
*Respondent.*

**On Petition For A Writ Of Certiorari  
To The Louisiana Supreme Court**

**PETITION FOR A WRIT OF CERTIORARI**

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## QUESTIONS PRESENTED

The transfer of a child from juvenile court to a criminal court is a “critically important action.” *Kent v. United States*, 383 U.S. 541, 556 (1966). It exposes children to increased prison sentences, placement in an adult prison system, and criminal proceedings for which they are at a “significant disadvantage[.]” *Graham v. Florida*, 560 U.S. 48, 78 (2010). Multiple courts have held that the Due Process Clause protects children from an arbitrary transfer. Others will give a child due process protections only if a state statute creates a liberty interest for the child to remain in juvenile court. Those courts, however, disagree over when a state creates a liberty interest. The decision below places Louisiana squarely on the most restrictive end of this range by allowing the automatic and irrevocable transfer of a 15-year-old child from the jurisdiction of a juvenile court to a criminal court without due process.

The questions presented are:

1. Whether the Due Process Clause requires that a child receive an individualized hearing before being placed in criminal court to be tried as an adult.
2. Whether a state statute that places children in the exclusive jurisdiction of its juvenile courts creates a liberty interest that is protected by the Due Process Clause.

**PARTIES TO THE PROCEEDING**

Petitioner Hunter Fussell is the defendant-appellee below.

Respondent the State of Louisiana is the plaintiff-appellant below.

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Hunter Fussell respectfully petitions for a writ of certiorari to review the judgment of the Louisiana Supreme Court in this case.

**OPINIONS BELOW**

The opinion of the Supreme Court of Louisiana, in a 4-3 decision, reversing the district court opinion and finding the automatic transfer provision of Louisiana Children's Code Article 305(A) constitutional is included at App. 1a. The opinion of the Louisiana Twenty-Second Judicial District Court, Parish of St. Tammany, declaring Article 305(A) unconstitutional, is not reported and is included at App. 31a.

**STATEMENT OF JURISDICTION**

The Louisiana Supreme Court entered its judgment in this case on December 11, 2019. On March 3, 2020, Justice Alito extended the time within which

to file a petition for a writ of certiorari to and including April 9, 2020. Subsequently, on March 19, 2020, due to public health concerns relating to COVID-19, the Court extended the deadline for all petitions due on or after that date to 150 days from the date of the lower court judgment. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

### **CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED**

The Due Process Clause of the Fourteenth Amendment provides: “No state shall . . . deprive any person of life, liberty, or property, without due process of law[.]” U.S. Const. amend. XIV, § 1.

Louisiana Children’s Code, Article 305 provides that:

A.(1) When a child is fifteen years of age or older at the time of the commission of first degree murder, second degree murder, aggravated or first degree rape, or aggravated kidnapping, he is subject to the exclusive jurisdiction of the juvenile court until either:

(a) An indictment charging one of these offenses is returned.

(b) The juvenile court holds a continued custody hearing pursuant to Articles 819 and 820 and finds probable cause that he committed one of these offenses, whichever occurs first. During this hearing, when the child is charged with aggravated or first degree rape, the court shall inform him that if convicted he shall register as a

sex offender for life, pursuant to Chapter 3-B of Title 15 of the Louisiana Revised Statutes of 1950.

(2) Thereafter, the child is subject to the exclusive jurisdiction of the appropriate court exercising criminal jurisdiction for all subsequent procedures, including the review of bail applications, and the court exercising criminal jurisdiction may order that the child be transferred to the appropriate adult facility for detention prior to his trial as an adult.

\* \* \*

D. The court exercising criminal jurisdiction shall retain jurisdiction over the child's case, even though he pleads guilty to or is convicted of a lesser included offense. A plea to or conviction of a lesser included offense shall not revert jurisdiction in the court exercising juvenile jurisdiction over such a child.

La. Child. Code art. 305(A)(1), (D).

## INTRODUCTION

More than fifty years ago, this Court explained the due process requirements for the transfer of a child to criminal court: “There is no place in our system of law for reaching a result of such tremendous consequence without ceremony—without hearing, without effective assistance of counsel, without a statement of reasons.” *Kent*, 383 U.S. at 554. Since then, however, courts have struggled to interpret *Kent*’s holding, and there is now broad disagreement



regarding what due process protections apply to protect a child from an arbitrary placement in or transfer to adult criminal court. This confusion results in wildly different levels of protection for children, depending on the jurisdiction in which they are detained.

This case presents an ideal opportunity for the Court to resolve this issue. In a 4-3 decision below, the Louisiana Supreme Court upheld a statute that permits the state to remove children as young as 15 years old from a juvenile court's exclusive jurisdiction and to place them in a court of general criminal jurisdiction to be treated as an adult. The majority below held that the state can do this without providing the child with due process because a child faced with such a situation has no liberty interest at stake that warrants protection. That holding is wrong for at least two reasons.

First, the decision below ignores the liberty interest granted to children by the Due Process Clause itself. Some courts historically have refused to recognize such an interest because they found that children are just as culpable for their delinquent actions as adults were for their criminal actions. *See, e.g., In re Boot*, 925 P.2d 964, 973-74 (Wash. 1996) (rejecting argument that children are less culpable for "crimes not calling for the death penalty"). As a result, there was no constitutional requirement to treat children differently. But science and this Court have now refuted that assumption: "[D]evelopments in psychology and brain science continue to show fundamental differences between juvenile and adult minds." *Graham*, 560 U.S. 68. As compared to adults, children have "diminished culpability and greater prospects

for reform[.]” *Miller v. Alabama*, 567 U.S. 460, 471 (2012). As the dissent below found, because children are categorically different from adults—in their culpability and in their ability to reform—a state should not be permitted to remove that distinction without adhering to due process.

Second, when a state places a child within the jurisdiction of its juvenile courts, it grants that child a liberty interest to remain there. While in juvenile court, a child benefits from a proceeding that accounts for his unique nature and that focuses on rehabilitation, treatment, and confidentiality. When a child is transferred away from that court, those protections are taken away by the state. Petitioner, for example, while he was under the juvenile court’s jurisdiction, was statutorily protected from any sentence that would extend beyond his 21st birthday. La. Child. Code art. 897.1(B)). After his transfer, however, he faces an adversarial criminal proceeding, and, if convicted, he will be subject to a mandatory life sentence with a potential for parole after 25 years. La. Rev. Stat. § 15:574.4. It is therefore not surprising that this Court has noted that such a transfer is “a matter of great significance to the juvenile[.]” *Breed v. Jones*, 421 U.S. 519, 535 (1975). As a result, “[t]here is no place in our system of law for reaching a result of such tremendous consequence without ceremony” and without due process. *Kent*, 383 U.S. at 554.

The decision below illustrates the need for this Court’s intervention. Because Petitioner resides in and was detained in Louisiana, he was transferred from juvenile proceedings to criminal court without due process. It may be that a state has a sufficient

interest in prosecuting and sentencing children as adults in certain instances, but the state should be required to adhere to due process before doing so. Louisiana did not do that here. And because other children throughout the country similarly are having their rights taken away without due process, this Court's review is warranted.

### STATEMENT

1. Petitioner is a 15-year-old boy that was detained for an alleged rape on December 13, 2018. App. 31a. Because of his age, Petitioner was detained at a juvenile detention center and was, as required by Louisiana statute, placed in the "exclusive jurisdiction" of Louisiana's juvenile courts. App. 31a-32a; La. Child. Code art 305(A).

More than two months later, on February 27, 2019, a grand jury returned an indictment charging Petitioner with first-degree rape. App. 32a. Due to the indicted offense and Petitioner's age, Article 305 of Louisiana's Children's Code mandated Petitioner's automatic transfer from juvenile court to "the exclusive jurisdiction of the appropriate court exercising criminal jurisdiction for all subsequent procedures[.]" La. Child. Code art. 305(A)(1)(a), (A)(2). More specifically, Petitioner was transferred to Louisiana's 22nd Judicial District Court. App. 32a. If a child like Petitioner is transferred under Article 305(A), he also faces the immediate risk of being transferred to an adult jail "facility for detention prior to his trial as an adult." La. Child. Code art. 305(A)(2).

Petitioner’s transfer to be tried as an adult is irrevocable under Louisiana law: “[a] plea to or conviction of a lesser included offense shall not reconstitute jurisdiction in the court exercising juvenile jurisdiction over such a child.” La. Child. Code art. 305(D). Moreover, as an adult offender, Petitioner faces a mandatory sentence of life in prison with the potential for parole after 25 years. La. Rev. Stat. § 15:574.4. While he is in an adult prison, his educational resources and requirements will fall short of those provided in youth facilities. *Compare* La. Rev. Stat. § 17:10.9, *with* La. Rev. Stat. § 15:828(A)(1). His confidentiality protections are weakened, and any subsequent expungement becomes more difficult than if he was tried in a juvenile proceeding. *Compare* La. Child. Code arts. 917-22, *with* La. Code Crim. Proc. art. 977.

2. Petitioner filed a motion to quash his transfer, contending that Louisiana’s automatic transfer provision, Article 305(A), violates both the United States and Louisiana Constitutions. App. 31a. On April 24, 2019, the District Court granted Petitioner’s motion to quash because it found that Article 305(A) “violates the Due Process Clauses of the United States and Louisiana State Constitutions.” App. 33a. The court explained that Louisiana remained free to transfer a child to adult court, but that “prior to transfer, a child must receive a hearing . . . for a determination of whether that particular child can be rehabilitated with the facilities available in the juvenile system, prior to transfer.” App. 33a.

The district court cited this Court’s holdings in *Roper*, *Graham*, and *Miller* in concluding that “[j]uveniles have a right not to be automatically

treated as adults,” App. 37a, but “[m]andatory transfer statutes . . . require certain accused juvenile offenders to be treated as adults based solely on their alleged crimes, without any opportunity for a judicial determination that the particular juvenile at issue should, in fact, be treated as an adult.” App. 37a. Addressing Petitioner’s age, the court concluded:

It does not follow, and no research supports, that a child three days into his 15th birthday is dissimilarly situated as a child that is four days younger. It may very well be that an individual is beyond rehabilitation at 15 years and three days. At a bare minimum the state and defense should have a forum to present evidence of, or contradicting that proposition.

App. 38a.

3. In a 4-3 decision, the Louisiana Supreme Court reversed the district court’s decision. There was no dispute that Petitioner did not receive due process prior to his transfer. Instead, relying heavily on its precedent from 1983, the majority found that Petitioner was not entitled to due process before his transfer because children in Louisiana do not possess a liberty interest under the United States or Louisiana Constitutions. App. 9a-10a. The court distinguished this Court’s decisions in *Roper*, *Graham*, and *Miller* as irrelevant to Petitioner’s arguments because those holdings “are based on the Eighth Amendment’s prohibition against cruel and unusual punishments[.]” App. 9a. The majority also held that “the Louisiana legislature has not provided certain juvenile offenders with a statutorily protected liberty interest in juvenile adjudication[.]” App. 10a.

Three justices dissented, finding a liberty interest in being adjudicated as a child created by state statute and supported implicitly in the Constitution and this Court’s prior holdings. App. 16a.

The dissent relied first on the “comprehensive juvenile system . . . established by the Louisiana Legislature to protect and rehabilitate juvenile offenders” designed with a “focus on rehabilitation and individual treatment rather than retribution.” App. 17a-18a. More specifically, the dissent observed, “[j]uveniles who are forced into the adult criminal justice system lose a plethora of benefits that come with adjudicating the alleged crime in the juvenile court.” App. 27a.

The dissent concluded that *Kent* and *In re Gault*, 387 U.S. 1 (1967), “together make it clear that juvenile court proceedings affecting a juvenile’s substantial rights must measure up to the essentials of due process and fair treatment . . . . Procedural due process mandates that juvenile offenders are entitled to a meaningful hearing before they can be removed from the jurisdiction of the juvenile court and subjected to adult court jurisdiction pursuant to Article 305(A).” App. 20a.

The dissent also recognized that a required transfer to adult jurisdictions exposed juveniles to more severe punishment and longer sentences without recognizing the “host of characteristics and circumstances attendant to the juvenile’s age” recognized by this Court in *Roper*, *Graham*, and *Miller*. App. 26a. The dissent found that Louisiana Article 305(A) violates the United States and Louisiana

Constitutions because it allows for a child's automatic transfer to criminal court without due process:

[It] is more significant than a simple change of venue. Juveniles who are forced into the adult criminal justice system lose a plethora of benefits that come with adjudicating the alleged crime in the juvenile justice system, and they are saddled with an adult criminal record. . . . Our understanding of juvenile culpability has changed dramatically over the last twenty years, shifting the way we treat accused juvenile offenders . . . . [The transfer decision] should be made on an individual basis. A mandated automatic transfer provision, based on age and offense alone, is constitutionally flawed.

App. 27a.

## **REASONS FOR GRANTING THE PETITION**

### **I. THE COURT SHOULD RESOLVE THE CONFUSION REGARDING THE DUE PROCESS RIGHTS GRANTED TO CHILDREN CHARGED WITH CRIMINAL CONDUCT.**

The Fourteenth Amendment's Due Process Clause protects liberty interests that "may arise from the Constitution itself, by reason of guarantees implicit in the word 'liberty,' or [that] may arise from an expectation or interest created by state laws or policies[.]" *Wilkinson v. Austin*, 545 U.S. 209, 221 (2005) (internal citations omitted). Accordingly, this

Court has held that a child can possess a protected liberty interest to be tried in juvenile court and cannot be deprived of that interest without a hearing. *Kent*, 383 U.S. at 554. But the question of when a child possesses such an interest remains disputed by courts.

In *Kent*, a 16-year-old boy in the District of Columbia was arrested and, as required by statute, placed within the “exclusive jurisdiction” of the juvenile court for the District. *Id.* at 543. Subsequently, the juvenile court “waived” its jurisdiction over the child and remitted him to the criminal jurisdiction of the U.S. District Court for the District of Columbia. Because the juvenile court transferred the child without a hearing or record of findings, however, this Court held that the transfer was unconstitutional. *Id.* at 554. “[T]here is no place in our system of law for reaching a result of such tremendous consequence without ceremony—without hearing, without effective assistance of counsel, without a statement of reasons.” *Id.*

Despite the Court’s plain language, courts have struggled to apply *Kent*’s holding. See *Woodard v. Wainwright*, 556 F.2d 781, 784 (5th Cir. 1977) (“[I]t remains unclear whether the hearing required in *Kent* was constitutionally mandated[.]”). Some have interpreted it broadly to find that the Due Process Clause grants to children a liberty interest in juvenile adjudication such that the state must give each child a hearing before a transfer to criminal jurisdiction. See, e.g., *Flakes v. People*, 153 P.3d 427, 436-37 (Colo. 2007), *as modified on denial of reh’g* (Mar. 19, 2007) (en banc) (holding state statute, “amended in response to *Kent*,” requires explanation of reasons



before juvenile may be subjected to adult sentencing); *Bouge v. Reed*, 459 P.2d 869, 870 (Or. 1969) (“We conclude that the intent of the United States Supreme Court, as expressed in [*Kent* and *In re Gault*] is that the due process clause of the Constitution of the United States requires states to accord a hearing before a juvenile can be remanded to the adult criminal process.”).

In *Flakes*, a juvenile was charged with first degree murder and thus automatically tried in adult court under Colorado’s juvenile transfer law. 153 P.3d at 430-31. The first-degree murder charge was rejected, but the juvenile was ultimately convicted of lesser charges. *Id.* The juvenile was still sentenced as an adult, even though the adult court lacked jurisdiction over the lesser charges. *Id.* Upon review, the Colorado Supreme Court rejected the sentence because it failed to comply with *Kent*. *Id.* at 436-37. The court found that *Kent* requires courts to give reasons for why a juvenile is subject to adult treatment. *Id.*

Other courts have declined to find a constitutionally provided interest and have instead held that *Kent*’s holding applies only if the state in question grants a liberty interest in juvenile court. *See, e.g., State v. Watkins*, 423 P.3d 830, 833-34 (Wash. 2018) (“There is no constitutional right to be tried in juvenile court and, hence, no constitutional right to a *Kent* hearing before being tried in adult court.”). Even among these holdings, courts disagree over what is needed for a state to confer such a right. Some have held that a protected interest exists only if a state statute allows for a discretionary transfer to a juvenile court, as was the case in *Kent*. *See, e.g.,*

*Watkins*, 423 P.3d at 834 (citation omitted) (“[T]he right [to a *Kent* hearing] attaches only if a court is given statutory discretion to assign juvenile or adult court jurisdiction.”); *People v. Patterson*, 25 N.E.3d 526, 548-49, 553 (Ill. 2014) (upholding transfer statute that required “all 15- and 16-year-olds charged with the listed offenses to be transferred”).

Other courts have found that the relevant question is one of jurisdiction; if the state statute grants jurisdiction to the juvenile court, like in *Kent*, then the juvenile possesses an interest to remain in that court. *See, e.g., Smith v. Sullivan*, 1 F. Supp. 2d 206, 222-23 (W.D.N.Y. 1998) (“The family court did not waive jurisdiction; it had none to begin with. . . . The due process concerns that were implicated in *Kent*, then, were not present here.”); *C.D. v. State*, 458 P.3d 81, 86 (Alaska 2020) (“When a statute vests the right to have a minor’s case heard in the juvenile justice system, that right constitutes a liberty interest that cannot be denied without due process.”); *State v. Grigsby*, 818 N.W.2d 511, 517 (Minn. 2012) (citation omitted) (“If the Legislature provides a juvenile with a statutory right to ‘exclusive’ juvenile court jurisdiction, however, the juvenile does have a protectable liberty interest in a juvenile adjudication, which attaches when the juvenile court attains jurisdiction.”); *Gingerich v. State*, 979 N.E.2d 694, 710-11 (Ind. Ct. App. 2012) (citation omitted) (“Thus, at the outset of the filing of the delinquency petition Gingerich enjoyed the panoply of protections associated with being tried in the juvenile system, and he was entitled to a full investigation and hearing prior to the court ordering waiver. Accordingly, Gingerich’s liberty was at stake when the State moved to waive Gingerich into adult court.”); *see also United States v.*

*Bland*, 472 F.2d 1329, 1336-37 (D.C. Cir. 1972) (stating due process rights implicated in *Kent* were caused by “initial juvenile court jurisdiction”). In these cases, once a child is placed in the jurisdiction of the juvenile court, the child obtains a liberty interest to remain there.

The interests and corresponding risk that Petitioner faces under the Louisiana statute at issue here are more striking and severe than in other cases in which the statutes were upheld. For example, the court in *Watkins* rejected a constitutional challenge to Washington’s transfer statute because adult criminal courts would have the discretion to ignore mandatory minimum sentences if the child was convicted. 423 P.3d at 833-34.

Petitioner is entitled to no such protection in Louisiana’s district court. *See, e.g.*, La. Child. Code arts. 102, 404, 897(d), 901, 918; La. Rev. Stat. §§ 17:10.9, 17:3911. Moreover, even if he is found not guilty, Petitioner immediately faces a longer period of detention—Louisiana’s district courts lack the expedited procedures required in Louisiana’s juvenile courts. More specifically, a juvenile detained for a charge involving violence is required to be given an adjudication hearing within 60 days of the appearance to answer the petition, while the same person tried in an adult criminal court could be forced to wait up to two years to be tried on a felony charge and three years for a capital offense. *Compare* La. Child. Code art. 877(A), *with* La. Code Crim. Proc. art. 578. Nor can Petitioner’s transfer be reversed—Louisiana does not allow for a “reverse transfer” back to juvenile court, even if the child’s more serious charges are withdrawn or if they result in an acquittal.

## II. THIS CASE PRESENTS AN IDEAL OPPORTUNITY TO RESOLVE THE ISSUE OF DUE PROCESS RIGHTS FOR CHILDREN.

Louisiana's transfer statute is particularly devastating in its treatment of detained children. Louisiana's Children's Code guarantees that every detained child will be placed within "the exclusive jurisdiction of the juvenile court." La. Child. Code art. 305(A)(1). That court has express goals to further the care and rehabilitation of children and to provide an array of protections in its approach to sentencing, education, and other opportunities. La. Child. Code art. 801 (declaring purpose of Louisiana Children's Code as "ensur[ing] that [each child] shall receive, preferably in his own home, the care, guidance, and control that will be conducive to his welfare[.]"). If the child is at least 15 years old and is subsequently indicted for a specified offense, or upon a finding of probable cause for that offense, the child is automatically removed without a due process hearing from juvenile court and transferred to the criminal jurisdiction of Louisiana's district courts to be tried as an adult. *See* La. Child. Code art. 305(A). One immediate implication of this transfer is that the child may be pulled from a youth detention center and placed in jail with adults. *See* La. Child. Code art. 305(A)(2).

Petitioner was first detained and placed within a youth detention center because he was only a few days past his 15th birthday at the time. He remained under the "exclusive jurisdiction" of Louisiana's juvenile courts for nearly two months. But after prosecutors obtained an indictment from a grand jury for an offense that mandated an automatic transfer under Article 305(A), Petitioner immediately was

moved to the jurisdiction of the 22nd Judicial District without an individualized hearing. That transfer also meant that Petitioner will be tried as an adult and, if convicted, faces a “mandatory penalty” of “life imprisonment” with his first opportunity for a parole hearing after 25 years. La. Rev. Stat. § 15:574.4.

Even though Louisiana’s statutory scheme placed Petitioner in the “exclusive jurisdiction” of juvenile court for months while he awaited his fate, the Louisiana Supreme Court found that he never possessed a liberty interest to remain in that jurisdiction, despite its many protections. This decision was wrong for two reasons. First, this Court should affirm what was implied in *Kent*—that children are granted a liberty interest directly under the Due Process Clause and cannot be placed in adult criminal jurisdiction without an individualized hearing. Second, at the very least, Louisiana’s statute created a liberty interest for Petitioner by guaranteeing that he would first be placed in the “exclusive jurisdiction,” and subject to the protections, of Louisiana’s juvenile courts.

**A. The decision below ignored the liberty interest created for children by the Due Process Clause.**

The Due Process Clause “specially protects those fundamental rights and liberties which are, objectively, deeply rooted in this Nation’s history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed[.]” *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997) (internal citations and

quotations omitted); *see also* *Wilkinson*, 545 U.S. at 221 (“A liberty interest may arise from the Constitution itself, by reason of guarantees implicit in the word ‘liberty[.]’”). Such liberty interests include the “right to freedom from bodily restraint” and to “personal security[.]” *Youngberg v. Romeo*, 457 U.S. 307, 315-16 (1982).

In *Vitek v. Jones*, this Court held that implicit in the Due Process Clause is a liberty interest of convicted prisoners to not be transferred to a mental hospital without appropriate procedures. 445 U.S. 480, 491-92 (1980). The Court noted that “the commitment to a mental hospital can engender adverse social consequences to the individual . . . and that it can have a very significant impact on the individual.” *Id.* at 492 (internal quotations and citation omitted). “Also, [a]mong the historic liberties’ protected by the Due Process Clause is the ‘right to be free from, and to obtain judicial relief for, unjustified intrusions on personal security.’” *Id.* (quoting *Ingraham v. Wright*, 430 U.S. 651, 673 (1977)). The Court concluded “that a convicted felon also is entitled to the benefit of procedures appropriate in the circumstances before he is . . . transferred to a mental hospital” because such a transfer “amount[s] to a ‘grievous loss.’” *Id.* at 488, 492-93.

In short, convicted adults are entitled to due process before they are transferred from a prison to a mental hospital. But courts disagree over whether similar protections exist for children facing a transfer to criminal court. This is despite the fact that the due process concerns are even greater. Pretrial confinees, for example, have greater liberty interests than convicted prisoners that are under a sentence

of confinement like in *Vitek*. See *Rapier v. Harris*, 172 F.3d 999, 1004-05 (7th Cir. 1999) (“[P]retrial confinees are not similarly situated [with convicted prisoners]; they are not under a sentence of confinement, and therefore it cannot be said that they ought to expect whatever deprivation can be considered incident to serving such a sentence.”).

More fundamentally, however, this issue presents unique due process concerns because children categorically are less culpable for their behavior than adults. See, e.g., *Roper v. Simmons*, 543 U.S. 551, 569-70 (2005) (citation omitted) (holding due to a child’s neurological development, “juveniles have a greater claim than adults to be forgiven for failing to escape negative influences in their whole environment”). “A child’s age is far ‘more than a chronological fact.’ It is a fact that ‘generates commonsense conclusions about behavior and perception.’” *J.D.B. v. North Carolina*, 564 U.S. 261, 272 (2011) (internal citations omitted). “Our history is replete with laws and judicial recognition’ that children cannot be viewed simply as miniature adults.” *Id.* at 274 (quoting *Eddings v. Oklahoma*, 455 U.S. 104, 115-16 (1982)). In short, “children are different[.]” *Miller*, 567 U.S. at 481. “[T]he normal 15-year-old is not prepared to assume the full responsibilities of an adult.” *Thompson v. Oklahoma*, 487 U.S. 815, 825 (1988).

A decade of holdings from this Court have made this point clear. See, e.g., *Roper*, 543 U.S. at 553 (“[I]t is less supportable to conclude a heinous crime committed by a juvenile is evidence of irretrievably depraved character.”). Children, as compared to adults, are less mature, more reckless and impulsive, more susceptible to peer pressure, and possess character

that is less fixed. *Id.* at 569-70. “[D]evelopments in psychology and brain science continue to show fundamental differences between juvenile and adult minds. For example, parts of the brain involved in behavior control continue to mature through late adolescence.” *Graham*, 560 U.S. at 68. Accordingly, children are more capable of rehabilitation as compared to adults, and even serious crimes committed by children do not necessarily evidence “irretrievable depravity,” making children less deserving of some sentences commonly imposed on adults. *Roper*, 543 U.S. at 553.

The Louisiana Supreme Court cast this Court’s decisions aside by noting they “are based on the Eighth Amendment’s prohibition against cruel and unusual punishments[.]” App. 9a. But a child’s decreased culpability and unique characteristics are constitutionally relevant to a criminal proceeding well before sentencing. Indeed, the differences of a child and adult come into play at the earliest stages of the criminal justice process. *See, e.g., J.D.B.*, 564 U.S. at 277 (holding distinction of child’s age is “a reality that courts cannot simply ignore” for *Miranda* analysis). And this Court has explained “the long history of our law, recognizing that there *are* differences which must be accommodated in determining the rights and duties of children as compared with those of adults.” *Thompson*, 487 U.S. at 823 (emphasis in original).

Because children are categorically less culpable, removing that distinction and treating a child like an adult for a criminal prosecution causes a “grievous loss” that should be protected by due process. Beyond this, “the features that distinguish juveniles from



adults also put them at a significant disadvantage in criminal proceedings.” *Graham*, 560 U.S. at 78. A child’s defense will more likely be impaired by “[d]ifficulty in weighing long-term consequences; a corresponding impulsiveness; and reluctance to trust defense counsel, seen as part of the adult world a rebellious youth rejects[.]” *Id.*

The harms do not end there. Transfer to Louisiana’s criminal jurisdiction also exposes a child to the risk of imminent placement in an adult jail. When placed in an adult jail, children are much more likely to be subject to sexual and other physical abuse. They also face substantial risks to their safety. Children in adult jails are five times more likely to be sexually abused—a risk so severe that Congress enacted the Prison Rape Elimination Act. 34 U.S.C. § 30301 (formerly cited as 42 U.S.C. § 15601) (finding that “[j]uveniles are 5 times more likely to be sexually assaulted in adult rather than juvenile facilities—often within the first 48 hours of incarceration”). Children often are also placed in solitary confinement, which is intended as a safety measure that comes with devastating consequences to mental health.<sup>1</sup> Moreover, children in adult jails are a staggering 36

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<sup>1</sup> See Ian M. Kysel, *Banishing Solitary: Litigating an End to the Solitary Confinement of Children in Jails and Prisons*, 40 N.Y.U. REV. L. & SOC. CHANGE 675, 688-90 (2016) (summarizing broad consensus regarding damaging impact of juvenile solitary confinement).

times more likely than adult inmates to commit suicide.<sup>2</sup>

In other words, as the dissent below held, placing a child in adult criminal court is “more significant than a simple change in venue,” App. 27a—it is a punishment. As a result, the Due Process Clause entitles a child to procedural protections before a state can impose that punishment. The holding below ignored Petitioner’s rights and allowed his transfer to Louisiana’s criminal jurisdiction without any opportunity to be heard. It should therefore be reversed.

**B. The decision below ignored the liberty interest created by the Louisiana Children’s Code.**

The decision below also was incorrect because it ignored the liberty interest that is created by the Louisiana Children’s Code. By first placing all children, including Petitioner, within the exclusive jurisdiction and protections of the juvenile court, Louisiana created a protected liberty interest for a child to remain in that court.

“[S]tate statutes may create liberty interests that are entitled to the procedural protections of the Due Process Clause of the Fourteenth Amendment.” *Vitek*, 445 U.S. at 488. In the context of convicted prisoners, for example, this Court has recognized and

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<sup>2</sup> See *Key Facts: Youth in the Justice System*, CAMPAIGN FOR YOUTH JUSTICE (April 2012), <http://www.campaignforyouthjustice.org/images/presskit/KeyYouthCrimeFacts.pdf>.

protected interests in the revocation of parole, *Morrissey v. Brewer*, 408 U.S. 471 (1972), and the revocation of probation, *Gagnon v. Scarpelli*, 411 U.S. 778 (1973). The test for a state-created liberty interest does not turn on whether it is a “right or a “privilege,” but “on the extent to which an individual will be condemned to suffer grievous loss.” *Morrissey*, 408 U.S. at 481.

In *Morrissey*, the Court considered whether a state created a protected liberty interest for prisoners by affording them parole, even though it could be revoked at any time. 408 U.S. at 472-73. Despite the fact that “the liberty of a parolee [is] indeterminate, . . . its termination inflicts a ‘grievous loss’ on the parolee[.]” *Id.* at 482. The Court also recognized societal interests in the liberty at stake, including in the parolee’s “normal and useful life within the law” and “in treating the parolee with basic fairness” by promoting rehabilitation. *Id.* at 484. “By whatever name, the liberty is valuable and must be seen as within the protection of the Fourteenth Amendment. Its termination calls for some orderly process, however informal.” *Id.* at 482.

States may similarly grant a liberty interest for a child to remain in juvenile court. As the Court noted in *Kent*, it would be “inconceivable” and “extraordinary” that a child would have fewer liberty interests than those possessed by adults, in light of “society’s special concern for children[.]” 383 U.S. at 554. The question then is when does a child’s “liberty become[ ] valuable” such that losing it would cause the holder a “grievous loss.” *See Morrissey*, 408 U.S. at 482.

Louisiana’s Children’s Code Article 305(A) meets this standard by placing each detained child within the “exclusive jurisdiction” of the juvenile court. A critical fact in *Kent* was that the juvenile court first possessed jurisdiction over the child before the transfer in question and that jurisdiction afforded certain privileges:

The Juvenile Court is vested with ‘original and exclusive jurisdiction’ of the child. This jurisdiction confers special rights and immunities. He is, as specified by the statute, shielded from publicity. He may be confined, but with rare exceptions he may not be jailed along with adults. He may be detained, but only until he is 21 years of age.

383 U.S. at 556.

Just as in *Kent*, Louisiana’s statute gave Petitioner special rights and immunities by placing him first in the “exclusive jurisdiction” of the juvenile court. App. 17a. As noted by the dissent below, Louisiana’s Constitution allows the state legislature to decide whether the state’s “special juvenile procedures shall not apply to juveniles arrested for having committed” certain offenses. App. 16a-17a. But that is not what the legislature did. Instead, it created a process where Petitioner was first placed in the “exclusive jurisdiction” of Louisiana’s juvenile courts.

This distinction is critical because the statutory scheme gave Petitioner unique statutory protections intended to further the statute’s goals of rehabilitation. Indeed, Louisiana courts have recognized that

the statutory mandate to rehabilitate youth constitutionally requires that children within the jurisdiction of a juvenile court must be given certain educational programming and support, and mental health services, among other protections. *State ex rel. S.D.*, 832 So. 2d 415, 434-35 (La. App. 4 Cir. 2002). A transfer that removes those benefits must adhere to the requirements of due process.

This Court has recognized the significance and immediate effects of transferring a child to be tried as an adult. *Breed*, 421 U.S. at 535 (describing transfer as “a matter of great significance”); *Kent*, 383 U.S. at 556 (“critically important action”). In juvenile court, Petitioner faced a proceeding that would focus on his needs and the needs of “society rather than adjudicating criminal conduct.” *Kent*, 383 U.S. at 554. If found delinquent in this proceeding, any sentence would be statutorily limited to his 21st birthday. La. Child. Code art. 897.1(B).

The transfer, however, changed that and Petitioner now must defend himself in a criminal prosecution where the state’s focus is to punish him as an adult offender. *Compare* La. Child. Code. arts. 102, 901, *with* La. Rev. Stat. § 15:906. In this proceeding, he faces a mandatory sentence of life in prison with the potential for parole after 25 years for the exact same crime. La. Rev. Stat. § 15:574.4. Importantly, after the transfer, Petitioner can have no hope that it will later be undone. Even if he is acquitted of the triggering offense or if that charge is dismissed, Article 305 requires that he remain in criminal court for any other charges that otherwise would have been adjudicated by the juvenile court. La. Child. Code art. 305(D).

Numerous courts have recognized that a liberty interest is created once the child falls within a juvenile court's jurisdiction and therefore can only reach criminal jurisdiction through a transfer. *See, e.g., Smith*, 1 F. Supp. 2d at 222-23 ("The family court did not waive jurisdiction; it had none to begin with. . . . The due process concerns that were implicated in *Kent*, then, were not present here."); *Grigsby*, 818 N.W.2d at 517 ("Absent a statutory right to 'exclusive' juvenile court jurisdiction, a child does not have any recognized protectable liberty interest in a juvenile adjudication."). In *Grigsby*, for example, the Minnesota Supreme Court explained that "[i]f the Legislature provides a juvenile with a statutory right to 'exclusive' juvenile court jurisdiction, . . . the juvenile does have a protectable liberty interest in a juvenile adjudication, which attaches when the juvenile court attains jurisdiction." 818 N.W.2d at 517; *see also Gingerich*, 979 N.E.2d at 711 ("Thus, at the outset of the filing of the delinquency petition Gingerich enjoyed the panoply of protections associated with being tried in the juvenile system, and he was entitled to a full investigation and hearing prior to the court ordering waiver. Accordingly, Gingerich's liberty was at stake when the State moved to waive Gingerich into adult court.").

The decision below illustrates the split among courts and the reluctance among some to recognize a liberty interest even in the statutory protections provided by juvenile court jurisdictions. This Court should make clear that all children obtain a liberty interest once they are placed within a juvenile court's jurisdiction and provided statutory protections. Although the State can remove that interest and transfer the child to criminal jurisdiction, the State must

comply with due process requirements in doing so. Because the decision below ignored the interest that Petitioner possessed to remain in juvenile court, that decision was wrong.

### III. A CHILD'S DUE PROCESS RIGHT IS AN IMPORTANT ISSUE.

#### A. Several jurisdictions allow the automatic transfer of children to criminal jurisdiction, often from a juvenile court's jurisdiction.

Clarifying the liberty interests of detained children is a critical and unresolved constitutional issue. Forty-two states allow for children to be automatically placed in adult criminal jurisdiction without any form of process or individualized hearing.<sup>3</sup> These pro-

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<sup>3</sup> Ala. Code § 12-15-204; Alaska Stat. § 47.12.100; Ariz. Rev. Stat. § 13-501(B); Ark. Code § 9-27-318; Cal. Welf. & Inst. Code §§ 602, 707; Colo. Rev. Stat. § 19-2-517; Conn. Gen. Stat. § 46b-127; Del. Code tit. 11, § 1447A; D.C. Code § 16-2301(3); Fla. Stat. § 985.557; Ga. Code § 15-11-560; Idaho Code § 20-509; 705 Ill. Comp. Stat. 405/5-130; Ind. Code § 31-30-1-4; Iowa Code § 232.8; La. Child. Code art. 305; Md. Code, Cts. & Jud. Proc. § 3-8A-03; Mass. Gen. Laws ch. 119, § 74; Mich. Comp. Laws §§ 712A.2, 600.606; Minn. Stat. §§ 260B.007, 260B.101; Miss. Code § 43-21-151; Mont. Code § 41-5-206; Nev. Rev. Stat. § 62B.330; N.J. Stat. § 2A:4A-26; N.M. Stat. §§ 32A-1-8, 32A-2-3; N.Y. Penal Law §§ 30.00, 70.05; N.Y. Crim. Proc. Law. §§ 1.20, 180.75; N.C. Gen. Stat. § 7B-2200; N.D. Cent. Code § 27-20-34; Ohio Rev. Code §§ 2152.10, 2152.12; Okla. Stat. tit. 10A, §§ 2-5-204 – 2-5-206; Or. Rev. Stat. § 137.707; 42 Pa. Cons. Stat. §§ 6302, 6355; R.I. Gen. Laws Ann. § 14-1-3; S.C. Code § 63-19-20; S.D. Codified Laws § 26-11-3.1; Utah Code § 78A-6-701; Va. Code § 16.1-269.1(D); Vt.

cedures violate basic principles of due process for children in each of these states, and those violations will continue unless this Court affirmatively recognizes the rights possessed by those children.

Among those forty-two states, thirty (including Louisiana) have created an independent liberty interest by placing detained children within the jurisdiction of the state's juvenile courts, but each allows children to be transferred to adult criminal court without a due process hearing to consider a child's age or potential for rehabilitation.<sup>4</sup> Recognizing that statutory schemes like this cannot withstand constitutional scrutiny is critical to protecting the due process rights of children in each of these states.

Even among these states, Louisiana is one of the most harmful to children. It is one of only fourteen

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Stat. tit. 33 § 5201; Wash. Rev. Code § 13.0430; W. Va. Code § 49-4-710; Wis. Stat. §§ 938.183, 938.12; Wyo. Stat. § 14-6-203.

<sup>4</sup> Ala. Code § 12-15-204; Alaska Stat. § 47.12.100; Ariz. Rev. Stat. § 13-501(B); Ark. Code § 9-27-318; Cal. Welf. & Inst. Code §§ 602, 707; Colo. Rev. Stat. § 19-2-517; D.C. Code § 16-2301(3); Fla. Stat. § 985.557; Ga. C. § 15-11-560; Idaho Code § 20-509; 705 Ill. Comp. Stat. 405/5-130; Ind. Code § 31-30-1-4; Iowa Code § 232.8; La. Child. Code art. 305; Md. Code, Cts. & Jud. Proc. § 3-8A-03; Mass. Gen. Laws ch. 119, § 54; Mich. Comp. Laws §§ 712A.2, 600.606; Minn. Stat. §§ 260B.007, 260B.101; Miss. Code § 43-21-151; Mont. Code § 41-5-206; Nev. Rev. Stat. § 62B.330; N.M. Stat. §§ 32A-1-8, 32A-2-3; N.Y. Penal Law §§ 30.00, 70.05; N.Y. Crim. Proc. Law. §§ 1.20, 180.75; Okla. Stat. tit. 10A, §§ 2-5-204 – 2-5-206; Or. Rev. Stat. § 137.707; 42 Pa. Cons. Stat. § 6321; S.C. Code §§ 63-3-510; 63-19-20; Utah Code § 78A-6-701; Wis. Stat. §§ 938.183, 938.12; Wyo. § 14-6-203.



states that allows a child to be placed into adult court without due process, but then prohibits that child from ever returning to juvenile court, even if the triggering charge is dropped (also known as a “reverse waiver” provision).<sup>5</sup> Conversely, other states, while not expressly authorizing “reverse waivers,” allow children other forms of review in an attempt to mitigate the harms that stem from a transfer to adult court. Alaska, for example, allows a child convicted of a lesser offense in adult court to show their amenability to treatment as a delinquent. Alaska Stat. § 47.12.030. Other states grant appellate courts the ability to review juvenile transfers<sup>6</sup> or allow district courts to return cases to juvenile court upon a finding that the case is “more properly suited to disposition” there.<sup>7</sup>

The variety of state approaches reflects the unsettled state of juvenile due process rights. Clarifying this issue will ensure children—for whom society has a special concern, *Kent*, 383 U.S. at 554—are appropriately protected in the criminal justice process.

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<sup>5</sup> Ala. Code § 12-15-204; Alaska Stat. § 47.12.100; D.C. Code § 16-2301(3); Fla. Stat. § 985.557; Idaho Code § 20-509; 705 Ill. Comp. Stat. 405/5-130; Ind. Code § 31-30-1-4; La. Child. Code art. 305; Mass. Gen. Laws ch. 119, § 74; Minn. Stat. §§ 260B.007, 260B.101; N.M. Stat. §§ 32A-1-8, 32A-2-3; Utah Code § 78A-6-701; Wash. Rev. Code. Ann. § 13.40.110; W. Va. Code § 49-4-710.

<sup>6</sup> W. Va. Code § 49-4-710(j).

<sup>7</sup> Wyo. Stat. § 14-6-237.

**B. Treating children as adults harms the child and harms society.**

Prosecuting children in adult criminal court also does not serve society's interests. Studies show that juvenile transfer laws are not effective means of reducing crime.<sup>8</sup> Youth transferred from the juvenile to the adult system, even if they are not convicted, are 34% more likely to recidivate—and recidivate with more violent offenses—than their juvenile counterparts that remain in the juvenile system.<sup>9</sup>

The disadvantages continue even after release from adult prisons. In Louisiana, an adult criminal conviction can be used as a predicate offense to enhance sentences for future wrongdoing, but a juvenile court adjudication—because it is not a conviction of a crime—cannot. La. Child. Code art. 884; *State v. Brown*, 879 So. 2d 1276, 1289-90 (La. 2004). For the same reason, youth with criminal records (but not

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<sup>8</sup> See, e.g., David L. Myers, *The Recidivism of Violent Youth in Juvenile and Adult Court: A Consideration of Selection Bias*, Youth Violence and Juv. Just., Jan. 2003, at 9-11; Jeffrey Fagan, *The Comparative Advantage of Juvenile Versus Criminal Court Sanctions on Recidivism among Adolescent Felony Offenders*, Law & Policy, Jan. 1996, at 77-114.

<sup>9</sup> Robert Hahn, et al., *Effects on Violence of Laws and Policies Facilitating the Transfer of Youth from the Juvenile to the Adult Justice System: A Report on Recommendations of the Task Force on Community Preventive Services*, Center for Disease Control and Prevention, Morbidity and Mortality Wkly. Rep., Nov. 30, 2007, at 7-8; see also *id.* at 9 (“To the extent that transfer policies are implemented to reduce violent or other criminal behavior, available evidence indicates that they do more harm than good.”).

those adjudicated delinquent in juvenile court) can be denied employment opportunities due to their criminal histories, creating a substantial roadblock very early in a person's life for future opportunities. *See, e.g.*, La. Rev. Stat. § 42:1701(B) (allowing state employers to consider criminal histories of prospective employees in making hiring decisions). Additionally, juvenile records are subject to enhanced confidentiality protections and have the potential for expungement, including for murder and rape adjudications. La. Child. Code arts. 404, 918. These heightened protections give a young person, uniquely capable of growth and change, a more meaningful chance to live a productive life. Further, while juvenile detention centers provide high school and college education, not all adult facilities do. *See* La. Rev. Stat. § 15:828(A)(1) (requiring prisons to establish education programming only when resources permit). Thus, by the time a child is released from adult jail, he may be years behind his peers academically and with significantly more limited opportunities.

These consequences of a transfer from juvenile to adult criminal court revolve around a central fact: age matters. Article 305, however, contravenes the very purpose of Louisiana's juvenile justice system and this Court's jurisprudence by depriving children capable of rehabilitation of a hearing to determine if a transfer to the adult system is appropriate. The consequences of a transfer are disproportionately grave and dangerous, stopping a child's greater possibility for reform dead in its tracks.

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**CONCLUSION**

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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MAY 8, 2020

## **APPENDIX**

1a

**APPENDIX A**

SUPREME COURT OF LOUISIANA

[Filed Dec. 11, 2019]

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No. 2019-KA-01061

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STATE OF LOUISIANA

versus

HUNTER FUSSELL

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ON APPEAL FROM THE TWENTY-SECOND  
JUDICIAL DISTRICT COURT, PARISH OF  
ST. TAMMANY

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PER CURIAM:\*

Children's Code article 305(A), pertaining to divestiture of juvenile court jurisdiction and original criminal court jurisdiction over children, provides:

A. (1) When a child is fifteen years of age or older at the time of the commission of first degree murder, second degree murder, aggravated or first degree rape, or aggravated kidnapping, he is subject to the exclusive jurisdiction of the juvenile court until either:

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\* Chief Judge Susan M. Chehardy of the Court of Appeal, Fifth Circuit, heard this case as Justice pro tempore, sitting in the vacant seat for District 1 of the Supreme Court. She is now appearing as an ad hoc for Justice William J. Crain. Retired Judge James Boddie Jr., appointed Justice ad hoc, sitting for Justice Marcus R. Clark.

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(a) An indictment charging one of these offenses is returned.

(b) The juvenile court holds a continued custody hearing pursuant to Articles 819 and 820 and finds probable cause that he committed one of these offenses, whichever occurs first. During this hearing, when the child is charged with aggravated or first degree rape, the court shall inform him that if convicted he shall register as a sex offender for life, pursuant to Chapter 3-B of Title 15 of the Louisiana Revised Statutes of 1950.

(2) Thereafter, the child is subject to the exclusive jurisdiction of the appropriate court exercising criminal jurisdiction for all subsequent procedures, including the review of bail applications, and the court exercising criminal jurisdiction may order that the child be transferred to the appropriate adult facility for detention prior to his trial as an adult.

Defendant Hunter Fussell was indicted for a first degree rape of a victim under the age of thirteen, La.R.S. 14:42(A)(4), that he was alleged to have committed on or shortly after his fifteenth birthday. At that point, pursuant to Article 305(A), defendant became subject to the exclusive jurisdiction of the Twenty-Second Judicial District Court exercising its criminal jurisdiction.

Defendant filed motions contending that the automatic transfer provision of Article 305(A) violates several constitutional provisions, both state and federal, as well as evolving United States Supreme Court jurisprudence recognizing the special characteristics of juveniles that can affect their capabilities and

culpability. In response, the district court ultimately ruled that this automatic transfer provision violates due process and that a transfer hearing, comparable to the one provided in Children's Code art. 862,<sup>1</sup> is

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<sup>1</sup> Children's Code art. 862 provides:

A. In order for a motion to transfer a child to be granted, the burden shall be upon the state to prove all of the following:

(1) Probable cause exists that the child meets the requirements of Article 857.

(2) By clear and convincing proof, there is no substantial opportunity for the child's rehabilitation through facilities available to the court, based upon the following criteria:

(a) The age, maturity, both mental and physical, and sophistication of the child.

(b) The nature and seriousness of the alleged offense to the community and whether the protection of the community requires transfer.

(c) The child's prior acts of delinquency, if any, and their nature and seriousness.

(d) Past efforts at rehabilitation and treatment, if any, and the child's response.

(e) Whether the child's behavior might be related to physical or mental problems.

(f) Techniques, programs, personnel, and facilities available to the juvenile court which might be competent to deal with the child's particular problems.

B. The court shall state for the record its reasons for judgment.

C. (1) The court shall transmit the order rendered after the hearing or a certified copy thereof, without delay, to the clerk of court having jurisdiction of the offense.

(2) Any party may request the court to provide a complete or partial transcript of the testimony of the witnesses; however, neither the record of the hearing



constitutionally required before a juvenile can be transferred to a district court exercising criminal jurisdiction. In reaching those conclusions, the district court relied on United States Supreme Court jurisprudence holding that juveniles are constitutionally different from adults for purposes of sentencing.<sup>2</sup> The district court also relied heavily on *Kent v. United States*, 383 U.S. 541, 86 S.Ct. 1045, 16 L.Ed.2d 84 (1966), for the propositions that transfer from juvenile court imposes a significant deprivation of liberty and therefore warrants protection under the due process clause, and that a transfer from juvenile court should not occur unless the due process protections provided to juveniles are satisfied. A probable cause determination based solely on the nature of the offense alleged and evidence defendant committed the offense is inadequate to satisfy due process, the district court found, without a judicial determination that the juvenile will not benefit from the special protections and opportunities for rehabilitation offered by the juvenile court. The district court also found that a juvenile who is subject to the automatic transfer provision is denied the equal

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nor the reasons for the transfer shall be admissible in evidence in any subsequent criminal proceedings, except for the purpose of impeachment of a witness.

<sup>2</sup> See generally *Roper v. Simmons*, 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1, 29 (2005) (holding the Eighth and Fourteenth Amendments forbid imposition of the death penalty on offenders who were under the age of 18 when their crimes were committed.); *Graham v. Florida*, 560 U.S. 48, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010) (holding the Constitution prohibits the imposition of life without parole sentences on juvenile offenders convicted of a non-homicide offense); *Miller v. Alabama*, 567 U.S. 460, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012) (holding that mandatory life imprisonment without parole for juvenile homicide offenders violates Eighth Amendment prohibition against cruel and unusual punishment).

protection of law. Thus, the district court quashed the transfer of defendant from the juvenile to district court.

Because the district court declared the automatic transfer provision of Article 305(A) to be unconstitutional, that declaration is appealable to this court pursuant to La. Const. Art. V, § 5(D). Before determining the correctness of the trial court's declaration, this court must first decide whether the issue of constitutionality was properly raised below. "[A] constitutional challenge may not be considered by an appellate court unless it was properly pleaded and raised in the trial court below." *State v. Hatton*, 07-2377, p. 13 (La. 7/1/08), 985 So.2d 709, 718. In *Hatton*, the court described the proper procedure for challenging the constitutionality of a statute, expressing the challenger's burden as a three-step analysis. "First, a party must raise the unconstitutionality in the trial court; second, the unconstitutionality of a statute must be specially pleaded; and third, the grounds outlining the basis of unconstitutionality must be particularized." *Id.*, 072377, p. 14, 985 So.2d at 719.

In the present case, a review of the record shows that defendant properly raised, pleaded, and particularized his challenge under the Due Process Clause, and its state constitution counterpart, and the district court's declaration of unconstitutionality on that ground is properly before this court on appeal. Defendant's equal protection challenge, however, was not specially pleaded.<sup>3</sup> Nonetheless, we will briefly

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<sup>3</sup> Defendant contended in his motion filed in the district court (which is nearly identical to his motion filed earlier in the juvenile court) that "Louisiana's Children's Code Art. 305 violates the Fourteenth Amendment Due Process Clause and the Eighth Amendment

address equal protection for the sake of completeness and expediency.

This court held that when a statute classifies persons on the basis of any of the six enumerated grounds in La. Const. Art. I § 3, including age, the statute is unconstitutional unless the proponents are able to prove that the legislative classification “substantially furthers an appropriate state purpose.” *Manuel v. State*, 95-2189, p. 4 (La. 3/8/96), 692 So.2d 320, 323, quoting *Sibley v. Board of Supervisors of Louisiana State University*, 477 So.2d 1094, 1108 (La. 1985). Defendant here contends that the automatic transfer provision draws a suspect age-based distinction between juveniles that not only fails to further an appropriate state purpose but defeats one—i.e., the rehabilitative purpose of having a separate juvenile court system—because the transfer is automatic without regard to whether the juvenile could benefit from the rehabilitative opportunities afforded by a juvenile court. However, in scrutinizing La.R.S. 13:1570(A)(5),<sup>4</sup> which was a predecessor to Article

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of the United States Constitution, Article I, Section 2, 16, 19, 20 and 22 of the Louisiana State Constitution, . . . and goes against the spirit of United States Supreme Court Case law . . .” Nowhere in that filing does defendant mention the Equal Protection Clause (or its state counterpart in La. Const. Art. I § 3). Defendant’s first mention of equal protection is during argument at the hearing on his motion.

<sup>4</sup> This statute, which pertained to the jurisdiction of the juvenile courts and became effective September 12, 1980, provided:

Except as otherwise provided herein, the [juvenile] court shall have exclusive original jurisdiction in proceedings:

A. Concerning any child whose domicile is within the parish or who is found within the parish:

. . .

305(A), this court found that provision furthered the state's interest in protecting the public from serious, violent felonies. *State v. Perque*, 439 So.2d 1060, 1064 (La. 1983); *see also State v. Leach*, 425 So.2d 1232, 1236-37 (La. 1983) ("In the instant case the classifications embodied are not arbitrary and bear a rational relationship to a legitimate state interest, the protection of its citizens by exposing older minors who are accused of committing serious and violent felonies to the usual procedures and sanctions of the state's criminal law system."). Defendant fails to persuade the court *erred there* (even if this claim was properly before the court now). The automatic transfer provision is the product of the balancing of policy considerations involving not only those relating to the special treatment of juveniles but also public safety. It is the prerogative of the legislature to engage in this balancing calculus.

The *Perque* decision also informs our analysis of due process. In *Perque*, this court discussed *Kent v. United States*, which figures prominently in defendant's arguments and the district court's reasons here. The

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(5) Who violates any law or ordinance, except a child who, after having become fifteen years of age or older is charged with having committed first degree murder, second degree murder, manslaughter, aggravated rape, or a person who, after becoming sixteen years of age or older, is charged with having committed armed robbery, aggravated burglary, or aggravated kidnapping. Once such a child has been charged with having committed any offense listed in this Paragraph, the district court shall retain jurisdiction over his case, even though the child pleads guilty to, or is convicted of, a lesser included offense, and a plea to, or conviction of, a lesser included offense shall not reconstitute the court exercising juvenile jurisdiction of such a child.

juvenile court in *Kent* opted to waive its jurisdiction over a 16-year-old child without holding a hearing, making any findings, or providing any reason for the waiver. The United States Supreme Court found the waiver invalid because it violated the procedures established by statute in that jurisdiction. *Kent*, 383 U.S. at 557, 86 S.Ct. at 1055. The Supreme Court’s statutory interpretation was informed by “constitutional principles relating to due process and assistance of counsel.” *Id.* The Supreme Court noted that the juvenile’s right to assistance of counsel in conjunction with the waiver would be “meaningless—an illusion, a mockery—unless counsel is given the opportunity to function” at a waiver hearing. *Kent*, 383 U.S. at 561, 86 S.Ct. at 1057. In addition, the Supreme Court found the waiver hearing “must measure up to the essentials of due process and fair treatment.” *Kent*, 383 U.S. at 562, 86 S.Ct. at 1057; *see also Application of Gault*, 387 U.S. 1, 12-13, 87 S.Ct. 1428, 1436, 18 L.Ed.2d 527 (1967). In *Perque*, we distinguished the statutory framework in *Kent* from that under the predecessor to Article 305(A):

The situation in the case at bar, however, is easily distinguishable from that in *Kent*. In this case, there are no statutory rights of which defendants are being deprived. Once a sixteen-year-old is charged with armed robbery, the question is not one of “transfer” of jurisdiction. Rather, the juvenile court is automatically divested of jurisdiction. This divestiture is not a matter of discretion on the part of the juvenile court or the district attorney, but is controlled by the statute defining the jurisdiction of the juvenile courts, La.R.S. 13:1570 A(5).

Since the defendants are not being deprived of “important statutory rights,” the question is not one of due process, but of whether La.R.S. 13:1570 A(5) is a valid exercise of the State’s police powers. We have already held that classifications by age and seriousness of the offense are not arbitrary or capricious, and that the classifications bear a rational relationship to the legitimate state interest of protecting the public from serious, violent felonies. *State v. Leach, supra*. Further, since the legislative intent is clearly that those fifteen and sixteen year olds charged with the enumerated offenses be treated in all respects as adults, we see no reason to depart from the rule that the district attorney has “entire charge and control of every criminal prosecution instituted and pending in his district, and determines whom, when and how he shall prosecute.”

*Perque*, 439 So.2d at 1064 (citations omitted).

Defendant here contends our analysis in *Perque* is rendered obsolete by more recent United States Supreme Court jurisprudence, such as *Roper v. Simmons*, *Graham v. Florida*, and *Miller v. Alabama*, which recognizes that juveniles are developmentally different from adults and therefore must be treated differently from adults. Those decisions, however, are based on the Eighth Amendment’s prohibition against cruel and unusual punishments and address the importance of considering the unique characteristics of juveniles in sentencing.<sup>5</sup> None have declared that a juvenile has a

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<sup>5</sup> Defendant also cites *J.D.B. v. North Carolina*, 564 U.S. 261, 131 S.Ct. 2394, 180 L.Ed.2d 310 (2011), which (while not grounded in the Eighth Amendment) held that “so long as the child’s age

liberty interest in juvenile court adjudication that requires certain procedural due process before the juvenile can be tried as an adult. While we recognize the importance and necessity that juveniles receive individualized sentencing determinations, we do not agree with the district court that the same principles also apply pretrial to require a waiver hearing focused on a juvenile's potential for rehabilitation,<sup>6</sup> which overrides the legislature's decision as to how to structure the jurisdiction of the juvenile courts.

Unlike in *Kent*, the Louisiana legislature has not provided certain juvenile offenders with a statutorily protected liberty interest in juvenile court adjudication but instead has specifically denied such when the juvenile is accused of a violent and serious felony. Therefore, defendant, as a 15-year-old charged with first degree rape, does not have the same statutorily protected liberty interest in juvenile court adjudication as the juvenile in *Kent*, which would entitle him to procedural due process through a transfer hearing before he could be subjected to adult court jurisdiction. The juvenile court here is not vested with the discretion to retain or waive jurisdiction. Instead, the Louisiana

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was known to the officer at the time of police questioning, or would have been objectively apparent to a reasonable officer, its inclusion in the *[Miranda]* custody analysis is consistent with the objective nature of that test." *J.D.B.*, 564 U.S. at 277, 131 S.Ct. at 2406.

<sup>6</sup> In fact, in *Miller v. Alabama* the Supreme Court appeared somewhat skeptical of a judge's ability to determine a juvenile's potential for rehabilitation at the pretrial transfer-stage: "Even when States give transfer-stage discretion to judges, it has limited utility. . . . [The decisionmaker typically will have only partial information at this early, pretrial stage about either the child or the circumstances of the offense." *Miller*, 567 U.S. at 488, 132 S.Ct. at 2474.

legislature has made the divesture of jurisdiction mandatory, and defendant is now “subject to the exclusive jurisdiction of the appropriate court exercising criminal jurisdiction for all subsequent procedures[.]” La.Ch.C. art. 305(A)(2).

Finally, we note that the state constitution specifically authorizes the legislature to create a provision like Article 305(A):

The determination of guilt or innocence, the detention, and the custody of a person who is alleged to have committed a crime prior to his seventeenth birthday shall be pursuant to special juvenile procedures which shall be provided by law. However, the legislature may (1) by a two-thirds vote of the elected members of each house provide that special juvenile procedures shall not apply to juveniles arrested for having committed first or second degree murder, manslaughter, aggravated rape, armed robbery, aggravated burglary, aggravated kidnapping, attempted first degree murder, attempted second degree murder, forcible rape, simple rape, second degree kidnapping, a second or subsequent aggravated battery, a second or subsequent aggravated burglary, a second or subsequent offense of burglary of an inhabited dwelling, or a second or subsequent felony-grade violation of Part X or X-B of Chapter 4 of Title 40 of the Louisiana Revised Statutes of 1950, involving the manufacture, distribution, or possession with intent to distribute controlled dangerous substances, and (2) by two-thirds vote of the elected members of each house lower the maximum ages of persons to whom juvenile



procedures shall apply, and (3) by two-thirds vote of the elected members of each house establish a procedure by which the court of original jurisdiction may waive special juvenile procedures in order that adult procedures shall apply in individual cases. The legislature, by a majority of the elected members of each house, shall make special provisions for detention and custody of juveniles who are subject to the jurisdiction of the district court pending determination of guilt or innocence.

La. Const. Art. V § 19. Article 305 was originally enacted as part of Acts 1991, No. 235, which originated as HB 939. By passing Article 305, the legislature “provide[d] that special juvenile procedures shall not apply to” persons who have been arrested and subsequently indicted for aggravated (now first degree) rape, among other enumerated crimes. Given that the state constitution contains an explicit grant of authority, it is difficult to conclude the legislature violated the state constitution when it exercised that authority.

Statutes are presumed constitutional, and any doubt is to be resolved in the statute’s favor. *State v. Fleury*, 01-0871, p. 5 (La. 10/16/01), 799 So.2d 468, 472; *State v. Brenner*, 486 So.2d 101, 103 (La. 1986); *Theriot v. Terrebonne Parish Police Jury*, 436 So.2d 515, 520 (La. 1983). This court has consistently held that such presumptively constitutional legislative enactments should be upheld when possible. *State v. Caruso*, 98-1415, p. 1 (La. 3/2/99), 733 So.2d 1169, 1170. The party challenging the constitutionality of a statute bears a heavy burden in proving that statute unconstitutional. *State v. Brooks*, 541 So.2d 801, 811 (La. 1989). The constitutionality of the predecessor to Article 305 has been repeatedly upheld by this Court.

*See State v. Foley*, 456 So.2d 979, 981 (La. 1984); *State v. Perique, supra*; *State v. Leach, supra*. Likewise, for the reasons above, we find defendant here failed to carry that burden of showing that Article 305(A) is unconstitutional.

Accordingly, we vacate the district court's ruling, which declared Children's Code art. 305(A) unconstitutional and quashed defendant's transfer to the district court, and we remand to the district court for further proceedings consistent with the views expressed here.

VACATED AND REMANDED

SUPREME COURT OF LOUISIANA

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No. 2019-KA-01061

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STATE OF LOUISIANA

vs.

HUNTER FUSSELL

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ON APPEAL FROM THE 22ND JUDICIAL  
DISTRICT COURT, PARISH OF ST. TAMMANY

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JOHNSON, Chief Justice, dissents and assigns reasons.

Because I agree with the district court that Louisiana Children's Code article 305(A) is unconstitutional, I must respectfully dissent.

La. Ch. C. art. 305(A) provides, in relevant part (emphasis added):

A. (1) When a child is fifteen years of age or older at the time of the commission of first degree murder, second degree murder, aggravated or first degree rape, or aggravated kidnapping, he is subject to the exclusive jurisdiction of the juvenile court until either:

(a) An indictment charging one of these offenses is returned.

(b) The juvenile court holds a continued custody hearing pursuant to Articles 819 and 820 and finds probable cause that he committed one of these offenses, whichever occurs first. During this hearing, when the

child is charged with aggravated or first degree rape, the court shall inform him that if convicted he shall register as a sex offender for life, pursuant to Chapter 3-B of Title 15 of the Louisiana Revised Statutes of 1950.

(2) Thereafter, the child is subject to the exclusive jurisdiction of the appropriate court exercising criminal jurisdiction for all subsequent procedures, including the review of bail applications, and the court exercising criminal jurisdiction may order that the child be transferred to the appropriate adult facility for detention prior to his trial as an adult.

Hunter Fussell was 15 years and four days old when he was arrested and charged with first degree rape, indecent behavior with a juvenile, and sexual battery. He was therefore subject to the exclusive jurisdiction of the juvenile court pursuant to Article 305(A)(1). However, because a grand jury subsequently returned an indictment charging Hunter with one count of first degree rape, Article 305(A)(2) mandated that he was thereafter automatically subject to the jurisdiction of the district court (referred to as “adult court” herein). In my view, this statutory mandate violates the Fourteenth Amendment Due Process Clause and violates the fundamental principles underlying United States Supreme Court jurisprudence set forth in *Roper v. Simmons*, 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed. 2d 1 (2005), *Graham v. Florida*, 560 U.S. 48, 130 S.Ct. 2011, 176 L.Ed. 2d 825 (2010), *J.D.B. v. North Carolina*, 564 U.S. 261, 131 S.Ct. 2394, 180 L.Ed. 2d 310 (2011), and *Miller v. Alabama*, 567 U.S. 460, 132 S.Ct. 2455, 183 L.Ed. 2d 407 (2012).

Under the Fourteenth Amendment of the United States Constitution and Article I, §2 of the Louisiana Constitution, a citizen is protected against deprivations of life, liberty, or property without “due process of law.” Procedural due process requires that before an individual is deprived of a property or liberty right, the individual must be provided with notice and an opportunity to be heard. *State v. Golston*, 10-2804 (La. 7/1/11); 67 So. 3d 452, 463. This court has held “[t]he fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner.” *State v. Bazile*, 12-2243 (La. 5/7/13), 144 So. 3d 719, 732.

La. Const. art. V, § 19 provides special procedures for juveniles alleged to have committed crimes before the age of 17, yet also sets forth a procedure to allow the legislature to provide that such special procedures will not apply in certain circumstances. La. Const. art. V, § 19 states (emphasis added):

The determination of guilt or innocence, the detention, and the custody of a person who is alleged to have committed a crime prior to his seventeenth birthday shall be pursuant to special juvenile procedures which shall be provided by law. However, the legislature may (1) by a two-thirds vote of the elected members of each house provide that special juvenile procedures shall not apply to juveniles arrested for having committed . . . aggravated rape . . . and (2) by two-thirds vote of the elected members of each house lower the maximum ages of persons to whom juvenile procedures shall apply, and (3) by two-thirds vote of the elected members of each house establish a procedure by which

the court Of original jurisdiction may waive special juvenile procedures in order that adult procedures shall apply in individual cases. The legislature, by a majority of the elected members of each house, shall make special provisions for detention and custody of juveniles who are subject to the jurisdiction of the district court pending determination of guilt or innocence.

Article 305(A) was enacted by the legislature pursuant to this constitutional authority. Notably and relevant to this case, Article 305(A) did not track the language of Article V, § 19 in that it does not provide that special juvenile procedures shall not apply to juveniles arrested for first degree (aggravated) rape. Rather, Article 305(A) specifically Mandates such juveniles are subject to juvenile court jurisdiction (making special juvenile procedures applicable) until an indictment is returned, or until the court holds a continued custody hearing and finds probable cause. Thus, although the legislature provided for the divestiture of juvenile court jurisdiction in certain situations, it also chose to vest jurisdiction initially in the juvenile court in those same situations.

A comprehensive juvenile system was established by the Louisiana Legislature to protect and rehabilitate juvenile offenders and to “insure that he shall receive . . . the care, guidance, and control that will be conducive to his welfare and the best interests of the state . . .” In *re State ex rel. A.J.*, 09-0477 (La. 12/1/09), 27 So. 3d 247, 267; La. Ch. C. art. 801. This court has recognized that “the hallmark of the juvenile system was its disposition, individually tailored to address the needs and abilities of the juvenile in question, and the unique nature of the juvenile system is manifested in

its non-criminal or ‘civil,’ nature, its focus on rehabilitation and individual treatment rather than retribution, and the state’s role as *parens patriae* in managing the welfare of the juvenile in state custody.” *A.J.*, 27 So. 3d at 267 (internal quotations and citations removed). The special procedures applicable to juvenile adjudication proceedings confer special rights and immunities. For instance, juvenile records are confidential (regrettably, Hunter has already lost this right); juveniles are typically not jailed with adults; juveniles are not confined past the age of 21; and juveniles are protected from the stigma of a permanent criminal record. These special rights necessarily emphasize rehabilitation over punishment, and provide a far better opportunity for rehabilitation at a much lower cost to the state than a convicted adult. In this case, Hunter was arrested on December 14, 2018, and was initially subject to the exclusive jurisdiction of the juvenile court. Thus, he was statutorily vested with all of the attendant benefits and rights to special procedures and had a liberty interest in his status as a juvenile, subject to juvenile court jurisdiction. To take away these rights and benefits by mandating an automatic divestiture of juvenile court jurisdiction after the grand jury handed down the indictment on February 27, 2019, implicates due process concerns.

The lack of a hearing vitiates the due process standards mandated by the Supreme Court in *Kent v. United States*, 383 U.S. 541, 86 S.Ct. 1045, 16 L.Ed. 2d 84 (1966). In *Kent*, the Court recognized the import of transferring juveniles to the adult system:

[T]here is no place in our system of law for reaching a result of such tremendous consequences without ceremony-without hearing,

without effective assistance of counsel, without a statement of reasons. It is inconceivable that a court of justice dealing with adults, with respect to a similar issue, would proceed in this manner. It would be extraordinary if society's special concern for children, as reflected in the District of Columbia's Juvenile Court Act, permitted this procedure. We hold that it does not.

383 U.S. at 554. While the majority essentially limits application of *Kent* based on the specific language of the D.C. statute involved, I do not find it should be read so narrowly. *Kent*, especially when read in conjunction with the Court's subsequent opinion in *Application of Gault*, 387 U.S. 1, 87 S.Ct. 1428, 18 L.Ed. 2d 527 (1967), prescribes constitutional duties by finding that a determination by a juvenile court on the issue of whether it should waive jurisdiction over a juvenile is a critical stage in a criminal proceeding, and therefore requires a hearing conforming to the basic requirements of due process. As stated by the Court in *Gault*, "In *Kent v. United States* . . . we considered the requirements for a valid waiver of the 'exclusive' jurisdiction of the Juvenile Court of the District of Columbia so that a juvenile could be tried in the adult criminal court of the District. Although our decision turned upon the language of the statute, we emphasized the necessity that 'the basic requirements of due process and fairness' be satisfied in such proceedings." 387 U.S. at 12. The decision in *Kent* rested on the crucially important distinction between the treatment afforded children in an adult court and that granted them in juvenile court. Although the *Kent* decision was partially based on the particular statute, it is clear to me the Court did not intend to limit the protections solely based on the procedural aspects of



that case. Here, the majority contends Hunter “does not have the same statutorily protected liberty interest in juvenile court adjudication as the juvenile in *Kent*. . .,” but the relevant due process concerns do not disappear simply because Article 305(A) does not provide for a hearing as did the statute at issue in *Kent*. The fact that our legislature made the divestiture of jurisdiction mandatory does not eliminate due process concerns, and the impact on the juvenile remains the same. *Kent* and *Gault* considered together make it clear that juvenile court proceedings affecting a juvenile’s substantial rights must measure up to the essentials of due process and fair treatment. I find that juvenile offenders have a constitutionally protected liberty interest in their status as a juvenile, subject to juvenile court jurisdiction. As a result, procedural due process mandates that juvenile offenders are entitled to a meaningful hearing before they can be removed from the jurisdiction of the juvenile court and subjected to adult court jurisdiction pursuant to Article 305(A).

I recognize this court has previously upheld the constitutionality of Louisiana’s juvenile jurisdiction statutory scheme in both *State v. Leach*, 425 So. 2d 1232 (La. 1983) and *State v. Perique*, 439 So. 2d 1060 (La. 1983). However, I find it relevant that these cases directly addressed La. R.S. 13:1570(A)(5), the predecessor to Article 305(A). That statute established adult court jurisdiction for juveniles fifteen years or older who were charged with certain enumerated offenses.<sup>1</sup> Thus, this case is the first wherein our court

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<sup>1</sup> La. R.S. 13:1570(A)(5) provided:

Except as otherwise provided herein, the court shall have exclusive original jurisdiction in proceedings:

has addressed the constitutionality of Article 305(A), which establishes juvenile court jurisdiction at the time a juvenile is arrested and charged until an indictment is returned or the juvenile court makes a finding of probable cause. Unfortunately, the majority erroneously finds Article 305(A) constitutional.

Moreover, even if our earlier decisions in *Leach* and *Perique* are directly relevant to our analysis of the constitutionality of Article 305(A), the district court correctly noted those decisions should be revisited in light of subsequent developments in case law, science, and policy. Most importantly, our understanding of juvenile behavior has evolved over time since those decisions were issued. In recent years, the United States Supreme Court has recognized and reinforced the special status of juveniles in a series of cases discussing the culpability of juvenile offenders.

In *Roper v. Simmons, supra*, the Court held the Constitution bars capital punishment for juvenile offenders. Noting that the death penalty is reserved

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A. Concerning any child whose domicile is within the parish or who is found within the parish:

(5) Who violates any law or ordinance, except a child who, after having become fifteen years of age or older is charged with having committed first degree murder, second degree murder, manslaughter, aggravated rape, or a person who, after becoming sixteen years of age or older, is charged with having committed armed robbery, aggravated burglary, or aggravated kidnapping. Once such a child has been charged with having committed any offense listed in this Paragraph, the district court shall retain jurisdiction over his case, even though the child pleads guilty to, or is convicted of, a lesser included offense, and a plea to, or conviction of, a lesser included offense shall not reconstitute the court exercising juvenile jurisdiction of such a child.

for a narrow category of crimes and offenders, the Court recognized three general differences between juveniles and adults which demonstrate that juvenile offenders cannot reliably be classified among the worst offenders:

First, . . . [a] lack of maturity and an under-developed sense of responsibility are found in youth more often than in adults and are more understandable among the young. These qualities often result in impetuous and ill-considered actions and decisions. \* \* \* In recognition of the comparative immaturity and irresponsibility of juveniles, almost every State prohibits those under 18 years of age from voting, serving on juries, or marrying without parental consent.

The second area of difference is that juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure. \* \* \* This is explained in part by the prevailing circumstance that juveniles have less control, or less experience with control, over their own environment.

The third broad difference is that the character of a juvenile is not as well formed as that of an adult. The personality traits of juveniles are more transitory, less fixed.

543 U.S. at 569-70 (internal quotations and citations omitted). Further, the *Roper* Court explained:

The susceptibility of juveniles to immature and irresponsible behavior means their irresponsible conduct is not as morally reprehensible as that of an adult. Their own vulnerability and comparative lack of control

over their immediate surroundings mean juveniles have a greater claim than adults to be forgiven for failing to escape negative influences in their whole environment . . . . The reality that juveniles still struggle to define their identity means it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character. 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. Indeed, the relevance of youth as a mitigating factor derives from the fact that the signature qualities of youth are transient; as individuals mature, the impetuosity and recklessness that may dominate in younger years can subside.

*Id.* at 570 (internal quotations and citations omitted).

Subsequently, in *Graham v. Florida, supra*, the Court held the Eighth Amendment does not permit a juvenile offender to be sentenced to life in prison without parole for a nonhomicide crime. In so holding, the Court recognized “developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds.” 560 U.S. at 68. The Court reasoned:

Juveniles are more capable of change than are adults, and their actions are less likely to be evidence of irretrievably depraved character than are the actions of adults. It remains true 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. These matters relate to the status of the offenders in question; and it is relevant to consider next the nature of the offenses to which this harsh penalty might apply.

560 U.S. at 68-69 (internal quotations and citations omitted).

In *J.D.B. v. North Carolina*, *supra*, the Court held that a child's age properly informs the *Miranda* custody analysis, so long as the child's age was known to the officer at the time of police questioning, or would have been objectively apparent to a reasonable officer. The Court explained:

A child's age is far more than a chronological fact. It is a fact that generates commonsense conclusions about behavior and perception. Such conclusions apply broadly to children as a class. And, they are self-evident to anyone who was a child once himself, including any police officer or judge.

\* \* \*

Time and again, this Court has drawn these commonsense conclusions for itself. We have observed that children generally are less mature and responsible than adults, that they often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them; that they are more vulnerable or susceptible to . . . outside pressures than adults, and so on.

\* \* \*

Our various statements to this effect are far from unique. The law has historically reflected the same assumption that children characteristically lack the capacity to exercise mature judgment and possess only an incomplete ability to understand the world around them.

\* \* \*

Like this Court's own generalizations, the legal disqualifications placed on children as a class e.g., limitations on their ability to alienate property, enter a binding contract enforceable against them, and marry without parental consent—exhibit the settled understanding that the differentiating characteristics of youth are universal.

\* \* \*

As this discussion establishes, our history is replete with laws and judicial recognition that children cannot be viewed simply as miniature adults.

564 U.S. at 272-74 (internal quotations and citations omitted).

Additionally, in *Miller v. Alabama, supra*, the Court held the Eighth Amendment forbids a sentencing scheme that mandates life without parole for juvenile offenders. The Court noted that *Roper* and *Graham* emphasized “that the distinctive attributes of youth diminish the penological justifications for imposing the harshest sentence on juvenile offenders, even when they commit terrible crimes.” 567 U.S. at 472. The Court further explained that the mandatory penalty scheme at issue prevented the sentencer from

taking into account these considerations. “By removing youth from the balance—by subjecting a juvenile to the same life-without-parole sentence applicable to an adult—these laws prohibit a sentencing authority from assessing whether the law’s harshest term of imprisonment proportionately punishes a juvenile offender.” 567 U.S. at 474.

The majority finds these decisions inapplicable because they involve sentencing issues under the Eighth Amendment. The majority fails to acknowledge that a law mandating adult court jurisdiction, such as Article 305(A), necessarily exposes juveniles to more severe punishment and longer sentences, thus implicating Eighth Amendment concerns and making these Supreme Court decisions directly relevant. Moreover, while *Roper*, *Graham* and *Miller* concern Eighth Amendment issues, these decisions, as well as *J.D.B.*, *supra*, are rooted in the Court’s acknowledgment of the special status of juveniles based on documented differences between children and adults. The mandatory nature of the Article 305(A) precludes consideration of a host of characteristics and circumstances attendant to the juvenile’s age. The need to recognize the unique characteristics of youthful offenders is inconsistent with a statute that mandates a transfer of jurisdiction to adult court—based solely on age and the offense charged—without giving the juvenile a right to a hearing. In my view, these incremental cases from the Supreme Court have prompted the need to reevaluate the constitutionality of Article 305(A). It would be nonsensical to recognize the significance and necessity of considering juvenile characteristics solely in the context of sentencing.

Moreover, it is troubling to me that Article 305(A) provides no judicial safeguard to juveniles alleged to

have committed the enumerated offenses—no judicial counterweight to any arbitrary charging authority by the state. The state has full control and discretion to seek an indictment on a particular charge, and this unilateral charging decision can effectively establish the jurisdiction over the juvenile. There is no provision to transfer the juvenile back to juvenile court if warranted by a particular situation, such as where a charge is eventually reduced or when a juvenile is convicted of a lesser crime that would not have subjected him to adult court jurisdiction initially. A meaningful hearing, informed by specific criteria to determine whether a juvenile is suitable to the rehabilitative processes available in juvenile court, prior to removing the juvenile from juvenile court jurisdiction is essential to withstand constitutional scrutiny.

Whether a defendant is tried in juvenile or adult court is not merely a matter of procedure. As the state admitted at oral argument before this court, subjecting a juvenile to trial in adult court has tremendous consequences and is more significant than a simple change of venue. Juveniles who are forced into the adult criminal justice system lose a plethora of benefits that come with adjudicating the alleged crime in the juvenile justice system, and they are saddled with an adult criminal record. Our understanding of juvenile culpability has changed dramatically over the last twenty years, shifting the way we treat accused juvenile offenders. I do not suggest that a juvenile offender should never be subject to the jurisdiction of adult court. But, that determination should be made on an individual basis. A mandated automatic transfer provision, based on age and offense alone, is constitutionally flawed. Considering the import and ramifications involved with subjecting a juvenile to adult court



jurisdiction, I would hold that a juvenile is first entitled to a hearing to comport with due process requirements to determine whether that juvenile is amenable to treatment or rehabilitation based on a careful review of relevant considerations. Because Article 305(A) does not allow for a hearing before the juvenile court is divested of jurisdiction, I find it is unconstitutional.

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SUPREME COURT OF LOUISIANA

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No. 2019-KA-01061

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STATE OF LOUISIANA

vs.

HUNTER FUSSELL

---

On Appeal from the 22nd Judicial District Court,  
Parish of St. Tammany

---

Hughes, J., dissents for the reasons assigned by  
Johnson, C.J.

30a

SUPREME COURT OF LOUISIANA

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No. 2019-KA-01061

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STATE OF LOUISIANA

vs.

HUNTER FUSSELL

---

On Appeal from the 22nd Judicial District Court,  
Parish of St. Tammany

---

CHEHARDY, J., dissents for the reasons assigned by  
Johnson, C.J.

**APPENDIX B**

Parish of St. Tammany State of Louisiana

[FILED: April 24, 2019]

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Docket Number 613874 G

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STATE OF LOUISIANA,

Versus

H.F.

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/s/ [Illegible]  
DEPUTY CLERK

**REASONS FOR JUDGMENT**

This matter came before the court on April 9, 2019 on a Motion to Quash a Bill of Indictment due to the unconstitutionality of *La. Ch. C. Art 305A*. The court granted the Motion to Quash and these reasons support that ruling.

H. F. (or “Hunter” or the “Child” DOB 12/10/2003) was taken into custody on December 13, 2018 for allegedly having committed a delinquent act, namely, First Degree Rape as defined by *La. R.S. 14:42*, on or between December 10, 2018 to December 13, 2018. H.F. was fifteen years and three days old at the time of the delinquent acts alleged, and therefore is a “Child” under *La. Ch. C. Art 804(1)*. Absent any specific statutory exceptions, in delinquency proceedings, such as the one at bar, exclusive jurisdiction is vested in the court exercising juvenile jurisdiction under *La. Ch. C. Art 303A(1)*.

On December 18, 2018, the Child was brought before the Juvenile Court for a continued custody hearing for the determination of probable cause. After finding good cause, and waiver by counsel of any delays associated with a finding of probable cause, the continued custody hearing was continued. Although the court was not privy to the exchanges between counsel in the intervening months, it is possible that the State and counsel for the Child were exploring a negotiated plea in juvenile court. During this time period the Child continued to be detained at the Florida Parishes Juvenile Detention Center.

On February 27, 2019, the grand jury returned an indictment charging H. F. with the crime of First Degree Rape of a victim under the age of 13. The mandatory penalty for an adult found guilty of that offense is life imprisonment at hard labor without benefit of probation, parole or suspension of sentence. Because of the Child's age and the crime alleged, jurisdiction of Hunter's case was automatically vested in the district court pursuant to *La. Ch. C. Art 305A*. By virtue of random allotment, the matter was assigned to this division of the court, which coincidentally, also handles all juvenile matters in the 22nd Judicial District and therefore, handled the proceedings while the Child was subject to juvenile jurisdiction.

*La. Ch. C. Art. 305* provides, in pertinent part, as follows:

A. (1) When a child is fifteen years of age or older at the time of the commission of first degree murder, second degree murder, aggravated or first degree rape, or aggravated kidnapping, he is subject to the exclusive jurisdiction of the juvenile court until either:

(a) An indictment charging one of these offenses is returned.

(b) The juvenile court holds a continued custody hearing pursuant to Articles 819 and 820 and finds probable cause that he committed one of these offenses, whichever occurs first . . .

(2) Thereafter, the child is subject to the exclusive jurisdiction of the appropriate court exercising criminal jurisdiction for all subsequent procedures, including the review of bail applications, and the court exercising criminal jurisdiction may order that the child be transferred to the appropriate adult facility for detention prior to his trial as an adult.

It is the finding of this court that Louisiana's mandatory transfer law violates the Due Process Clauses of the United States and Louisiana State Constitutions. In its ruling, this Court does not find that a delinquent child should never be transferred to the punishment focused jurisdiction of an adult criminal court, merely that, prior to transfer, a child must receive a hearing similar to the one set out in *La. Ch. C. Art. 862* for a determination of whether that particular child can be rehabilitated with the facilities available in the juvenile system, prior to transfer.

While the Louisiana Supreme Court has previously upheld the constitutionality of mandatory transfer in cases such as *State v. Perow*, 616 So. 2d 1336 (La. 1993) and *State v. Leach*, 425 So. 2d 1232 (La. 1983), this case presents the opportunity to revisit those holdings based on developments in the law, science and policy.

“[T]he Due Process Clause provides that certain substantive rights—life, liberty, and property—cannot be deprived except pursuant to constitutionally adequate procedures.” *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 541, 105 S. Ct. 1487, 84 L. Ed. 2d 494 (1985). The Supreme Court has affirmed the proposition that juveniles charged with crimes also have the right to procedural due process. *In re Gault*, 387 U.S. 1, 30-31, 87 S. Ct. 1428, 18 L. Ed. 2d 527 (1967). That esteemed body has also held that as a matter of constitutional law, juveniles must be treated differently than adults in sentencing, as well as being entitled to special procedural protections. *Miller v. Alabama*, 567 U.S. 460, 132 S. Ct. 2455, 2459, 183 L. Ed. 2d 407 (2012), *Roper v. Simmons*, 543 U.S. 551, 551, 125 S. Ct. 1183, 1184, 161 L. Ed. 2d 1 (2005) and *Graham v. Fla.*, 560 U.S. 48, 130 S. Ct. 2011, 2014-15, 176 L. Ed. 2d 825 (2010), *as modified* (July 6, 2010).

Over fifty years ago, the United States Supreme Court held that the transfer from juvenile court to adult court imposed a significant deprivation of liberty and, therefore, warranted protection under the Due Process Clause of the 14th Amendment. *Kent v. United States*, 383 U.S. 541, 544-45, 86 S. Ct. 1045, 1049, 16 L. Ed. 2d 84 (1966). The *Kent* court found that transfer was a critically important action determining vitally important statutory rights of the juvenile. In that case, the trial court’s failure to follow the statutory procedures, state the reasons for the transfer, and, specifically to the case at bar, to hold a hearing, required reversal of the juvenile’s court’s transfer order. “There is no place in our system of law for reaching a result of such tremendous consequences without ceremony – without hearing, without effective assistance of counsel, without a statement of reasons.” *Id.* at 554. The ruling in *Kent* makes it clear that

because of the critical nature of the proceedings, a transfer to adult court should not occur unless and until the due process protections specifically provided to juveniles are satisfied.

In addition to the enhanced protection of individual rights afforded juveniles through Louisiana's due process clause, *La. Const. Art. V, § 19* provides juveniles alleged to have committed crimes prior to age seventeen, the constitutional right to special juvenile procedures. The Louisiana Supreme Court has read the provisions of *Art. V, § 19*, to dictate a general rule of non-criminal treatment of juveniles. *State ex rel. S.D.*, 2002-0672 (La. App. 4 Cir. 11/6/02), 832 So. 2d 415.

In a discretionary (or judicial) transfer hearing authorized by *La Ch. C. Art. 857* and set out in *Art. 862*, the juvenile court *alone* must decide, based on all the facts and circumstances involved in each case, whether a child facing transfer can be rehabilitated within the juvenile court system. The burden falls upon the state to prove, by clear and convincing evidence, that "there is no substantial opportunity for the child's rehabilitation through facilities available to the court." In mandatory transfer cases, like Hunter's, the juvenile court is prohibited from considering any of these factors and is only asked to consider if there is probable cause for the offense alleged. A hearing to determine probable cause alone, without a probable cause hearing similar to that provided for in *La Ch. C. Art. 862*, is not an adequate safeguard, as it does not protect a child's individual rights by virtue of his status as a juvenile, before the deprivation of his liberty interest by transfer. In mandatory transfer cases, there is no meaningful determination of an individual child's amenability to rehabilitation. Thus,



Louisiana's transfer statute lacks the core requirements of Kent.

On several occasions in the last several decades, the Supreme Court has considered the primacy of the principals of the culpability of young people and the legal processes due them. These include *Miller v. Alabama*, 567 U.S. 460, 132 S. Ct. 2455, 2458, 183 L. Ed. 2d 407 (2012), holding that mandatory sentence of life without possibility of parole for minors violates the Eighth Amendment; *Graham v. Fla.*, 560 U.S. 48, 130 S. Ct. 2011, 2015, 176 L. Ed. 2d 825 (2010), *as modified* (July 6, 2010), ruling that imposition of life without the possibility of parole for non-homicide crimes committed by juveniles violates the Eighth Amendment; *J.D.B. v. North Carolina*, 564 U.S. 261, 272, 131 S. Ct. 2394, 2403, 180 L. Ed. 2d 310 (2011), holding that age is a significant factor in determining whether a youth is "in custody" for *Miranda* purposes; *Roper v. Simmons*, 543 U.S. 551, 551, 125 S. Ct. 1183, 1184-85, 161 L. Ed. 2d 1 (2005), holding that imposition of the death penalty on minors violates the Eighth Amendment; and *Montgomery v. Louisiana*, 136 S. Ct. 718, 724, 193 L. Ed. 2d 599 (2016), *as revised* (Jan. 27, 2016), holding that the ruling in *Miller v. Alabama* should be applied retroactively.

This line of cases emphasizes the principle that juveniles are developmentally different from adults and that these differences are relevant to juvenile defendants' constitutional rights. These principals are supported by a substantial body of developmental research and neuroscience demonstrating significant psychological differences between juveniles and adults. See, e.g., *Graham*, 560 U.S. at 68 ("developments in psychology and brain science continue to

show fundamental differences between juvenile and adult minds.”)

In all of these decisions, the Court has relied on three abundant scientifically supported categorical distinctions between juveniles and adults, in order to conclude that children must be treated differently than adults under the law. “First, children have a lack of maturity and an underdeveloped sense of responsibility, leading to recklessness, impulsivity, and heedless risk-taking.” *Miller, supra* at 2464. Second, the high court recognized that children differ from adults in constitutionally relevant ways because of their susceptibility to outside pressures. Finally, in *Miller*, 132 S. Ct. at 2464 (quoting *Roper*, 545 U.S. at 570), the Court recognized that children and adults differ because adolescence is a transitional phase. “[A] child’s character is not as well formed as an adult’s; his traits are less fixed and his actions less likely to be evidence of irretrievabl[e] deprav[ity].” As a result, “a greater possibility exists that a minor’s character deficiencies will be reformed.” *Id.*

It is the status of being a juvenile, and not the specific offending behavior at issue, that triggers differing protections for youth. Mandatory transfer statutes, however, require certain accused juvenile offenders to be treated as adults based solely on their alleged crimes, without any opportunity for a judicial determination that the particular juvenile at issue should, in fact, be treated as an adult.

Juveniles have a right not to be automatically treated as adults. This mandates that a juvenile court conduct a hearing to consider the individual juvenile in order to determine whether adult criminal court is the right place for that particular individual. Louisiana’s own equal protection standard is based

upon the guarantee that state laws generally “affect alike all persons and interests similarly situated.” *State v. Petrovich*, 396 So. 2d 1318, 1322 (La. 1981). Nevertheless, Louisiana’s legislature is allowed great latitude to create classifications under its laws, “so long as those classifications can withstand constitutional muster.” *State v. Fleury*, 799 So. 2d 468 at 472, (La. 2001); see also *Burmaster v. Gravity Drainage Dist. No. 2 of the Parish of St. Charles*, 366 So. 2d 1381, 1388 (La. 1978).

It is clear that juveniles who have committed a delinquent act and adults who have committed the same offense are not groups that are similarly situated. It does not follow, and no research supports, that a child three days into his 15th birthday is dissimilarly situated as a child that is four days younger. It may very well be that an individual child is beyond rehabilitation at 15 years and three days. At a bare minimum the state and defense should have a forum to present evidence of, or contradicting that proposition.

It is because the courts have repeatedly found that children are different than adults that this court must find that all children, regardless of the charge they are accused of committing, should be provided with the same rights and protections. The existence of the juvenile court system itself is a recognition of the validity of the separate classification of juveniles for correctional purposes. *State in the Interest of Banks*, 402 So.2d 690, 695 (La. 1981). Currently, children who fall under Louisiana’s mandatory transfer law do not get the same rights and protections as other juveniles. They are denied the protection of a statutorily created juvenile court and denied equal protection under the law.

Over the last 20 years, our understanding of juvenile culpability has changed dramatically. Courts

now recognize that “parts of the brain involved in behavior control continue to develop well into a person’s 20s, and so juveniles differ from adults in their risk and consequence assessment, impulse control, tendency toward antisocial behaviors, and [their] susceptibility to peer pressure.” *State v. O’Dell*, 183 Wn. 2d 680, 691-92, 358 P.3d 359 (2015) (footnotes and internal quotation marks omitted, quoting Miller supra). This new knowledge has resulted in a shift in the way courts treat accused juvenile offenders. When asked whether juveniles should be treated differently than adults, both the United States and Louisiana Supreme Courts have consistently answered in the affirmative and now “it is the odd legal rule that does not have some form of exception for children.” *Miller*, supra at 481, and *J.D.B.*, supra.

Legislation enacted in Louisiana in the last three years confirms that state policy has begun to embrace the understanding that adolescent brain development must inform how juveniles are treated in the justice system. In 2016, the legislature enacted the “Raise the Age Louisiana Act,” that amended *La. Ch. C. Arts. 305 and 306* so as to allow a court discretion in whether to transfer a child charged as an adult to an adult facility or to remain in a juvenile detention facility prior to trial as an adult. More importantly, the Act took the extraordinary step of amending *La. Ch. C. Art. 804* to gradually include all 17 year olds in the juvenile court system. (*See SB 324.*)

*La. Ch. C. Art. 897.1*, enacted in 1993 required children adjudicated of certain offenses to serve until their 21st birthday in secure care without the benefit of parole, probation, suspension of imposition or execution of sentence, or modification of sentence. In 2018, the legislature amended that article to allow for

modification of a juvenile's sentence in certain cases after a juvenile serves a minimum of thirty-six months. See *La. Ch. C. Art. 897.1 (D)*. Courts should view those recent amendments as consistent with the growing body of law and science that affirms the fundamental principle that "children are different." *Miller*, *supra.* at 481.

This court acknowledges that the state's interest, the protection of its citizens, is legitimate. However, this interest is served and protected by a transfer hearing. If a particular child is more dangerous, more culpable, and less subject to rehabilitation than other juveniles, a transfer hearing allows for the court to make that determination.

Years of juvenile justice jurisprudence has recognized that a child is not as culpable as an adult who commits the same offense. The differences between children and adults have resulted in the Supreme Court's drawing a bright-line distinction between the punishments available for children who commit criminal offenses, even after they are transferred to criminal court prosecution. (See generally, *Graham*, and *Miller*, *supra.*) Accordingly, the presumption that all 15 year olds who commit First Degree Rape are as culpable as their adult counterparts is not true. In light of recent Supreme Court jurisprudence that recognizes that children are different than adults, this Court must find that Louisiana's mandatory transfer law *La. Ch. C. Art. 305 A*, is unconstitutional on its face, and as applied to Hunter.

41a

THUS DONE AND SIGNED this 24 day of April,  
2019, at Covington, La.

/s/ Scott Gardner  
JUDGE SCOTT GARDNER, DIVISION G

PLEASE MAIL A COPY TO ALL PARTIES