

Supreme Court of the United States

OCTOBER TERM, 1970

In the Matter of:

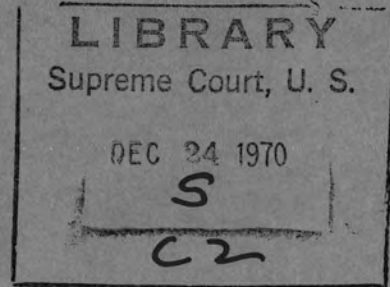
Docket No. 322

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JOSEPH MC KIEVER AND EDWARD TERRY, :
Appellants :
: :
: :

vs. :
: :

THE STATE OF PENNSYLVANIA, :
: :

Appellee :
: :
----- X



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BENHAM

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM

JOSEPH MC KEIVER AND EDWARD TERRY,)
)
Appellants)
)
vs) No. 322
)
THE STATE OF PENNSYLVANIA,)
)
)
Appellee)

The above-entitled matter came on for argument at
10:40 o'clock a.m., on Thursday, December 10, 1970.

BEFORE:

WARREN E. BURGER, Chief Justice
HUGO L. BLACK, Associate Justice
WILLIAM O. DOUGLAS, Associate Justice
JOHN M. HARLAN, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice

APPEARANCES:

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On behalf of the Appellants

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On behalf of the Appellee

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments in Number 322, McKeiver and Terry against Pennsylvania.

Mr. Farmer, you may proceed whenever you are ready.

ORAL ARGUMENT BY DANIEL E. FARMER, ESQ.

ON BEHALF OF APPELLANTS

MR. FARMER: Mr. Chief Justice and may it please the Court:

This case raises the same constitutional issue as the preceding case: in re Burris, raised. The question is whether due process requires the right to jury trial in juvenile delinquency proceedings. However, the facts in this case are somewhat different. Both Joseph McKeiver and Edward Terry were tried after the date of this Court's decision in Duncan versus Louisiana. Both were 15 years old at the time of their trials. Under Pennsylvania juvenile court law both of them stood the risk of confinement until they were 21 years old. So that at the time of trial a possible outcome was that they would be confined until they were 21.

Unfortunately, the institutions in which they risked confinement are far from being as attractive as those described for the State of North Carolina. The worst of the institutions to which Philadelphia juveniles can be sent is a place called Camp Hill. Camp Hill is a prison. It has been described as a prison by Justice Hoffman of our Superior Court, who for many

1 years was an outstanding juvenile court judge.

2 Q Well, returning to what Justice White raised
3 in the previous argument that you heard, what's the connection
4 between the kind of institutions on the constitutional issue
5 involved here?

6 A It seems to me that if it could be proven
7 overwhelmingly that there was no punishment, that in fact, the
8 juvenile court was an exact parallel to the model of, let us
9 say, a mental commitment proceeding, rather than the stigma-
10 tizing for the commission of crime and punishment type of pro-
11 ceeding that it is, there might be some question as to the
12 rights.

13 Q You don't think confinement alone, without
14 more, is enough to trigger the constitutional claim to a jury?

15 A I think it might be, Your Honor, but I don't
16 think I have to maintain that because I think it's so clear
17 from both the facts in Pennsylvania and the materials found in
18 the National Crime Commission studies of our juvenile court
19 system that, in fact, it is not a generally rehabilitative
20 system. It closely approximates a system of finding out about
21 wrongs and imposing punishment.

22 Joseph McKeiver was charged with robbery, larceny
23 and receiving stolen goods. There are felonies under the penal
24 code of Pennsylvania. Robbery carries an adult penalty of
25 imprisonment for up to ten years. Larceny carries an adult

1 penalty of imprisonment up to five years.

2 Edward Terry was charged with assault and battery
3 and conspiracy. Those are misdemeanors which for an adult
4 carry imprisonment penalties of up to two years.

5 One of the contentions made by the opponents is
6 that juvenile court judges view their role in fact-finding as
7 something very different than their role when they are sitting
8 as juvenile court judges. But I respectfully direct the
9 Court's attention to page 16 of the appendix where the court
10 makes the finding, and the court says, and I quote:

11 "The court adjudicates him delinquent of larceny
12 and robbery." It does not adjudicate the juvenile delinquent
13 of receiving stolen goods. So it's clear that the court's
14 frame of mind as it approaches solely the fact-finding issue
15 is very much the frame of mind of a judge when he's trying
16 the facts in an adult criminal case.

17 Q Well, how could he do it any other way when
18 there are multiple specific facts of delinquency alleged?
19 Wouldn't the whole process be worse off if he didn't pinpoint
20 his findings?

21 A It might be worse off, Your Honor. All I am
22 saying is that the process in the juvenile court of fact-
23 finding is almost identical, even in terms of the mental pro-
24 cesses through which the judge must go with what the judge
25 goes through in an adult bench trial for the same crimes.

1 Edward Terry was committed to a state correction
2 institution; Joseph McKeiver was placed on probation.

3 Q Did I understand you to indicate that in
4 Pennsylvania there is no effort in the juvenile court system
5 to protect the juveniles from the stigma that many times
6 attaches to the civil trials or convictions of adults?

7 A Mr. Justice White, there is an effort to
8 protect them and results are somewhat spotty. In Philadelphia
9 there is a serious problem created by the fact that the police
10 maintain a parallel set of juvenile records over which the
11 juvenile court exercises no control. So in cases that the
12 police department deems to be serious they release the infor-
13 mation.

14 Q The police can't maintain a parallel set of
15 records of what happens in the juvenile courts because they
16 don't know.

17 A They do seem to know, Your Honor.

18 Q You said the police have a practice of
19 releasing those records?

20 A In juvenile cases which the police consider
21 major the fact that a person has been arrested and charged, his
22 past record appears in the newspapers. I'm a member of the Bar
23 Association committee that's trying to do something about that.
24 As far as we can tell that information comes from the police.
25 They don't deny it but they won't comply with the committee's

1 request to stop doing it.

2 Q The police -- I mean police make arrests of
3 juveniles all around the country and turn them over to the
4 juvenile authorities, and you are just saying that in Pennsyl-
5 vania they make a record of that?

6 A That's right, but their record also shows
7 the past juvenile record of this particular juvenile and it
8 also shows the dispositions of convictions.

9 Q How do they get the convictions?

10 A I don't know how they get the convictions,
11 Mr. Justice White.

12 Q Well, what does the law require in Pennsyl-
13 vania?

14 A What does it require by way of police record
15 keeping?

16 Q No. What does it require in terms of con-
17 fidentiality of juvenile court records.

18 A The law states that juvenile records will not
19 be open to indiscriminate public inspection but that the records
20 may be seen by anyone having a "legitimate interest."

21 Q Does that include the military?

22 A As far as I know it does.

23 Q And it includes if any other police department
24 from around the country writes to Pennsylvania and says, "Do you
25 have a record. We have so and so in custody here for stealing

1 a car. Does he have a police record? Or does he have any
2 kind of a record?" Will a juvenile record be given when they
3 reply to that response?

4 A I believe it would if they sought that
5 information from our police department.

6 Q Well, how about from the juvenile court?

7 A I don't know. I know that employers having
8 some kind of a legitimate interest, get the information they
9 know --

10 Q Directly from the juvenile court?

11 A I believe that they can.

12 Q You have a separate juvenile court system,
13 don't you in Pennsylvania?

14 A Yes. It is a separate division of our Court
15 of Common Pleas, which is the court of general jurisdiction.

16 Q Is that throughout the state?

17 A No.

18 Q Was that changed in the recent constitutional
19 revisions in Pennsylvania?

20 A Mr. Chief Justice, the constitutional revision
21 had this effect: the county court which was formerly a court
22 of general jurisdiction, but limited civilly, those judges
23 became judges of the family division of the Court of Common
24 Pleas. So that the present judges of the family division are
25 judges who used to be judges of the court of general

1 jurisdiction, but with limits on their jurisdiction.

2 The issue that seems to draw the most fire from the
3 other side and which seems to be at the heart of this case,
4 is whether or not a grant of the right to jury trial would
5 interfere in those distinctive features of the juvenile court
6 process which hold that promise that the system may in the
7 future, become genuinely rehabilitative.

8 I would like to go through the juvenile court pro-
9 cess step by step to persuade this court that the -- who deal
10 with almost all of the juvenile court process that relates to
11 rehabilitative purposes, who might be touched by jury trials
12 which affect only fact-finding.

13 Q What is your basic constitutional position
14 Is it a due process argument or are you saying this is a
15 straight and simple criminal proceeding and a Sixth Amendment
16 right must apply?

17 A Mr. Justice White, I agree that the standard
18 to be applied in deciding a constitutional issue is whether or
19 not fundamental fairness requires a jury trial in juvenile
20 delinquency proceedings. So far as the argument on that point,
21 it seems to me that every feature of the fact-finding phase in
22 adult criminal cases which demands the right to jury there, it
23 also appears in the fact-finding phase of the juvenile delin-
24 quency process.

25 Q But you aren't saying that this is a

1 criminal proceeding and therefore the Sixth Amendment applies?

2 A No, Mr. Justice White, that seems like an
3 overly simplistic argument.

4 The features of the juvenile court which distinguish
5 it and which, hopefully, will some day lead to it becoming a
6 generally rehabilitated system are: first, that it has a
7 socialized intake procedure and that is when an arresting
8 officer comes in with an offense he may be able to make out
9 that a crime was committed but the employee of the juvenile
10 court may decide that there will not be a delinquency petition
11 filed, that the case will be adjusted.

12 The juvenile court judge has a broad range of
13 alternatives available to him in terms of disposition of the
14 juvenile prior to the hearing. He can even begin the diag-
15 nostic and evaluative phases of the juvenile court process at
16 that point and save some of the delay which the other side
17 seems to be so worried about.

18 Finally, to return to the trial itself, there is a
19 great deal of talk from the other side about jury trials whip-
20 ping out the socialized process of the juvenile court; jury
21 trials interfering with the juvenile court judge's ability to
22 guide and mould the hearing; juvenile jury trials injecting
23 formality into the hearing.

24 But those ideas have tremendous advocative power(?)
25 but when you turn to analyze them in detail I think it can be

1 seen that the -- those notions of what the judge can actually
2 do are not going to be adversely affected by the granting of
3 a right to jury trial.

4 In its brief, the National Council of Juvenile
5 Judges suggested as its only concrete meaning to guiding and
6 moulding by the juvenile judge, that the juvenile judge will
7 no longer be able to make findings of delinquency on hearsay
8 evidence. But I read Gault, in its right to confrontation and
9 cross-examination has now precluded findings of delinquency
10 based on hearsay evidence.

11 Q By "hearsay," I take it you are referring
12 primarily to the traditional type of hearsay that was used in
13 juvenile court by way of the judge acting on reports accumu-
14 lated by the social workers and others?

15 A Mr. Chief Justice, I'm not referring -- I'm
16 referring to that kind of hearsay, but the reports of the
17 social workers and the probation officers, that kind of hear-
18 say would still be admitted in the dispositive phase --

19 Q Treatment.

20 A The treatment phase, the evaluative phase,
21 just as they would if the right were not imposed.

22 Q But not on the determination --

23 A But not on the determination of facts.

24 The heart --

25 Q Would it be fair to say that type of report

1 was widely used over the years by juvenile courts on the fact-
2 finding process?

3 A That was the conclusion that was reached in
4 Gault and we still have a problem in that regard even in
5 Pennsylvania today because the court personnel hand the
6 juvenile court judge the social history folder of the juvenile
7 and oftentimes the judge doesn't seem to be able to keep his
8 eyes off the interesting things in that folder while the fact-
9 finding hearing is actually in process.

10 That folder, by the way, is a very interesting
11 folder because it's stored by family so that when he opens that
12 up he sees the social history, not only for the juvenile
13 before it, but for all his brothers and sisters.

14 Q That happened in --

15 A It's exactly correct.

16 Q Do you suggest that that's not a useful part
17 of the process?

18 A I suggest it's a very useful part of the
19 dispositive process. It's not at all a useful part of the fact-
20 finding process.

21 Q In this respect then you would move it to be
22 just like any other criminal trial?

23 A In the fact-finding phase?

24 Q Right.

25 A Well, I don't think that the jury trial

1 compels any necessity for the trials to be public. I don't
2 think that a jury trial compels any broader release of the
3 records of the juvenile. I think it's still possible to
4 maintain a limited kind of privacy the juvenile court now is
5 able to enjoy and have jury trials too.

6 Q So you would still, I suppose, have the
7 juvenile present when you're choosing a jury and to the extent
8 that you need a large panel up there to get a jury why you're
9 going to have a lot of people knowing about the trial that's
10 going on?

11 A Mr. Justice White, one notion that occurred
12 to me to solve that problem is to try the juvenile by his
13 first name and last initial.

14 To return to the point of the judge's discretion in
15 the fact-finding here, the heart of his discretion, it seems
16 to me, the only real legitimate discretion he has left in the
17 fact-finding is this power to find that in fact the juvenile
18 has committed the act which would be delinquency, but to ab-
19 stain in the social best interests of the juvenile, from enter-
20 ing on the record an adjudication of delinquency. A jury
21 trial won't change that. As I envision it, a jury will return
22 a piece of paper which says: "We find that the facts alleged
23 in the delinquency petition are established beyond a reasonable
24 doubt." At that point the judge is still free to make his own
25 determination of whether the child's best interest requires an

1 adjudication of delinquency or not.

2 He could even suspend the adjudication of delin-
3 quency, pending some probationary period. That's all that a
4 juvenile court judge can do now. So there isn't going to be
5 any reduction of the judge's ability to guide and mould the
6 fact-finding here in any legitimate way that you can do that
7 now.

8 There is also talk about formality between rehabili-
9 tation in the opponent's brief. I think common sense in the
10 scholarly opinion that's cited in my brief, makes it quite
11 clear that if we are limiting our look to the fact-finding
12 phase there is not going to be any rehabilitation during fact-
13 finding. Formality or lack of formality in the fact-finding
14 phase has no effect, really in rehabilitation at all. Surely
15 half an hour being in the courtroom is not going to change
16 behavior patterns which have been built up over a lifetime.

17 Q Do you think there is any constitutional
18 obligation on the part of the state to give a different treat-
19 ment, different in any respect, to juveniles as compared with
20 adult offenders? In short, could the states simply say they
21 are going to wipe the juvenile statutes off the books and treat
22 all juveniles as adults?

23 A I believe they could do that constitutionally.
24 Yes, Mr. Chief Justice.

25 Q Could they do it if a majority of the court

1 should hold it is fundamentally unfair?

2 A No, I don't think they could, Mr. Justice
3 Black, but it seems to me that the rehabilitative notion of
4 constitutional law that has appeared in some of the Circuit
5 Court decisions is an act of fulfilling a statutory promise;
6 not whether or not there is an a priori affirmative duty under
7 the constitution to rehabilitate children.

8 I'd like to turn to the question of delay because
9 that's the one which is broader and it's a strong argument
10 that the grant of the right to a jury trial will interfere with
11 rehabilitation. It's argued that such a backlog will be
12 created that there will be a long gap between when the juvenile
13 first enters the system and when the juvenile is tried and
14 with the rapid changes in his personality it will interfere
15 with rehabilitation.

16 I think that the brief of the Public Defender of
17 Washington, D. C. shows quite well that the experience in
18 states granting the right statutorily has been that very few
19 jury trials are requested. In the District of Columbia there
20 has been a very special problem. There have been a lot of
21 requests for jury trials and a serious backlog has been de-
22 veloped. And the Congress, worried about that backlog in the
23 belief that the backlog was created by the number of jury trial
24 requests, repealed the right to jury trial.

25 However, on page 17 of the amicus brief of the

1 Public Defender of Washington they cite a professional manage-
2 ment study that was made of the District of Columbia Juvenile
3 Court. And the conclusion of that study was, and this con-
4 clusion was not available to the Congress -- the conclusion of
5 that study was that contrary to the notion Congress had in its
6 mind when it repealed the right, that the reason there was a
7 backlog was because there was not proper calendar control; not
8 because there was a large number of requests for jury trials.

9 So, I think that in repealing the right to a jury
10 trial, Congress acted under a misapprehension of facts, because
11 it did not have that study available to it.

12 Q Did that report on the District of Columbia
13 show a correlation between the requests for jury trials and the
14 nature of the delinquency involved? In other words, did it
15 show that jury trials were demanded in the more serious cases
16 and generally waived in the less serious cases?

17 A I have not seen the report itself, Mr.
18 Chief Justice. I have relied on the brief of the Public
19 Defender for that information about it, and that's not revealed
20 in the brief.

21 Q Could I ask you to articulate perhaps what
22 good you think the jury trial will do juveniles and their
23 parents? You have talked a lot about the fact that it won't
24 do any harm. And why are juveniles so interested in having a
25 jury trial?

1 A The Duncan and Louisiana opinion, as I read
2 it, the reasoning that jury trials were found essential to
3 fundamental fairness was that they were protection against, to
4 use the language of the opinion, "the compliant, biased or
5 eccentric judge, the overzealous or corrupt prosecutor."

6 Q But in your own views do the juries con-
7 tribute to accurate fact-finding?

8 A That is my view, Mr. Justice White, and I
9 think it's supported by the research of Kalven and Zeisel in
10 their book: "The American Jury," which is cited in my brief.
11 Their conclusion was that in a significant percentage of cases
12 -- I believe 16 percent -- the difference in the --

13 Q Maybe 7 percent.

14 A Pardon?

15 Q Maybe 7 percent.

16 A Perhaps it is. The difference in the result
17 between the jury and the judge was due to the jury having a
18 stricter notion of what reasonable doubt required. There are
19 peripheral advantages. Obviously, having a jury solves the
20 problem of the judge seeing this inadmissible evidence.

21 Q Well, you think you will get significantly
22 different results in jury cases than in the judge cases in the
23 juvenile courts?

24 A Mr. Justice White, I would answer that question
25 this way: I think if we would look at all of the statistics

1 of all trials --

2 Q Suppose as a lawyer in your prediction, would
3 you say you were going to get significantly different results?

4 A Yes. Especially in the case where, in my
5 judgment, I had already limited the category of cases to those
6 where I had some affirmative reasons for wanting a jury. If I
7 limited it to that category of cases then I am very strongly
8 convinced that there would be a sharp divergence in the results.

9 Q Do you think you would have had different
10 results in these two cases had there been jury trials?

11 A Yes, Mr. Justice Blackmun, I think we would
12 have. Let me review the facts of these cases very briefly --

13 Q I know what the facts are, but I just --

14 A Well, I think they are such close cases that
15 there is a high likelihood that they could have gone the other
16 way with a jury. Certainly in the case of Edward Terry, where
17 the judge approached the fact-finding already knowing that the
18 juvenile had been convicted on a previous occasion of burglary.
19 That knowledge would have been excluded from the purview of the
20 jury. And that in itself, would be a strong reason for
21 thinking that a different result would have occurred.

22 Q What kind of practice would you take into
23 account in making the decision as to whether you would waive
24 a jury or not waive a jury? Is it the age of the child, the
25 kind of crime -- I'm a little bit lost, but you brought the

1 subject up and I wondered how you would decide that issue.

2 A Mr. Chief Justice, I think some of the
3 factors are really the same factors that would apply in an
4 adult criminal case. My mention about the disposition of the
5 judge, the kind of judge that he was, would be one of the
6 factors. Another one of the factors would be whether the
7 evidence against the juvenile consisted entirely of police
8 testimony.

9 Q Well, on your theory, then, you've got to
10 make the choice of waiver of jury before you have the case
11 assigned in a large court, as Philadelphia, or Washington,
12 D. C. You can't be sure of which judge you are going to get
13 until you are assigned for trial. And then you would have to
14 have the right to demand the jury in the first instance, and
15 waive it if you thought the judge would be better, a particular
16 judge would be better.

17 A Well, my overall view about that, Mr. Chief
18 Justice, is that in the interest of speeding the process and
19 avoiding delay, there would be no constitutional objection to
20 requiring the right to be exercised by a certain time or having
21 it lost. That way, Mr. Specter's concern about jury trial
22 demands being used as last-minute requests to delay trial and
23 gum up the whole process, would be met. That, of course, would
24 require giving up the tactical advantage of knowing -- being
25 able to dodge a particular judge the way adult criminal

1 defendants try to do. But I don't think that knowing who the
2 judge would be and being able to dodge him by requesting a
3 jury trial, is at all central to the constitutional issue here.

4 With the Court's permission I'll reserve the rest
5 of my time for rebuttal.

6 MR. CHIEF JUSTICE BURGER: Very well.

7 Mr. Specter.

8 ORAL ARGUMENT BY ARLEN SPECTER, DISTRICT
9 ATTORNEY, STATE OF PENNSYLVANIA,

10 ON BEHALF OF APPELLEE

11 MR. SPECTER: Mr. Chief Justice and may it please
12 the Court:

13 Starting with the decisions in Gault, Winship and
14 Duncan, I would submit to Your Honors that there is implicit
15 in the rationale of those cases the conclusion that jury trials
16 are not required for juvenile proceedings.

17 In Gault this Court said that due process of law
18 does not require displacing the substantive benefits of the
19 juvenile court process and this Court further said that the
20 features of the juvenile court system are not to be impaired
21 by constitutional domestication.

22 I think that what the Court referred to, as it
23 amplified its opinion and rationality in Gault was pre-
24 cisely this issue that is here today and the same court was
25 present in the Winship opinion with the language that there was

1 to be no effect on the formality, flexibility or speed of the
2 juvenile court process and as the juvenile court process was
3 taken up and come to grips with, it is precisely those factors
4 reserved in Winship which militate against the jury trial.

5 The same thing, I submit to Your Honors, is present
6 in Duncan. In one of the footnotes there is a reference to the
7 conclusion that there is no be no widespread change in the
8 criminal process in the state and that this Court encompassed
9 and envisioned an entirely fair process without the jury.

10 I think that brings us right to the central question
11 which is presented in this case, as to what the difference
12 would be if there is a jury trial as opposed to a bench trial
13 in the juvenile process. And I would suggest to Your Honors
14 that there would be a great loss in the intimacy of the pro-
15 ceeding if you have a jury trial.

16 Yesterday the question was raised in the North
17 Carolinacase as to whether the matter would be public. I
18 would submit to Your Honors that if you have 12 jurors who
19 come into a courtroom to try the issue of facts, you would have
20 morepublic participation than is present in most criminal
21 trials, say in Philadelphia. The audience --

22 Q Mr. Farmer addressed himself to the police
23 having a duplicate set of records which, in any event, are
24 released, so --

25 A I think that Mr. Farmer was referring

1 basically to the cases where juveniles are treated as adults.
2 We have had a wave in gang killings in the City of Philadelphia
3 and where there is a determination that those juveniles should
4 be tried as adults, because we think the consequences should be
5 long-term confinement, the standard approach has been a certi-
6 fication to an adult court.

7 The police --

8 Q Was that made by the juvenile judge?

9 A That is made by the juvenile judge; yes,
10 Mr. Justice Brennan.

11 There may be other records of arrest where they are
12 processed initially by the police, but there has been no
13 issue in the City of Philadelphia raised in any court, to my
14 knowledge, that the police are making any improper disclosure
15 of any juvenile court records.

16 Q Do they have access to the juvenile court
17 records?

18 A No, Your Honor; they do not have any access
19 to juvenile court records.

20 Q So they don't know whether the -- whether he's
21 been adjudicated or not, do they?

22 A That is correct. The police records do not
23 contain the disposition of juvenile cases. In fact, the police
24 records customarily don't even contain the disposition of adult
25 records. The police are not equipped by and large to have

1 those dispositions. Sometimes they do or don't in adult
2 records, but they do not have in juvenile record cases where
3 the case was tried through the juvenile court.

4 Q But, they necessarily have arrest records
5 because they make the arrests.

6 A Yes, Your Honor; they do. When they take a
7 juvenile into custody they do have a record of that, but they
8 don't --

9 Q Is that a public record?

10 A No, sir; it is not a public record; it is a
11 record which is customarily not disclosed.

12 Q If I wanted to hire a young man and was
13 interested in knowing if he had an arrest record, would the --
14 and I wrote the police up there, would they tell me whether or
15 not he had an arrest record?

16 A I think they would not. ~~Honor.~~

17 Q Or would they say: "It's none of your
18 business"?

19 A I think they would not. I know that they
20 should not. I would not represent to you that there is no way
21 that it can be found out. But, I think the standards --

22 Q That's true of almost anything.

23 A Yes, sir. Yes, sir.

24 The point that I would make as emphatically as I
25 can, that in Philadelphia, as in most big cities, there is a

1 superabundance of litigation, quite properly so, as to the
2 proper role of the police and the proper rights of juveniles
3 and adults as well. And there has been no question raised by
4 a very active Defender's office, community legal services and
5 bar associations about any improper disclosure by police of
6 juvenile records.

7 Q How about the military? Do they have access
8 to the --

9 A I think that they do not, Mr. Justice
10 Brennan. But, again, that is largely a negative inference on
11 my part because no one has challenged it. I know of no
12 occasion when someone has complained about the military obtain-
13 ing a record and I know of no such request and I think it would
14 be the procedure of our juvenile court not to let anybody have
15 those records because I think that would be an improper dis-
16 closure under our juvenile court law.

17 But, this entire area of disclosure of records has
18 not been raised or litigated on the Philadelphia scene and we
19 have raised and litigated virtually every -- many, many issues.
20 involving the allegation of improper police conduct.

21 Returning, if I may, to the central question as to
22 just what kind of a trial you have with a jury, as contrasted
23 with the judge alone. I would submit to Your Honors that there
24 would be at least four factors which would come into play here.
25 As I would characterize them: the factor of intimacy, the

1 father figure, the general flexibility and the aspect of
2 speed.

3 With respect to the question of intimacy where there
4 is a bench trial and a judge sits and a juvenile is before him,
5 there is a straight line between that judge and that juvenile
6 and it is vastly different when you bring a jury into a court-
7 room. As soon as a jury is in a courtroom, then there is the
8 immediate import of the tactics of a courtroom and quite
9 properly so, under our judicial system, the thrust of the
10 lawyer for the defense is to do everything he can to secure
11 an acquittal.

12 When there is a proceeding before a judge alone,
13 lawyers respond very differently and so do those who are there
14 to be adjudicated. There is much less emphasis upon excluding
15 material and now I'm talking about material that may properly
16 be before a judge. A judge has much wider latitude in accepting
17 competent evidence than may go before a jury because of its
18 possibly prejudicial effect. It is a much more understandable
19 proceeding for a juvenile when he is in a more informal cir-
20 cumstance.

21 I think that it is a consequence even for lawyers,
22 and certainly for juveniles and certainly for other defendants,
23 that when a jury comes into a box and sits in the room there
24 is an immediate electrifying effect in terms of what that de-
25 fendant does in an adult trial, in terms of how he responds.

1 If there is an occasion made of a sidebar conference there are
2 waves that go between a defendant in an adult trial and a jury
3 and certainly it is a very formalizing effect to have that
4 jury present for a juvenile to know that those men are to judge
5 him and are to pass upon this question in terms of his very
6 basic reaction.

7 Q Well, Mr. Specter, assume that the juvenile's
8 lawyer explains all of that as eloquently as you have, and the
9 juvenile and his parents say, "We still want it."

10 A No, Your Honor, I would not. I would think
11 that it is in his best interest that he not be tried by a jury.

12 Q Well, he says, "I appreciate all of that,
13 but I rather take my chances on convincing one of 13 than on
14 convincing one." Then why should he be denied that?

15 A Because we must formulate a system which may
16 not respond to his personal wishes or which may not respond to
17 his personal likelihood of beating the rap if that is un-
18 desirable for him as an individual and undesirable for society
19 as a general rule.

20 Q Well, you wouldn't object to him waiving it
21 all and pleading guilty, would you?

22 A I would object to it if it was not well-
23 founded, if there was not evidence behind --

24 Q But I said a lawyer who is as good as you
25 are and has explained it well.

1 A There is a great deal that has to be ascer-
2 tained beyond his mere decision to plead guilty. We have --

3 Q Well, do you still have in Pennsylvania, the
4 possibility of jury and an equity proceeding?

5 A We have the possibility of advisory juries,
6 but that is discretionary and our equity trials --

7 Q Why couldn't we have a jury in the juvenile
8 court? We move in six or 12 seats -- extra seats and we put a
9 jury in there and the jury's sole job is to find facts: is
10 this person a delinquent or not, and all of the rest of this
11 beautiful thing that you do for the juveniles and the juvenile
12 judge still does. What's wrong with it?

13 A I would submit to Your Honor that the
14 juvenile would get less under that system and I would move
15 ahead to part of my Duncan argument in responding directly to
16 Your Honor --

17 Q That's where I was going.

18 A -- that a juvenile gets more under the current
19 juvenile system than he would get under the jury determination
20 and as Your Honor formulated that question, an advisory jury,
21 to make a determination that he is a delinquent, and that's the
22 critical question; not: did he commit the act, but is he, in
23 fact, a delinquent? And under the current juvenile system a
24 juvenile gets more because he is not subject to confinement or
25 subject to training or subject to an adjudication as a

1 delinquent on a mere finding that he committed a specific act.
2 Every adult is. That is an adjudication of delinquency, but
3 the juvenile is not.

4 Q But the judge could still say that "I don't
5 think he is a delinquent; I don't think he deserves to be
6 punished."

7 A Mr. Justice Marshall, I don't think you can
8 do --

9 Q But sort of an NOV thing.

10 A I would say that that cannot, if this Court
11 says to the states that a juvenile has a constitutional right
12 to have a determination of: did he do it or did he not do it
13 that you cannot then separate that out from a determination as
14 to whether he is a delinquent. That's going to be the very
15 next case. When a judge makes a determination that he is a
16 delinquent on a factual finding that he committed the act
17 then there is going to be the question: oh, no. That's the
18 ultimate question of this case, and that is a question for a
19 jury. It is fundamentally unfair to let the judge make that
20 determination and then we become involved in the impossible
21 issue of charging a jury on what the factors are that consti-
22 tute a delinquent status.

23 It is possible -- difficult, but possible -- we have
24 done it for centuries, to charge a jury as to making a factual
25 determination: "did he commit the larceny or did he commit

1 the larceny? But as soon as you move from that question to a
2 judgment: did he, in fact, become a delinquent as a result of
3 these complex circumstances? you are moving away from what a
4 judge is to do and to what a jury is to do. A jury returns
5 a verdict --

6 Q Let me cut back now. The jury just finds
7 a fact that he committed the larceny. I don't think that
8 changes your argument at all; does it?

9 A The jury finds the fact that the juvenile
10 has --

11 Q On a blank day did such and such and --

12 A Yes, sir.

13 Q -- you know; that's all.

14 A Yes, sir.

15 Q Then it goes to the judge to decide whether
16 he's delinquent.

17 A Well, if you --

18 Q I'm trying to save my hypothetical.

19 A I'm sorry, I didn't hear you, sir.

20 Q I'm trying to save my hypothetical.

21 A Well, I think that you can fashion a system
22 to try to give the juvenile the benefit of the verdict and then
23 to try to preserve something from the judgment of delinquency,
24 but I think that when you do that you make it infinitely more
25 difficult for the judge then to say in the fact of that

1 verdict that this juvenile is not delinquent. After all, in
2 the fact-finding process the judge has a great deal of dis-
3 cration. To put it, perhaps overly bluntly: he can hide
4 behind the findings if there is not proof beyond a reasonable
5 doubt. He can base his decision from those witnesses who have
6 been there that he does not believe or tends to weigh, or finds
7 on burden of proof that the act was not committed, so that when
8 he makes the adjudication that the juvenile is not a delinquent
9 he has a much easier time doing that if he is not faced with a
10 verdict from the jury that the act, in fact, was committed.

11 Q Mr. Specter --

12 Q It doesn't make it a matter of fact if --
13 isn't an adjudication of delinquency automatic when it's found
14 that he committed the act?

15 A Mr. Justice White, I don't think so. I
16 don't think so because --

17 Q In Pennsylvania?

18 A The judge sits -- no, sir; it is not. If
19 the judge sits and he makes a determination as to what happened
20 in the case and very frequently he will make an adjudication
21 that he is not delinquent. Now, he does not get on the record
22 or does not articulate or speak out as to what facts he has
23 found.

24 Q But what I -- in Pennsylvania when a juvenile
25 judge tries a young man for committing an act which would be

1 a felony if committed by an adult, does he at that time have
2 the probation officer's report on the young man? Or the
3 juvenile court officer's report on the young man?

4 A He should not; he should not have --

5 Q Has he?

6 A I think he still does to some extent because
7 we are still learning from Gault.

8 Q Then he -- surely then if you say it's a
9 two-stage process he must have the report after he finds he
10 committed the act and before he decides he is a delinquent.

11 A I do not think that the juvenile court judge
12 can properly have his background before he makes an adjudica-
13 tion of delinquency. I think that --

14 Q Well, then what difference would it make
15 whether it was a jury question or a judge question?

16 A Because the issue is raised at that stage,
17 without regard to his prior record. I think the judge can --

18 Q Delinquency?

19 A Yes, sir. I think --

20 Q Separate determinations?

21 A No, sir. I think that the question of his
22 record is to come into play when he decides what the disposi-
23 tion should be. But I don't think he can have, he can have his
24 prior record before him when he makes the determination of
25 delinquency. I think that that is going too far at that

1 stage of the proceeding.

2 Q Is it possible for him to find delinquency,
3 that he's guilty of delinquency, without also finding that he
4 has been guilty of some kind of conduct that is prohibited by
5 law?

6 A I think he must find the underlying pro-
7 hibited conduct before making a determination of delinquency,
8 that the judge would have to do that --

9 Q Whether you call it delinquency or not call
10 it delinquency in either instance, the purpose of the court is
11 to find out if he is engaging in some conduct in violation of
12 the law.

13 A Correct. That's necessary in every case.

14 Q That's necessary in every case.

15 A Indispensable as a matter of the Gault
16 requirements before there can be an adjudication of delinquency.

17 Q What you are arguing now is that it's open
18 for a judge to say, "Sure, this youngster did commit these
19 acts, but I'm going to hold he is not a delinquent because my
20 judgment is that he's not habitual and we don't need to re-
21 habilitate him.

22 A Precisely, Mr. Justice Harlan, for a wide
23 variety of reasons that judge can believe that the act was
24 committed but can conclude that the interests of the juvenile,
25 the overall interest of the system --

1 Q So that's at the very essence of this whole
2 special procedure. And whether you call it a criminal procedure;
3 call it a penal procedure; call it anything you like but that's
4 the theoretical consideration behind the whole thing; isn't
5 it?

6 A I think that's the critical question that the
7 broader benefit which the juvenile gets that he cannot get
8 if there is a jury present.

9 Q Suppose you have two persons up before the
10 court; one of them is 20 years, 364 days old; one of them is
11 21 years old. They committed the same acts. Do you mean that
12 under the law they can be treated differently by reason of that
13 one day's difference in age?

14 A Yes, Mr. Justice Black, I would say precisely
15 that. You have to draw a line somewhere and that's the line.

16 Q Suppose we draw that same line now in
17 another area -- in many other areas. One would be on the
18 liability of an for his contractors. I assume that's
19 true in Pennsylvania.

20 A Yes, sir.

21 Q Of course, it's a totally different area.

22 A There are enormous number of areas in the law,
23 Mr. Chief Justice, where the juvenile gets different considera-
24 tion, different treatment.

25 Q He doesn't get drafted, for one thing.

1 If he gets over age 26 or something like that, then he doesn't
2 get drafted again.

3 Q And he gets Social Security at 65. There
4 are many differences on ages in our entire system and with the
5 rational basis they are upheld. Everybody is not treated the
6 same. You must have a cutoff line and that line is the age.

7 Q The question, though, then is whether that's
8 a rational basis when it comes to the administration of penal
9 law -- I'll use that term to get away from criminal.

10 A Well, let me move the response of that if I
11 might, skipping parts of the argument because of the time
12 problem, into this issue of promptness, which I submit shows
13 that the juvenile gets a much better treatment the way the
14 court systems work in very practical consequences.

15 In the City of Philadelphia we are able to deal
16 with our juvenile problems in a much better manner because we
17 do not have the jury trial as a matter of the administration
18 of criminal justice, contrasted with the administration of
19 criminal justice for adults.

20 For example: in the first ten months of 1970 we have
21 tried slightly less than 13,000 adult cases contrasted with
22 slightly less than 11,000 juvenile cases. We have 25 judges on
23 an average trying those adult cases. We have five judges on an
24 average trying those juvenile cases.

25 Q Do you think that should have anything to do

1 with deciding the constitutionality of the thing?

2 A Mr. Justice Black, I think it does and I
3 think it does --

4 Q What do you --

5 A I think that it has to and I would move over
6 to what Mr. Justice Douglas said in De Backer versus Brainard,
7 when he pointed out that the juvenile court had not come along
8 as everyone hoped that it would because there was not the kind
9 of a municipal budget to handle the problems. And I think
10 that when you evaluate the juvenile system and say that it was
11 a horrendous system and point to the faults of it I would not
12 stand here and say that it is a perfect system but I will say
13 that if you compare it to the adult system it is vastly pre-
14 ferable.

15 I will not argue that the schools are models for
16 juveniles, in Pennsylvania, although I think it's irrelevant
17 to this case in any event, but they are vastly superior to the
18 prisons for the adults. But, when you come down to what
19 happens as you dispose, in a big city like Philadelphia, of
20 11,000 juvenile cases and 13,000 adult cases. We have a back-
21 log in Philadelphia on the adults of almost 6,000 cases con-
22 trasted with 1,400 for juveniles where we are current.

23 We can give a juvenile an adjudicatory hearing in
24 two weeks in the City of Philadelphia, not only tried at the
25 first listing, but they are tried promptly. On the adult side,

1 they go on for six months, 12 months or even 18 months. We
2 have in confinement in the City of Philadelphia today on the
3 adult side, 1885 adults awaiting trial. We have juveniles:
4 249 on a system where about half feed in as adults and about
5 half feed in as juveniles.

6 So that the practical consequence of this juvenile
7 system is that you get the juvenile to court in a hurry by
8 comparison to the adults and if there is any juncture where
9 rehabilitation and the curative effect of a prompt trial --
10 never mind where he's sentenced -- where he's sent, but the
11 curative effect of a prompt trial, it is certainly in the
12 formative stage of a young man's life: 15 or 16 where it's
13 done with promptness. It's much more important to give him
14 that kind of immediate hearing and immediate determination than
15 it is someone who is much older.

16 Q If I'm not mistaken, many people who are
17 opposed to the trial by jury at all, both for adults and any-
18 body else, one of the main arguments is it costs too much.

19 A Well, I do not believe it would be appro-
20 priate under our constitutional form of government to make any
21 shift from the traditions on adult trials. I think that they
22 are arms-length proceedings; it is deeply ingrained in our
23 system and I think an adult is entitled to a jury trial.

24 I think that one day there will be presented to this
25 Court the conflict on the constitutional right to a speedy

1 trial with the constitutional right to a jury trial. And I
2 would suggest to Your Honors here this morning that the estab-
3 lishment of priorities is a matter which must affect all
4 deliberative bodies. It would be preferable to keep out the
5 question of priorities in the determination of constitutional
6 issues, but it is something which is just implicit.

7 We have in our system today in juvenile court,
8 responding to an inquiry made earlier by Mr. Chief Justice, as
9 to our new system. Our juvenile court now is a part of our
10 overall court system. If we had jury trials in the juvenile
11 court there must be, necessarily, a movement of judges from
12 the adult courts into the juvenile courts so that the system
13 will become more aggravated.

14 We have been attempting in Philadelphia for the last
15 four years to get 30 additional judges for the City of
16 Philadelphia urgently needed and because of state financial
17 problems we cannot get those judges for the City of Philadelphia.
18 This may be irrelevant in terms of the theory of constitutional
19 law, but it's a very major practicality.

20 We have, in Pennsylvania today, a mandamus action
21 brought by the Philadelphia City Courts against the Philadel-
22 phia City Council to compel the Council to put up \$4 million
23 to run gthe courts and we have gotten a judgment in the lower
24 court and it is now on appeal to the Supreme Court and there
25 is a ticklish issue of division of responsibility as to whether

1 the courts can compel a legislative body to provide more judges
2 and necessarily to increase taxes, but that is where we are in
3 the City of Philadelphia. And if we have the necessity for
4 juvenile jury trials -- I'm not going to say to you that it's
5 going to overwhelm our system because that might be placing the
6 issue finances too high, but what I will say to you is that it
7 will leave the juvenile in much worse shape than he is today
8 because when there is an opportunity for a jury trial it be-
9 comes, to a large extent a device for delay which is used with
10 total propriety by a defense lawyer to get the case continued.

11 We have a practice in Pennsylvania of having the
12 waive assigned at the time of trial. It must be signed by the
13 trial judge before whom the case goes. We could not, under
14 our practice, have it waived in advance and the question as to
15 whether the case would be bench trial or jury trial is deter-
16 mined when the defendant is called before that specific judge
17 and a decision is made as to whether the defendant can get, is
18 more likely to be acquitted by that judge.

19 We have, in the City of Philadelphia of the 13,000
20 cases we have tried this year, only 226 jury trials -- less
21 than two percent of our cases in adult court are tried through
22 a jury. It is estimated that between 30 to 50 percent of the
23 cases there is a demand for a jury trial and it is made as a
24 tactical device and no one -- and I do not now quarrel with that
25 tactical device -- but if it is present in the juvenile system

1 it will necessarily, I submit to Your Honors, result in great
2 delay.

3 Q Well, would there be any likelihood that the
4 percentage would be any greater of asking for a trial by jury
5 among the juveniles than the adults?

6 A Mr. Justice Black --

7 Q I understood you to say 226 --

8 A 226 jury trials in adult court out of almost
9 13,000; less than 2 percent.

10 Q Is there any reason to think that there would
11 be more than that by the juveniles if they are entitled to a
12 jury?

13 A No, sir; I would predict there would be very
14 few jury trials, but its presence would be a great delay be-
15 cause when a case is called it would be continued because there
16 was not a jury available. When a judge has a list of, say,
17 20 cases, as we have in our Philadelphia adult courts, the
18 judge may dispose of 12 cases on that list if he tries them on
19 a bench trial. If a jury demand is made that case is put
20 over. It's put over and it's put over and it's put over,
21 until it's continued six, eight, ten, 20 times.

22 So that the opportunity for demand will result in
23 great delay.

24 Q Mr. Specter, if 2 percent of your adults
25 actually go to trial before a jury --

1 A Yes, Mr. Justice White.

2 Q -- and it follows from that argument like
3 it does in the context of the juveniles that you should dis-
4 pense with jury trials in the adult cases?

5 A No, Mr. Justice White. I do not say that.
6 I think that our traditions are too firm in terms of according
7 an adult criminal defendant the right to jury trial.

8 Q And in short you say that that two percent
9 that want the jury trial is an important enough consideration
10 to retain the right?

11 A Yes, I do. I think it is important enough
12 and I think that the distinctions between the adults and the
13 juveniles, for the other reasons that I have given, justify the
14 difference in treatment between adults and juveniles in terms
15 of our entire tradition. And

16 And I would close on just that note --

17 Q I notice that twice when you referred to the
18 value of a jury trial -- at least twice, you did not say it
19 was good because it was constitutional; you said it was good
20 because it was traditional.

21 A Mr. Justice Black, had I selected my words
22 with perhaps more amplification I would have rested it on the
23 constitution. I think it's in the constitution because it is
24 in our tradition and I think our constitution has embodied the
25 tradition of our concepts of fundamental fairness and

1 justice.

2 Q Do you think of course -- I'm not talking
3 about this issue -- do you think of course that the constitu-
4 tion should be enforced, whether it costs much or little?

5 A Yes, I do. I do. But I think necessarily
6 that when there is an extension of constitutional rights and
7 if the constitution is interpreted differently in different
8 eras that there is a necessary balancing process that this
9 Court must undertake and that it necessarily involves the
10 issues of priority and I would put it in terms of the juvenile
11 being treated worse under a modified system as opposed to the
12 present system.

13 MR. CHIEF JUSTICE BURGER: Thank you, Mr. Specter.

14 Mr. Farmer, you have about five minutes.

15 REBUTTAL ARGUMENT BY DANIEL E. FARMER, ESQ.

16 ON BEHALF OF APPELLANTS

17 MR. FARMER: Thank you.

18 Mr. Justice White, you have asked whether or not a
19 finding that the crime had been committed automatically led to
20 a conclusion that the child was delinquent. The answer is a
21 bifurcated one. If you read the words of the juvenile court
22 law the answer is "yes."

23 Q That's what I thought.

24 A But the clear practice of the juvenile court
25 is otherwise. The juvenile court has created for itself a

1 category which they call, and I quote, "determined." And
2 when they write "determined," across the juvenile delinquency
3 petition it means: the facts were found, but for sociological
4 reasons the juvenile is not being adjudicated a delinquent.

5 Q And when the judge does that it's because
6 after he's found the facts, perhaps, he has some other infor-
7 mation.

8 A That's correct, and there is no reason why
9 that couldn't happen with a jury trial.

10 Q Yes. But, as a matter of practice in
11 Pennsylvania, does the judge have the juvenile's record before
12 he makes the determination of facts?

13 A It is handed to him and some of the judges
14 look at it. Not every judge looks at it. It's up to --

15 Q But at least he has it once he's made the
16 finding of fact?

17 A There is a little pile of them beside the
18 bench when the juvenile's case is called. The clerk hands up
19 the folder to the judge.

20 Q Mr. Farmer, is it possible for a juvenile
21 judge to find that the young man or woman did not actually do
22 this act on which he is now being charged, but nonetheless,
23 made a finding that the young persons are delinquents?

24 A It's not possible, Your Honor.

25 Q That's not possible. Then while I've

1 interrupted you, let me ask you one other question: there was
2 talk in previous colloquy about a plea of guilty. Are there
3 formal pleas in the juvenile court?

4 A No. There is a pretrial hearing at which
5 pleas of guilty are received and they are bargained for and
6 when a plea of guilty is received at that pretrial hearing a
7 disposition is made right at that point.

8 Q Is that guilty of being a delinquent or
9 guilty of "Yes, I did steal the money, but I ask you not to find
10 me a delinquent."

11 A Since the plea of guilty always results in
12 a disposition, I can only assume that in fact, he is pleading
13 to the legal conclusion of an adjudication of delinquency.

14 Mr. Specter spoke about four factors in the jury
15 trial was going to interfere with: intimacy, the role of the
16 judge as a father figure and special informality.

17 The record in this case is entirely reflective of
18 the practice in the juvenile courts, and the court will look
19 in vain in that record for any special intimacy between the
20 judge and the juvenile or any father figure at all claimed by
21 the judge.

22 As far as fact-finding is concerned, it's like an
23 adult criminal bench trial, pure and simple.

24 Mr. Justice Brennan asked what the law of England
25 was. On page 19 of my brief, footnote 24, there is a citation

1 to the act in England which provides for the right of jury
2 trials where the juvenile if over 14 and charged with an in-
3 dictable offense as an act of delinquency.

4 Mr. Specter and I are in strong disagreement about
5 what the police records are.

6 Q Where is he tried -- he's not tried before
7 the Magistrate's bench, is he?

8 A It is the Magistrate's Court's Act, Mr.
9 Justice Brennan, but I don't know exactly what the mechanics
10 are of which court he's tried in.

11 Mr. Specter and I are in strong disagreement about
12 what the police records contain. Mr. Specter says they don't
13 record dispositions. That's just wrong. On page 21 of the
14 brief there is a citation to a study undertaken for the National
15 Institute of Mental Health by the distinguished criminologists
16 Sellin and Wolfgang. That study uses as its source of
17 statistics the police records because the juvenile court records
18 were not made available to Professors Sellin and Wolfgang.

19 So that if it weren't true that the police recorded
20 all of the facts of the juvenile's history that study which
21 you see cited at page 21 of the brief would not be possible.

22 MR. CHIEF JUSTICE BURGER: Mr. Farmer, thank you.

23 MR. FARMER: Thank you, Your Honor.

24 MR. CHIEF JUSTICE BURGER: Mr. Farmer and Mr.
25 Specter, the case is submitted.

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(Whereupon, at 11:41 o'clock a.m., the argument in
the above-entitled matter was concluded)