THIS APPEAL INVOLVES A DELINQUENT MINOR PROCEEDING UNDER THE JUVENILE COURT ACT

No. 120796

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Petitioner-Appellant Cross-Appellee, -vs- DESTINY P., a minor, Respondent-Appellee Cross-Appellant.	)))))))))))	Appeal from the Circuit Court of Cook County, Juvenile Justice Division, No. 14 JD 01625. Honorable Stuart P. Katz, Judge Presiding.

REPLY TO THE STATE'S RESPONSE TO APPELLANT'S CROSS-APPEAL

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REPLY TO THE STATE'S RESPONSE TO APPELLANT'S CROSS-APPEAL

Destiny P., cross-appellant and respondent-appellee, by counsel, Jessica D. Fortier, Assistant Appellate Defender, Office of the State Appellate Defender, respectfully requests that this Honorable Court affirm the trial court's ruling granting her the right to a jury trial on equal protection grounds. Alternatively, on cross-appeal, Destiny P. respectfully requests that this Court reverse the trial court's ruling and grant her a right to a jury trial on due process grounds.

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ARGUMENT

II. Juveniles charged with first degree murder under the Department of Juvenile Justice statute, like Destiny P., should have a due process right to a jury trial because she faces mandatory incarceration upon adjudication as a result of the significant transformations to the Juvenile Court Act since this Court's decision in *In re Fucini*, 44 Ill. 2d 305 (1970), and the United States Supreme Court in *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971).
(Cross-Appeal Relief Requested)

In her opening brief, Destiny P. set forth an issue of first impression regarding the constitutionality of the Juvenile Court Act in denying minors, like Destiny P., facing mandatory incarceration when charged with first degree murder under the Department of Juvenile Justice (hereinafter referred to as "DOJJ") statute, the right to a jury, where that right is provided to the only other juveniles facing mandatory incarceration, those charged under the Habitual Juvenile Offender (hereinafter referred to as "HJO") and the Violent Juvenile Offender (hereinafter referred to as "VJO") statutes. 705 ILCS 405/5-750(2) (West 2016) (DOJJ statute); 705 ILCS 405/5-815 (West 2016) (HJO statute); 705 ILCS 405/5-820 (West 2016) (VJO statute).

The State responds that the "contention that this case presents a question of first impression is entirely incorrect," and that nothing in the amendments of the Juvenile Court Act or the case law since *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971), and *In re Fucini*, 44 Ill. 2d 305 (1970) were decided, has undermined their applicability. (State Br. 23-33). However, this issue is one of first impression because the Juvenile Court Act interpreted by this Court more than 45 years ago in *Fucini* was drastically different than

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today's Act in both practice and purpose. The most critical of those differences being that in 1970 no juvenile was afforded a right to a jury trial, nor was mandatory incarceration a possible sentence. Ill.Rev.Stat.1967, ch. 37, §702-7(5). The Act today provides for the right to a jury in two of the three categories of juveniles that now face mandatory incarceration if found guilty. 705 ILCS 405/5-815 (HJO); 705 ILCS 405/5-820 (VJO). Juveniles charged with first degree murder under the DOJJ, like Destiny P., are the only category of juveniles facing mandatory incarceration that are not provided a right to a jury trial under the due process clause of the United States and Illinois Constitutions. U.S. Const., amend. VI; U.S. Const. amend. XIV; Ill. Const. 1970, art. I, § 2.

The State argues this issue "should be rejected under *stare decisis*," because "[w]hen a question has been deliberately examined and decided, it should be considered settled and closed to further argument," but that is not the situation in the instant case. (State Br. 23-25). None of this Court's decisions have specifically examined whether juveniles who are charged with murder under the DOJJ statute and facing mandatory incarceration until the age of 21 have a due process right to a jury. Although this same issue was raised in *In re G.O.*, this Court chose not to address it; thus, there is currently no authority regarding this issue. *In re G.O.,* 191 Ill.2d 37, 44, n. 3 (2000). However, in *G.O.*, this Court specifically held that a due process argument like the one presented here is not "foreclosed by *Fucini*." *Id*.

Furthermore, the rule of *stare decisis* is not meant to be "so static that

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it deprives the court of all power to develop the law." *Charles v. Seigfried*, 165 Ill. 2d 482, 512 (1995) (McMorrow, J., dissenting, joined by Harrison, J.), citing *Alvis v. Ribar*, 85 Ill. 2d 1, 24 (1981) ("The maintenance of stability in our legal concepts does not and should not occupy a preeminent position over the judiciary's obligation to reconsider legal rules that have become inequitable in light of the changing needs of our society."). This Court itself has found no "judicial sagacity in continually looking backward and parroting the words and analysis of other courts so as to embalm for posterity the legal concepts of the past." *Dini v. Naiditch,* 20 Ill.2d 406, 429 (1960). Thus, the State's suggestion that this Court use the principle of *stare decisis* to not address the issue presented here should be rejected.

This Court has considered other due process violation claims in *Jonathon C.B.,* 2011 IL 107750, ¶117*,* and *People ex rel. Birkett v. Konetski*, 233 Ill. 2d 185, 205 (2009), but they were rejected. However, the claims addressed in those cases were not the same due process violation raised in the instant case. The legislation challenged in both *Jonathon C.B.* and *Konetski* was the Sex Offender Registration Act (hereinafter referred to as "SORA") statute, not the DOJJ statute. *Id.* The State ignores this vital distinction.

This Court's findings in *Jonathon C.B.* and *Konetski* actually support Destiny P.'s argument, where this Court found that juveniles facing mandatory incarceration (under the HJO and VJO statutes), like Destiny P. currently faces, *requires* the extra protection of a jury trial because of the severe punishment they face. *Konetski*, 233 Ill.2d at 205. However, this Court denied

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Jonathon C.B. and Konetski's claim holding that the requirement to register under SORA was not a severe punishment and did not require the extra protection. *Id*. Therefore, applying this Court's analysis from *Jonathon C.B.* and *Konetski*, because of the "severe deprivations of liberty" facing juveniles charged with murder under the DOJJ statute, they too should have a due process right to a jury like their HJO and VJO counterparts. *Jonathon C.B.*, 2011 IL 107750, ¶117; *Konetski*, 233 Ill. 2d at 205.

The State continually asserts that juvenile proceedings are not criminal prosecutions, and therefore, juveniles like Destiny P. do not have a due process right to a jury trial. (State Br. 27-33). And, in response to Destiny P.'s argument that the landscape of juvenile proceedings has changed and now subjects juveniles to more criminal-like prosecutions, the State reiterate the protective and paternal nature of the Juvenile Court Act, and argues those goals remain the emphasis of the Act just as at its inception. (State Br. 27-33). However, this Court itself has recognized that the changes in the Act and in the case law in the past almost 50 years, have made delinquency proceedings more akin to criminal prosecutions than ever before. In *People v. Austin M.*, 2012 IL 111194, this Court specifically found that "our legislature has transformed the [Juvenile Court] Act, making juvenile delinquency proceedings more akin to criminal prosecutions." *Austin M.,* 2012 IL 111194, ¶ 76, citing *Taylor*, 221 Ill. 2d at 165.

Moreover, the State's recitation of the holdings in some of the cases they rely on for the proposition that juvenile proceedings are not akin to criminal

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prosecutions, are somewhat misleading. (State Br. 28). And, when actually examined as a whole, they are more supportive of Destiny P.'s argument that the changes to the Act in 1998 have made the juvenile proceedings more akin to criminal proceedings. For example, the State includes the following quote from *In re A.G.,* 195 Ill. 2d 313, 317 (2001): the Act is "still not criminal in nature and are to be administered in a spirit of humane concern for, and to promote the welfare of, the minor... ." (State Br. 28). However, the rest of that sentence states, "article V of the Act has been reconfigured and now contains a purpose and policy section which represents a *fundamental shift* from the singular goal of rehabilitation to include the overriding concerns of protecting the public and holding juvenile offenders accountable for violations of the law." *In re A.G.,* 195 Ill. 2d at 317, citing *In re G.O.*, 191 Ill.2d 37, 61 (2000) (Heiple, J., dissenting) (emphasis added). This Court went on to note that, "virtually all of the constitutional requirements of a criminal trial have been introduced into juvenile delinquency proceedings." *In re A.G.,* 195 Ill. 2d at 318. Lastly, in *People v. Taylor*, 221 Ill. 2d 157, 165 (2006), this Court recognized that the General Assembly amended the Act "to make the juvenile delinquency adjudicatory process look more criminal in nature."

Despite the State's arguments otherwise, when a delinquency prosecution is filed against a juvenile for murder under the DOJJ statute, the similarity to criminal prosecution cannot be denied. The juvenile is detained in a jail, or "detention center," prior to trial, then brought to court in chains, tried with the assistance of counsel, all of the evidentiary rules of adult

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criminal prosecutions apply, and if found guilty, the court would be mandated to sentence the juvenile to incarceration until the age of 21. Additionally, the juvenile must submit DNA samples for inclusion in adult statewide and national databases (*see e.g.*, *In re Lakisha M.*, 227 Ill.2d 259, 273 (2008)), and a variety of previously confidential information would be public (*see* 705 ILCS 405/5-901(5)(a) (West 2016) (names, addresses, and offenses are subject to public disclosure for any minor adjudicated delinquent for murder)). Juvenile adjudications also are considered prior convictions for purposes of federal criminal sentencing guidelines in every circuit court to have addressed the issue, save the Ninth. *See Welch v. United States*, 604 F.3d 408, 427-29 (7th Cir. 2010). And, the court and law enforcement records of minors found guilty of murder are not subject to expungement. *See* 705 ILCS 405/5-915(2) (West 2016) (unlike other delinquency records, felony sex offenses and first degree murder may never be expunged).

Due to the fact that "juvenile delinquency proceedings are more akin to criminal prosecutions," this Court held that "the need for zealous advocacy to vindicate the constitutional rights of minors in delinquency proceedings has become even greater." *Austin M.,* 2012 IL 111194, ¶ 76, citing *Taylor*, 221 Ill. 2d at 165. The constitutional right that needs to be ensured in this case is the fundamental right to a jury trial for those juveniles who face more severe deprivations of liberty than ever before, mandatory incarceration until the age of 21. The legislature has already granted such a right under the Act to juveniles facing mandatory incarceration under HJO and VJO statutes. And,

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this Court has held that those juveniles were provided their due process right to a jury *because* of the "severe deprivations of liberty" they faced. *Konetski,* 233 Ill. 2d at 205. Thus, Destiny P. is simply requesting that the other class of juveniles who face mandatory incarceration – juveniles charged with murder under the DOJJ statute – be extended the fundamental right to a jury trial as well.

However, the State claims, "For purposes of the jury trial right, what matters is the potential length of that term of incarceration: whether the *potential* punishment includes a maximum lengthy prison sentence (over 6 months' incarceration)." (State Br. 34). The State is simply wrong. Regardless of what is required in adult proceedings, this Court found mandatory incarceration for a juvenile offender was a "severe deprivation of liberty" that *required* the extra protection of a jury trial right. *Konetski*, 233 Ill.2d at 205. In support of its assertion, the State proceeds to discuss at length when the right to a jury trial attaches in an adult criminal proceeding. (State Br. 34-36). However, what the State fails to address is the fact that in juvenile proceedings, which is at issue here, the right to a jury is only granted to those juveniles charged under the HJO and VJO statutes. Not coincidentally, those are the juveniles – except those charged with murder under the DOJJ statute – who face mandatory incarceration. 705 ILCS 405/5-815; 705 ILCS 405/5-820. Thus, denying juveniles like Destiny P. the right to a jury trial is a violation of their due process rights, where they too require the extra procedural protection due to the "severe deprivation of liberty" they face. *Id*.

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Also included in the State's lengthy discussion of when adult offenders are provided a right to a jury trial, the State inaccurately expands Destiny P.'s argument by stating, "her position mandates jury trials in *every* juvenile adjudication proceedings with the potential for detention longer than six months." (State Br. 35). In no way is this an accurate statement of Destiny P.'s due process claim, which is an as-applied challenge to juveniles facing mandatory incarceration but not provided the right to a jury. Granting juveniles charged with murder under the DOJJ statute a right to a jury trial would not lead to an expansion of jury trial rights among all other categories of juvenile offenders. Instead, it would simply be granting the last group of juveniles that face mandatory incarceration if convicted, their due process right to a jury, which has already been granted to juveniles charged under the HJO and VJO statutes facing the same severe deprivation of liberty – mandatory incarceration.

In an attempt to dissuade this Court from granting juveniles like Destiny P. their due process right to a jury, the State claims that "there may be unintended consequences of inserting a jury trial right in delinquency cases beyond the limited circumstances authorized by the legislature." (State Br. 37). The State further asserts, "Jury trials would insert unnecessary complications into the proceedings that have no relevance to questions of guilt and sentencing." (State Br. 37). This argument is puzzling for many reasons. First of all, the case relied on by the State for this assertion, *In re A.S.,* 2017 IL App (1st) 161259, involved a situation where a jury trial right had already been

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authorized by the legislature under the HJO statute. It is unclear how providing the right to a jury trial to another specific and limited set of juveniles – those charged with murder under the DOJJ statute – would have any different or additional consequences. Moreover, the State relies on *In re A.S.* as an example of where the jury selection process ultimately delayed the resolution of the juvenile's case. (State Br. 37). However, the reason for the delayed resolution was solely due to the State's purposeful discrimination during jury selections. *In re A.S.*, 2017 IL App (1st) 161259, ¶¶ 27-29. Nowhere in the *In re A.S.* decision is there any discussion that the delay was due to an "unnecessary complication" caused by allowing the juvenile the right to a jury trial. In fact, it is hard to understand how ensuring a fair and unbiased arbiter of guilt, whether by an unbiased jury or an unbiased judge, could be seen as an "unnecessary complication" that has "no relevance to questions of guilt and sentencing." (State Br. 37).

The State also asserts another consequence of granting the right to a jury trial for a juvenile like Destiny P. would be that it would "pierce the confidentiality of juvenile proceedings, which was a key factor in creating a separate juvenile justice system." (State Br. 37). However, as noted above, confidentiality of juvenile proceedings has fallen by the wayside since the 1998 amendments to the Act, where the juvenile must now submit DNA samples for inclusion in adult statewide and national databases (*see e.g.*, *In re Lakisha M.*, 227 Ill.2d 259, 273 (2008)), a variety of previously confidential information is now public (*see* 705 ILCS 405/5-901(5)(a) (West 2016) (names, addresses, and

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offenses are subject to public disclosure)), and the minor's record is not subject to expungement, which would allow possible future employers access to such information (*see* 705 ILCS 405/5-915(2) (West 2016)). Thus, the State's hypothetical consequences to granting juveniles like Destiny P. a right to a jury are without merit and should be rejected.

Lastly, the State contends that the issue presented here is a "policy question better suited for the legislature's consideration and action." (State Br. 38-40). It is true that public policy should emanate from the legislature, however, the issue presented here is not one of policy, but of the constitutionality of the denial of a right to a jury trial to juveniles facing severe deprivations of liberty – mandatory incarceration – when charged with murder under the DOJJ statute. Although it is the province of the legislature to enact laws, it is also the province of the courts to construe them and determine their constitutionality. *People v. Whitfield*, 228 Ill.2d 502, 522 (2007). When issues arise like the one raised in the instant case, and where the legislature has failed to act to remedy a law that results in injustice, "it is the imperative duty of the court to repair that injustice and reform the law to be responsive to the demands of society." *Seigfried*, 165 Ill. 2d at 513, citing *Alvis*, 85 Ill. 2d at 23-24.

Therefore, guidance from this Court is needed to ensure that minors receive the fundamental fairness they are due in today's juvenile court, and to help lower courts make sense of the conflicting opinions of the state supreme courts regarding a minor's right to a jury trial. (Opening Br. 22-24); *See In re*

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L.M., 286 Kan. 460, 472-74 (2008); *In re State ex rel. A.J.*, 27 So.3d 247 (2009). Destiny P. requests that this Court, for the first time, recognize that the Illinois due process protections under our State Constitution should afford all juveniles facing mandatory incarceration, like Destiny P., a right to a jury trial. Additionally, given the shifting landscape of juvenile justice, this Court should revisit its adherence to the United States Supreme Court's decision in *McKeiver*, and provide juveniles charged with first degree murder under the DOJJ statute their due process guarantees assured by both the Illinois and Federal Constitution.

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CONCLUSION

Destiny P., cross-appellant and respondent-appellee, respectfully requests that this Court affirm the trial court's ruling granting her the right to a jury trial on equal protection grounds. Alternatively, Destiny P. respectfully requests that this Court reverse the trial court's ruling and grant her a right to a jury trial on due process grounds.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I, Jessica D. Fortier, certify that this reply conforms to the requirements of Supreme Court Rule 341(a) and (b). The length of this reply, excluding pages containing the Rule 341(d) cover and the Rule 341(c) certificate of compliance, is 13 pages.

/s/Jessica D. Fortier
JESSICA D. FORTIER
Assistant Appellate Defender

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NOTICE AND PROOF OF SERVICE

TO: Lisa Madigan, Attorney General, 100 W. Randolph St., Chicago, IL 60601;

Ms. Kimberly M. Foxx, State's Attorney, Cook County State's Attorney Office, 300 Daley Center, Chicago, IL 60602;

Ms. Destiny P., Register No. DC228823, Juvenile Temporary Detention Center, 1100 S. Hamilton Avenue, Chicago, IL 60612

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct. An electronic copy of the Reply to the State's Response to Appellant's Cross-Appeal in the above-entitled cause was submitted to the Clerk of the above Court for filing on April 21, 2017. On that same date, we electronically served the Attorney General of Illinois, personally delivered three copies to opposing counsel and mailed one copy to the petitioner in an envelope deposited in a U.S. mail box in Chicago, Illinois, with proper postage prepaid. The original and twelve copies of the Reply will be sent to the Clerk of the above Court upon receipt of the electronically submitted filed stamped petition.

/s/Carol Chatman
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