

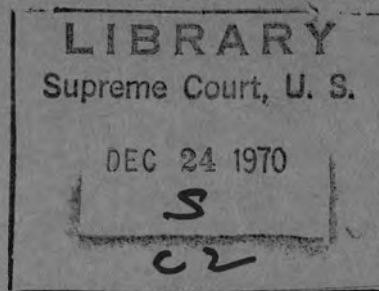
# Supreme Court of the United States

OCTOBER TERM, 1970

In the Matter of:

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:  
BARBARA BURRUS, ET AL., :  
:  
Petitioners. :  
:  
----- X

Docket No. 128



pt. 2

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Date December 10, 1970

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1 IN THE SUPREME COURT OF THE UNITED STATES  
2 OCTOBER TERM  
3

4 IN RE BARBARA BURRUS, ET AL., )  
5 )  
6 Petitioners. ) No. 128  
7 )

8 Argument in the above-entitled matter was resumed at  
9 10:05 o'clock a.m. on Thursday, December 10, 1970.

10 BEFORE:

11 WARREN E. BURGER, Chief Justice  
12 HUGO L. BLACK, Associate Justice  
13 WILLIAM O. DOUGLAS, Associate Justice  
14 JOHN M. HARLAN, Associate Justice  
15 WILLIAM J. BRENNAN, JR., Associate Justice  
16 POTTER STEWART, Associate Justice  
17 BYRON R. WHITE, Associate Justice  
18 THURGOOD MARSHALL, Associate Justice  
19 HARRY A. BLACKMUN, Associate Justice

20 APPEARANCES:

21 ROBERT MORGAN, ATTORNEY GENERAL,  
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24 On behalf of the Respondent

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On behalf of Petitioners

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: Mr. Morgan, you may proceed whenever you are ready.

ORAL ARGUMENT BY ROBERT MORGAN, ATTORNEY  
GENERAL OF NORTH CAROLINA, ON BEHALF OF  
THE RESPONDENT

MR. MORGAN: Mr. Chief Justice and may it please the Court: I am Robert Morgan, representing the State of North Carolina.

As I heard the argument of Petitioner yesterday and as I studied the briefs filed in this case I find that one thread that remains throughout the brief and throughout the argument is a contention that the juvenile system in North Carolina affords no treatment different from that which criminals would receive.

Now, on Tuesday night when I arrived in the office of Mr. Scanlan, here in Washington, I was handed a copy of the Petitioner's reply brief for the first time, notwithstanding the fact that all of the briefs in this case have been on file for several months and I find it somewhat ironical that in a case such as this where the sole argument seems to be the question of procedural due process.

Where the Petitioners plead in their brief as they do on pages 18 and 19, for more formality in the courts; where they claim that the courts often ignore the established rules



1 of evidence; where they claim that the courts are often sub-  
2 jected to inadmissible evidence, that the Petitioner in this  
3 case submitted to the Court on the eleventh hour a brief con-  
4 taining what I believe to be distorted, misleading and actually  
5 false representations of the North Carolina juvenile correc-  
6 tions system.

7 They cite in their brief and the full citation for  
8 their position is a purported report made by a group of law  
9 students from Duke University. A copy of the report has not  
10 been made available to me nor has it been distributed to my  
11 knowledge to -- a telephone call to the North Carolina Director  
12 of Juvenile Corrections was made in which he informed me that  
13 he had not been supplied with a copy of the brief, although  
14 he did agree that back in the summer of '69 he had agreed for  
15 some law students to spend a week in each one of the correc-  
16 tional institutions.

17 There has not been time for me to refute the  
18 accusations made in this reply brief, nor would I attempt to  
19 do so if time were available because I think such accusations  
20 or such information should be more properly made to the General  
21 Assembly of North Carolina, a legislative body. Or to a court,  
22 or any court of law where an attack was being made upon such  
23 conditions, if such conditions actually exist.

24 I would be remiss, I think, since the brief is on  
25 record and on file in this Court, the highest Court of our

1 land, if I did not state to the Court that while our  
2 juvenile correctional institutions are not all that they  
3 ought to be; they are not all that we hope that they will be;  
4 I do believe that they offer to the boys and girls who are  
5 there, substantial and meaningful opportunities for education,  
6 vocational treatment and for correction.

7 There are no fences around any of these institu-  
8 tions with the exception of the Dillon School, where there  
9 are 113 of the most aggressive and incorrigible juveniles.

10 Q When did you say that brief was submitted?

11 A On Tuesday night was when I received it,  
12 Your Honor -- the night before --

13 Q Has it been distributed?

1           A           Yes; it has, but we did not receive it until  
2 Tuesday night.

3           Now, in every one of the juvenile correctional  
4 institutions there are public schools. Every teacher in these  
5 schools has an A certificate, the highest certificate issued by  
6 the State of North Carolina, except graduate certificates and  
7 many of the teachers, many of them hold graduate certificates.

8           Driver's education is taught in these institutions  
9 and the State of North Carolina furnishes automobiles for the  
10 youngsters to drive while they are in such training. There are  
11 gymnasiums at every institution and athletics is a part of the  
12 regular curriculum.

13           Four of them have swimming pools; summer camping  
14 programs are carried out, using the regular 4-H Club camping  
15 facilities of North Carolina, which are made available to them  
16 justas they are made available to all the boys and girls across  
17 North Carolina.

18           Tickets are regularly reserved at the Big-4 football  
19 games in the area and of other college football games in the  
20 neighborhood and in the areas where these schools are located,  
21 as well as basketball games and scholastic events. Tickets are  
22 reserved for them at concerts in the area and especially at the  
23 very well-known Friends of the College Concerts, which take  
24 place at North Carolina State University.

25           Remedial reading is taught; other remedial courses

1 are taught there.

2 Now, it may be true that all of these buildings are  
3 not all that they should be, but I would say to this Court that  
4 I attended school in a wooden frame building with an old pot-  
5 bellied stove and I don't believe that it did me a great deal  
6 of harm.

7 And I speak, Mr. Chief Justice, with some degree of  
8 person experience and knowledge, for in the 1950s I served as  
9 Judge of the Juvenile Court in my county and I visited every  
10 single one of these institutions, with the exception of the two  
11 that have been constructed most recently.

12 My wife presently is presently is serving as chair-  
13 man of a state committee to raise funds to build a chapel at  
14 the Dodge School and on each Sunday afternoon that the committee  
15 has met there, my eight-year-old boy and my nine-year-old boy  
16 have accompanied her and have played on the grounds with the  
17 children and have eaten in the dining halls with the children  
18 while she was at the meeting.

19 So, I believe, if it pleases the Court, that if the  
20 conditions at these institutions have been as described in the  
21 reply brief, that I would have been in a position to know some-  
22 thing about it. And I submit to you that they are not; they  
23 are corrective in nature and are designed to rehabilitate and  
24 to offer vocational training and education for these boys and  
25 girls.



1 Q Are there any findings in the record of these  
2 charges?

3 A There are no findings, Your Honor, and none  
4 of the information contained in the reply brief which attacks  
5 the conditions that are under -- and I note that in a Fifth  
6 Circuit case, Mitchell versus Tradewinds Company, 209 Fed.2d,  
7 278, the Court ordered such information in a brief stricken,  
8 saying that "We know of no basis under which it would be ad-  
9 missible for such to be injected into litigation at the  
10 Appellate level. Relevant to the issue being tried in the  
11 District Court, it should have been tendered in the usual way."

12 Q Suppose that were true; what effect would it  
13 have upon the legal issues here?

14 A Mr. Justice Black, I think it would have no  
15 real effect, because if it were true, the same conditions and  
16 the same circumstances would apply to a youngster who is con-  
17 victed by a jury as one who is convicted by a judge sitting  
18 alone. I think the purpose of it being submitted was to indi-  
19 cate to this Court that we treat youngsters or juveniles as  
20 criminals and therefore, that the entire criminal procedure,  
21 all criminal safeguards and procedures should be provided.

22 And now, may it please the Court, with that brief  
23 statement, I would like to return to what I consider to be the  
24 relevant issues and the facts in this case, and that is that  
25 one issue: Does the Due Process Clause of the 14th Amendment

1 require a jury trial for a juvenile charged with delinquency?  
2 This is a question of nationwide import. I think that it's  
3 important to the State of Maryland, for instance, a state from  
4 which the Johnson case arises that's on this docket now.

5 It's important to the District of Columbia where the  
6 Congress has just recently removed the right of jury trial.  
7 And while it is important to my state and especially to my  
8 state as a matter of constitutional law and constitutional  
9 principle, I'm frank to admit to this court that I do not think  
10 that jury trials will impose any undue hardship on my state  
11 except perhaps in the four or five more larger metropolitan  
12 areas, such as Charlotte, Raleigh and Greensboro, where the  
13 court dockets are already crowded and where a delay of as much  
14 as two years is not at all unusual.

15 And I might add that --

16 Q -- cases, Mr. Attorney General?

17 A Yes, sir. And, Mr. Chief Justice, there are  
18 no provisions in our law for a jury trial in the District Court.  
19 Therefore, if this Court should order that a juvenile is en-  
20 titled to a jury trial then there would have to be of necessity  
21 transferred to the Superior Court.

22 Q That's the court of general jurisdiction?

23 A Yes, sir; that is the court of general  
24 jurisdiction.

25 Q Well, are you suggesting that the consequence

1 of a jury trial to your state means that all persons of every  
2 age will be tried in the regular criminal court?

3 A No, sir; I think, Your Honor, that if such  
4 were to be true, while the general court of general jurisdiction  
5 would probably have to conduct the trial because that's where  
6 we have jury trials, I think the same safeguards and procedural  
7 safeguards which this Court has laid down in the Gault and  
8 Kent and Winship cases, and which are spelled out in our  
9 statute, would apply.

10 Q In other words, the Superior Court would  
11 sit as a juvenile court, but with all the other panoply of the  
12 trial?

13 A Yes, sir, that is my opinion.

14 Q The District Court Judges do not sit on the  
15 Superior Court?

16 A No, sir.

17 Q Are all your District Court Judges lawyers?

18 A With the exception of a very few, Your Honor,  
19 but we just recently adopted a new constitution, which requires  
20 all judges to be lawyers. However, it does not apply -- it has  
21 a grandfather clause as far as those who are presently sitting.

22 Q The District Court Judges do things other than  
23 juvenile work, of course?

24 A Yes, sir, their exercise of general jurisdic-  
25 tion with regard to misdemeanors and civil jurisdiction up in

1 matters involving \$5,000 or less.

2 Q Would you say your District Court Judges are  
3 chosen or by experience, are especially qualified in juvenile  
4 work or not?

5 A Mr. Justice White, within the last decade we  
6 brought about in North Carolina, a complete revision of our  
7 criminal justice system. A District Court Judge is elected  
8 usually from two or three counties and he is generally well-  
9 qualified. Most of them are lawyers; one is designated as a  
10 chief judge and he designates a particular judge, generally,  
11 to sit as juvenile court judge and tranquil(?) judge. Now,  
12 this is not always true, because you may have one particular  
13 district where you may only have one or two judges.

14 But, generally you do have one designated specifi-  
15 cally for this purpose.

16 I think that this is a very proper question for this  
17 Court to consider, and I think one that should be resolved,  
18 after research and study on this case I am satisfied that if  
19 jury trials are to be accorded to juveniles then it should be  
20 done by the legislative body and not be required by this Court  
21 on the constitutional provisions.

22 I personally favor jury trials. I was a defense  
23 attorney for 15 years and in almost every criminal case, after  
24 being employed, I would automatically request a jury trial.  
25 I didn't always insist on it; quite frequently I must state



1 that I used it for the purpose of plea bargaining and I'm  
2 afraid that if juvenile courts are allowed to have jury trials  
3 that it will not be long before the same thing would be true  
4 here.

5 Now, this Court has already said in the three cases  
6 I ---

7 Q What about your trials that you actually  
8 tried?

9 A Well, Mr. Justice White, I like to think I  
10 was fairly successful --

11 Q Oh, yes, but how about your choice of jury  
12 or bench trial?

13 A I beg your pardon.

14 Q What about your choice on the cases that  
15 actually went to trial; jury or bench?

16 A Most of them were jury.

17 Q Why was that?

18 A Mr. Justice White, as a defense attorney, of  
19 course, I normally preferred a jury.

20 Q Well, that's what you said, but I wondered  
21 why.

22 A I think, frankly, because my chances of  
23 getting an acquittal were greater.

24 Q Why is that?

25 A I thought that I could be more persuasive

1 with 12 men than I could with one. I'm being quite candid  
2 with this Court as a defense attorney --

3 Q This is what jury trials are all about, in  
4 many respects.

5 A Yes, sir.

6 Q The thing right here is that you have a  
7 cross-section and historically it was to soften the blow;  
8 wasn't it?

9 A Yes, sir; that's my understanding of it.

10 And I think that this Court has said, of course, that  
11 so far in the Kent case and the Gault case and the Winship  
12 case, that all -- practically all of the procedural safeguards  
13 which are afforded to a criminal or a person charged with  
14 committing a crime are afforded to a juvenile, with the excep-  
15 tion of jury trials and, of course, public hearings which would  
16 be required by the Sixth Amendment.

17 I'm afraid that if jury trials are afforded to  
18 juveniles that many of the advantages of the juvenile court  
19 system would have been destroyed. I think, for instance, the  
20 question of public trials, for all practical purposes, would  
21 have been destroyed. While it still would be possible to ex-  
22 clude the public you still have 12 jurors and in the course of  
23 selecting those 12 jurors you probably have subjected many  
24 other prospective to questioning on their voir dire.

25 So, I think for that purpose it would practically

1 destroy that effectiveness.

2 Now, I --

3 Q In your state are the newspapers permitted to  
4 print the details of a juvenile proceedings?

5 A No, sir; they are not. They are -- I think  
6 I should correct that. They are permitted to print the details  
7 but not the names. And I believe that in North Carolina that  
8 the confidentiality of the records of the juvenile courts is  
9 more of a reality than rhetoric, because the juvenile court  
10 records are confidential except to the juvenile himself and to  
11 his parents and the court can permit --

12 Q Are they available to the military?

13 A No, sir; they are not available to the  
14 military. And so, I believe that while in occasion if a  
15 juvenile in a particular community should commit a crime, why,  
16 of course, most people in the community know that this  
17 youngster is involved with delinquency proceedings, but it's  
18 not widespread; it's not known; it's not disseminated across  
19 the state and across the nation. And I do think that this is  
20 important.

21 Q Mr. Morgan, what about giving the juvenile  
22 the choice of having a trial in the juvenile court as set up  
23 as of today, or to give that up and say "I would rather have  
24 a jury trial in Superior Court." Give him the choice.

25 A I think that this still would impede the

1 administration of justice because I think eventually we would  
2 see that jury trials are continually requested. For instance,  
3 in March of 1970 there were 288 juveniles waiting for a jury  
4 trial here in this area.

5 And Mr. Justice Marshall, there is one other  
6 question that deserves consideration by this Court in that  
7 connection. The North Carolina Constitution does not permit  
8 the waiver of a jury trial of a person charged with a crime.  
9 Now, just what effect a decision of this Court requiring a jury  
10 trial would have on that provision is problematical. There  
11 have been several attempts through the years made to permit  
12 the waiver of a jury trial and it has always been defeated.  
13 The only time that a jury trial can be waived is by a person  
14 charged with a petty offense.

15 I notice that my time is about up. I would like to  
16 mention two points which I think are crucial. The Petitioners  
17 contend in their brief that judges are likely to be arbitrary  
18 and capricious. I say to this Court that in their own brief on  
19 page 30 in footnote 30, that they make the strongest argument  
20 against that statement. On that footnote they give the  
21 statistics -- for instance, they say that in the District of  
22 Columbia in 1968 there were only 32 requests for jury trials  
23 out of 3,196; less than one percent.

24 In 1969 there were only 28 out of 2,863; again, less  
25 than one percent. They give the figures for Denver in which



1 they say in 1969 there were 1892 delinquency petitions and  
2 13 resulted in jury trials; less than one percent and I  
3 believe this is the strongest argument against their statement  
4 that judges acting alone are likely to be arbitrary and  
5 capricious.

6 Now, one other point I would like to mention is that  
7 there is no contention by the Petitioners in this case that  
8 the judge was partial or that he was unfair or that he dis-  
9 criminated in any way. There is no contention that the  
10 evidence was not sufficient to find that the adjudication --  
11 make the adjudication by the evidence and beyond the reasonable  
12 doubt. The law in North Carolina requires that the judge make  
13 a finding of fact and conclusions of law in writing and this  
14 can be appealed to the Appellate Courts and if there is an  
15 insufficiency of evidence to support it, then the Appellate  
16 Courts can either reverse or acquit.

17 And one possible danger I see and I would like to  
18 mention to this Court in closing, is that shortly after an  
19 adjudication by the court that a person charged with a crime  
20 carrying a possible punishment of more than six months is en-  
21 titled to a lawyer, the North Carolina legislature, out of  
22 necessity reduced the maximum penalty for driving drunk and  
23 many other offenses, in order to get around this provision be-  
24 cause it was felt that it would so bog down our courts that  
25 justice would be impeded.

1           And I'm afraid that if such were to happen here,  
2   that we might find such restrictions placed upon the juvenile  
3   court and I say to you that if you should restrict the amount  
4   of time that a juvenile could be put into a correctional in-  
5   stitution to six months, you would not give him any meaningful  
6   training or vocational training or education and that then it  
7   might very well become six months of punishment, rather than  
8   six months of correction.

9           Q       What's the annual volume, Mr. Morgan, of  
10   juvenile cases now in North Carolina?

11          A       Mr. Justice Harlan, I don't know. I don't  
12   know. I would say this: that the mean time that a juvenile  
13   stays in our institutions, is about 13 months.

14          Thank you.

15          Q       Whether you call it correction or punishment,  
16   the result of these convictions is that a person can be con-  
17   fined for a number of years.

18          A       Mr. Justice Black, he can be restrained of  
19   his liberties.

20          Q       He can be confined.

21          A       He can be confined, but we --

22          Q       Like any prisoner.

23          A       Yes, sir; but he is not confined in North  
24   Carolina like any prisoner.

25          Q       Well, do they turn him loose?

1 A No, sir; he is sent to school and given  
2 vocational training, recreational facilities --

3 Q I suppose that could be done for the other  
4 prisoners?

5 A Well, we are hoping to do that, Your Honor,  
6 but it's going to take years to do it.

7 MR. CHIEF JUSTICE BURGER: Mr. Scanlon.

8 ORAL ARGUMENT BY ALFRED L. SCANLAN, ESQ.

9 FOR NATIONAL COUNCIL OF JUVENILE COURT JUDGES,

10 AS AMICUS CURIAE

11 MR. SCANLON: Thank you Mr. Chief Justice, and may  
12 it please the Court:

13 I appear today for the National Council of Juvenile  
14 Court Judges, who support the Appellees in this case and the  
15 case which follows: Number 322 in maintaining that the Sixth  
16 Amendment jury trial right is not applicable to the states  
17 through the Due Process Clause of the 14th Amendment should  
18 not be applied to juvenile proceedings.

19 And I might say that counsel has no quarrel with  
20 and did not at the time those cases were decided: the Gault  
21 and Winship cases. The rights which this Court upheld in those  
22 two cases unquestionably are indispensable to fair procedure.

23 Indeed, actually the rights that this Court enun-  
24 ciated in Gault are elementary procedural rights applicable  
25 in almost any civil proceeding that I can conceive of; the

1 adversary, that is. The only one that is not is the right to  
2 counsel if you can't afford it and in the civil law we're  
3 moving in that direction.

4 In Winship this Court found that the reasonable  
5 doubt standard which is adhered to by every State in the Union,  
6 since colonial times, since common law times, is a prime  
7 instrument for reducing the risk of error in fact-finding  
8 in a proceeding by which a man may lose his liberty.

9 I don't think this Court has held, and it's --  
10 indicated by not making the jury trial retroactive, yet it  
11 considers the jury trial indispensable to the integrity of the  
12 fact-finding process.

13 Moreover, there is enough dispute about the merits  
14 of the jury trial to raise at least a question of whether it's  
15 wise to extend it in another area unless the call for its  
16 applicability is overwhelming, and strong, at least. I don't  
17 think that that can be fairly said when the right is attempted  
18 to be extended to an area where it has not held forth before,  
19 except in some states, in the juvenile court proceeding.

20 And I think this Court, when it gave us the  
21 reasonable doubt standard for juvenile court proceedings, gave  
22 some indication that it would weigh whether or not the jury  
23 trial's advantages in the juvenile court system offset its  
24 disadvantages with respect to the adjudication procedure.

25 You will recall, with this Court speaking through



1 Mr. Justice Brennan, in that case, conceded, or was of the  
2 opinion that the reasonable doubt standard did not have any  
3 adverse effect on the informality, the speed or the flexibility  
4 of the adjudication and concurring, Mr. Justice Harlan said  
5 about the same thing, but added two other factors that  
6 weighed in his mind, whether or not the addition of the rights  
7 would increase the possibility of public stigma of the juvenile  
8 and whether or not it would interfere with the worthy goal of  
9 rehabilitation.

10 I think analyzing the jury trial right in light of  
11 those comments and balancing what it brings to the adjudication  
12 proceedings, both by way of good, and by way of bad, I think  
13 that the scales are tipped in the balance on the side of not  
14 requiring a jury trial.

15 I would argue that many children would be traumati-  
16 cally affected by a jury trial, but there would be some that  
17 are struck -- there are some that will enjoy the little drama,  
18 and bring out the worst in them -- there will be some.

19 I'm not saying that the jury trial conducted in  
20 secret would stigmatize a child any more than a juvenile court  
21 proceedings conducted in secret, but does the Appellant really  
22 seriously maintain that you can give us the jury trial and have  
23 jury trials in camera? It wouldn't be long before jury trials  
24 in the juvenile court would receive almost the same attendant  
25 publicity that the trials in the criminal side receive.

1 Q Do you know whether in England, which is the  
2 birthplace, as we all know, of the jury system, are there jury  
3 trials in juvenile proceedings?

4 A Yes, there are, Your Honor; yes there are.

5 I'd like to say, though, I think the area where the  
6 jury trial would have its most unfortunate impact would be  
7 the area of delay. I don't mean just delay in the particular  
8 proceeding that's going on: picking a jury, making the motion's  
9 objections, extending what would be a two-hour hearing over a  
10 day-and-a-half hearing. That form of delay, but delay in  
11 scheduling, delay in scheduling.

12 Attorney General Morgan referred to the 290 some  
13 cases that were pending when the Congress got rid of the jury  
14 trial right in the District of Columbia.

15 Q Mr. Scanlan, I'd like to go back to the  
16 question that Mr. Justice Stewart asked you. Did you say that  
17 jury trials in juvenile cases are prevalent in England?

18 A No. I don't believe that jury trials were  
19 abolished in England. I'm not quite sure; I think they still  
20 have them in the Magistrate's Court. I'm not sure of that,  
21 Your Honor.

22 Q My recollection is to the contrary.

23 A Your recollection was that England did away  
24 with the jury trial --

25 Q Well, they have a rather different system

1 for handling juvenile offenses, as you know, before the local  
2 magistrates, which are largely lay people, and I had supposed  
3 that they did not have, and I may be --

4 A You may be correct.

5 I would like to deal in closing with one point that  
6 was adverted to by the Attorney General: there is no question  
7 but if the jury -- if the juvenile system, the rehabilitation  
8 goal is -- in North Carolina or anywhere, and indeed, it has  
9 fallen short in many states -- maybe the Duke study is  
10 absolutely right; I don't know. There are certainly other  
11 states where the rehabilitative ideal is more an illusion than  
12 a fact.

13 And it seems to me fastening a jury trial on that  
14 wouldn't cure that unfortunate situation at all. It seems to  
15 me if the courts are going to move in this area they should  
16 take their cues from what is being done at least at the Circuit  
17 Court level and in some of the state supreme court levels, in  
18 the area of the mentally ill. A man is deprived of his liberty  
19 because he is mentally ill on the premise that under the  
20 statute he is going to receive special treatment and he doesn't  
21 receive that treatment.

22 There have been several cases which suggest that in  
23 such a case that equal protection is being denied him. I re-  
24 call, just in passing, perhaps the ones that are best known:  
25 one is Rouse versus Cameron, decided, I believe, when Mr.

1 Chief Justice Burger was on the Circuit Court of Appeals at  
2 373 F 2d. Then there was Judge Soboloff's opinion for the  
3 Fourth Circuit: a man put away under the Maryland Juvenile  
4 Delinquents Act; said he wasn't getting the treatment; brought  
5 a habeus corpus. The matter was not decided on that grounds,  
6 but Judge Soboloff brought, indeed, if he could prove it, the  
7 serious question of constitutionality.

8 And then there was the Hazen case more recently in  
9 the District of Columbia, where the very issue was put but not  
10 decided; that is: whether the statutory promise of rehabilita-  
11 tion for a juvenile can be denied that juvenile because of the  
12 alleged lack of facilities such as our adversaries claim is the  
13 case in North Carolina? There is the area where a court should  
14 move. There is the area where courts can have some long-range  
15 effects on making the dream of the framers of the juvenile  
16 court system become a reality. Fastening the jury trial right,  
17 if that's what it is, is another matter.

18 We may believe, as a result of history, our legal  
19 constitutional history that as the aphorism goes, it is better  
20 that 999 persons go unpunished than one innocent man be con-  
21 demned. But do we seriously maintain that it's better that  
22 999 juveniles who may need treatment, not receive it, lest one  
23 who doesn't need it might get it.

24 I don't think so.

25 Q May I ask you: what is your definition of a



1 in point of age?

2 A Well, it varies. I would say it is, Your  
3 Honor -- I would say 21; unfortunately under 21. I would like  
4 to see the age extended, principally because of the special  
5 care one can get --

6 Q Extended which way?

7 A Well, I'd like to see it at 21. Unfortunately  
8 the Congress has reduced it to 16 in the case of serious  
9 crimes. My own personal opinion is that's a mistake. That's  
10 going back -- that's going in the direction that maybe our  
11 adversaries would like it to go. Maybe the system is a  
12 failure. The Congress--

13 Q Do you know what percentage of crimes are  
14 committed by people under 21?

15 A A very, very significant percentage; I know  
16 that.

17 Q Could I ask you: in those states that now  
18 have jury trials for juveniles, what is the issue that's sub-  
19 mitted to the jury?

20 A It usually is did the juvenile do the act  
21 which, if found guilty of doing it, renders him a delinquent  
22 within the definition of the state statute.

23 Q In most of the states if he does this act he  
24 is automatically a delinquent?

25 A That's right. I gather there are some that

1 there is sort of a two-stage thing. If found guilty of the  
2 act still the judge has some leeway as to whether or not he is  
3 a delinquent. I can't name a specific state, but I think  
4 generally if he has done the act with which he is charged, then  
5 technically he is a delinquent and now is within the disposi-  
6 tional area of the juvenile court.

7 Q But there are some states that just ask the  
8 jury: did he do the act, and that's -- and then judge still  
9 has to decide whether he's a delinquent?

10 A That's right.

11 Q And that extra -- that area of discretion  
12 is not one that juries exercise?

13 A That's correct.

14 MR. CHIEF JUSTICE BURGER: Thank you, Mr. Scanlon.  
15 You have about three minutes left, Counsel.

16 RELOTTAL ARGUMENT BY MICHAEL MELTSNER, ESQ.

17 ON BEHALF OF PETITIONERS

18 MR. MELTSNER: Thank you, Mr. Chief Justice.

19 Mr. Justice White, it dawned on me late last night  
20 that the question you asked me yesterday was the question that  
21 you just asked Mr. Scanlon and I must have totally misunder-  
22 stood it and if, as I now understand the question, it is  
23 whether, after a jury finds that a juvenile has committed the  
24 act, whether a judge can nevertheless, decide that he is not a  
25 delinquent. The answer I give is an emphatic "yes." And that

1 is indeed --

2 Q Under North Carolina law?

3 A That is indeed the case under North  
4 Carolina law, as best one can tell, given of course the fact  
5 that there aren't any jury trials.

6 Q So let me ask you: the jury trial that you  
7 are contending for would be a jury trial only to consider  
8 whether the act was committed?

9 A That is correct. The juvenile court judge  
10 would retain the flexibility, and this is what we think the  
11 juvenile court is all about: to not adjudicate the youth a  
12 delinquent regardless of the findings of the jury. That is  
13 provided for in North Carolina law and is, in fact, what the  
14 judge did in this case, if one reads the order of commitment.

15 He first said: "You have committed an act which,  
16 if an adult did it, would be a criminal act," and then found  
17 delinquency.

18 Q Does North Carolina have jury sentencing,  
19 too?

20 A Not that I know of, Your Honor. I don't  
21 know.

22 There are, in addition to that, several small points  
23 that I would like to make.

24 First of all, the Attorney General has stated that  
25 in his judgment juvenile cases would have to be automatically

1 transferred to another court if this court held that the right  
2 to jury trial applies, but I really don't see why he reached  
3 that conclusion because the very court we're concerned with  
4 here, the District Court, presently tries civil cases with  
5 juries at the present time.

6 Secondly, the matter of the reply brief, a matter  
7 which causes me some embarrassment. This brief was printed  
8 by the Court, as this case is here in forma pauperis, and the  
9 brief was filed with this Court, as Mr. Justice Stewart said,  
10 on the 2nd of December. Apparently the Clerk's office, out of  
11 an abundance of caution, did not mail the brief, feeling that  
12 perhaps they would cross the lawyers. When I got here Monday  
13 I found this out and I immediately took the brief to Mr.  
14 Scanlan's office. I took a copy and served Mr. Scanlan; I took  
15 another copy for Mr. Morgan and asked Mr. Scanlan to please  
16 give it to him as soon as he arrived.

17 And this brief was not -- was submitted in reply  
18 to the claim made by my adversaries that rehabilitative pur-  
19 poses of North Carolina's juvenile law justified denial of  
20 trial by jury.

21 Q Well, is there any real relevance -- any  
22 connection to the right to jury trial and the rehabilitation  
23 conditions?

24 A I don't think so, because I think it's puni-  
25 tive incarceration. I think this Court has already --



1 Q Well, I know, but what was the relevance to  
2 the material you submitted in your reply brief?

3 A There was some suggestion in the brief of the  
4 State of North Carolina that its juvenile institutions were  
5 totally different from the rest and we merely sought to dispel  
6 any such impression by referring to a study done under the  
7 auspices of the Duke Law School and the Office of Economic  
8 Opportunity, which took some ten weeks in the summer of 1969;  
9 it included many law students, attorneys with the Duke Center  
10 and sight visits to all the North Carolina juvenile institu-  
11 tions.

12 And in closing I merely want to point out that  
13 already North Carolina law provides that in the discretion of  
14 the juvenile judge the court may be opened and newspaper  
15 reporters may come in.

16 Thank you.

17 MR. CHIEF JUSTICE BURGER: Thank you Mr. Meltsner.  
18 Thank you Mr. Morgan and Mr. Scanlan.

19 The case is submitted.

20 (Whereupon, at 10:40 o'clock a.m., the argument in  
21 the above-entitled matter was concluded)