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.

BRIEF AND ARGUMENT FOR DEFENDANT-APPELLEE CROSS-RELIEF REQUESTED

MICHAEL J. PELLETIER
State Appellate Defender

PATRICIA MYSZA
Deputy Defender

JESSICA D. FORTIER
Assistant Appellate Defender
Office of the State Appellate Defender
First Judicial District
203 N. LaSalle St., 24th Floor
Chicago, IL 60601
(312) 814-5472
1stdistrict.eserve@osad.state.il.us

COUNSEL FOR RESPONDENT-APPELLEE

ORAL ARGUMENT REQUESTED

POINTS AND AUTHORITIES

ISSUE PRESENTED FOR REVIEW

I. Whether the Juvenile Court Act violates equal protection principles where it does not grant a right to a jury trial to juveniles who are charged with first degree murder and subject to mandatory incarceration, but grants a jury right to juveniles who are charged and subject to the same punishment under the Habitual Juvenile Offender and Violent Juvenile Offender statutes.

CROSS APPEAL ISSUE PRESENTED FOR REVIEW

II. Whether 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).

ARGUMENT

I. The Juvenile Court Act violates equal protection principles where it does not grant a right to a jury trial to juveniles who are charged with first degree murder and subject to mandatory incarceration, but grants a jury right to juveniles who are charged and subject to the same punishment under the Habitual Juvenile Offender and Violent Juvenile Offender statutes. Thus, this Court should affirm the trial court's ruling granting Destiny P. a jury trial.

This case raises a question regarding the constitutionality of the Juvenile Court Act in denying the right to a jury to only one of the three classifications of minors facing mandatory incarceration under the Act – minors at least 13 years old charged with first degree murder. 705 ILCS 405/5-750(2) (West 2016). The right to a jury is provided, however, for the other two classes of minors facing mandatory incarceration – Habitual Juvenile and Violent Juvenile Offenders. 705 ILCS 405/5-815 and 705 ILCS 405/5-820 (West 2016). These three classes are similarly situated, but are not treated similarly, in violation of the Equal Protection Clauses of the United States and Illinois Constitutions. U.S. Const. amend. XIV; Ill. Const. 1970, art. I, § 2.

Destiny P. is currently facing a first degree murder charge under the general Department of Juvenile Justice statute, which requires mandatory incarceration. (C. 6-8). Her motion for a jury trial was granted by the trial court because of the disparate treatment between juveniles charged with first degree murder, and those charged under the Habitual Juvenile and Violent Juvenile Offender statutes. (C. 194-205, 212, 288-293). This Court should affirm the trial court's ruling granting Destiny P. a jury trial, finding that it was a violation of equal protection to deny her that right.

The State alleges that juveniles under the Habitual Juvenile Offender (hereinafter referred to as "HJO") and Violent Juvenile Offender (hereinafter referred to as "VJO") statutes are not similarly situated to a minor charged with first degree murder under the general Department of Juvenile Justice statute (hereinafter referred to as "DOJJ") due to the HJO and VJO juveniles' status as recidivist offenders. (State Br. 21-32). Furthermore, the State asserts that, even if they are considered similarly situated, there is a rational basis for affording a right to a jury to the HJO and VJO juveniles and not to a minor charged with murder under the DOJJ statute, again only focusing on the fact that the HJO and VJO juveniles are repeat offenders. (State Br. 33-39). However, for the plethora of reasons set forth below, the State's arguments are faulty and should be rejected. Therefore, this Court should find that Destiny P., a juvenile charged with first degree murder under the DOJJ statute, is denied her equal protection rights when not granted the right to a jury trial like her similarly situated counterparts charged under the HJO and VJO statutes.[1] This Court should affirm the trial court's ruling granting Destiny P. a jury trial and remand this cause back to the juvenile court for a jury trial.

The constitutionality of a statute is reviewed *de novo*. *People v. Dinelli,* 217 Ill. 2d 387, 397 (2005). Statutes are presumed constitutional, and the party

---

[1] The right to a jury trial is also provided to juveniles charged under the Extended Jurisdiction Juvenile Prosecution statue, 705 ILCS 405/5-810(3) and (4) (West 2016) (hereinafter referred to as "EJJ"). This class of juveniles do not face mandatory incarceration upon adjudication, as do juveniles under the HJO, VJO, and DOJJ statutes. Therefore, juveniles charged under the EJJ statute are not part of the classes being compared in this case.

challenging the validity of a statute bears the burden of establishing its unconstitutionality. *E.g.*, *People v. Sharpe*, 216 Ill.2d 481, 487 (2005).

The United States and Illinois Constitutions require equal protection under the law. U.S. Const. amend. XIV; Ill. Const. 1970, art. I, § 2. While the legislature is relatively free to make distinctions between different classes of individuals when enacting laws, equal protection guarantees require that similarly situated individuals be treated in a similar manner. *People v. Savage*, 361 Ill. App. 3d 750, 759 (4th Dist. 2005). Where, as here, the challenged statute does not involve a fundamental right or a suspect class, courts of review employ a rational basis test, which requires the court to determine whether the disparate treatment of two classes of persons is rationally related to, or intended to further, a legitimate State goal. *People v. Whitfield*, 228 Ill. 2d 502, 512 (2007); *People v. Breedlove*, 213 Ill. 2d 509, 518 (2004).

A. Minors facing murder charges under the DOJJ statute are similarly situated to minors charged under the HJO and VJO statutes because they are the only three categories of minors charged under the Act that face the most severe punishment of mandatory incarceration.

A determination that classes are similarly situated requires an analysis of the purpose of the legislation at issue. *People v. Masterson*, 2011 IL 110072, ¶25. The legislation at issue here involves juveniles charged with first degree murder under the general DOJJ statute, 705 ILCS 405/5-750(2) (West 2016), juveniles charged under the HJO statute, 705 ILCS 405/5-815 (West 2016), and juveniles charged under the VJO statute, 705 ILCS 405/5-820 (West 2016). These three classes of juveniles are the only juveniles that face mandatory

incarceration, which is a deprivation of liberty beyond any other juvenile dispositions. The possibility of mandatory incarceration for these classes are driven by the same legislative purpose of protecting the public. *People ex rel. Carey v. Chrastka*, 83 Ill.2d 67, 74 (1980); *In re G.O.*, 304 Ill. App. 3d 719, 724-727 (1st Dist. 1999) (*reversed and vacated on other grounds*, *In re G.O.,* 191 Ill.2d 37 (2000) (citing 88th Ill. Gen. Assem., House Proceedings (November 15, 1994) at 24, 80)); *see also* 705 ILCS 405/5-1-1(a) (West 2016) (legislature specified the first purpose of the Act is to protect citizens from juvenile crime). Thus, being the only three classes of minors facing such severe punishment and for the same legislative purpose, they are similarly situated; however, they are not treated in a similar manner.

As an initial matter, it must be clarified that the challenged classification here is *within* one group, juveniles – those facing mandatory incarceration and provided a right to a jury trial, compared to those facing mandatory incarceration but denied a right to a jury trial. The State mistakenly claims that the comparison here is a juvenile facing murder charges under the DOJJ statute, compared to a juvenile facing murder charges under the HJO or VJO statues. (State Br. 29-30). However, the pivotal factor here is not whether a juvenile is charged with committing a murder, but whether a juvenile faces mandatory incarceration if adjudicated guilty.

Moreover, what the State ignores is the fact that it is not only the juvenile charged with a repeat offense of first degree murder who is provided a right to a jury trial under the HJO or VJO statutes, it is a juvenile charged

for *any* of a number of specified offenses under those statutes who are provided such a right. (State Br. 26). Even a juvenile charged with "burglary of a home or other residence intended for use as a temporary or permanent dwelling," if it is a repeat offense, is provided a jury trial. 705 ILCS 405/5-815(a)(4)(West 2016). Murder is unquestionably a more severe offense than burglary and more of a threat to the safety of society, but a juvenile first-time offender facing a murder charge and a repeat juvenile offender facing a burglary charge, each face mandatory incarceration; however, only the repeat offender charged with burglary is afforded the right to a jury trial. This is, in effect, punishing minors for *not* being repeat offenders. Thus, the comparison here is not between juveniles facing murder charges under different statutes, but juveniles facing a severe deprivation of liberty in the form of mandatory incarceration.

The trial court in this case granted Destiny P. a jury trial finding that to deny her such a right would be an equal protection violation because juveniles charged under the DOJJ, HJO, and VJO statutes are similarly situated based on the determinate sentencing structure upon adjudication, with mandatory commitment until the age of 21. (C. 288-293). The trial court, relying on the analysis set forth in the *In re G.O.* case for persuasive authority, found that the purpose behind the mandatory incarceration for these three classes of juveniles is protection of the public, as well as the rehabilitation of the minor. (C. 288-293); *see In re G.O.*, 304 Ill. App. 3d at 724-727(interpreting purpose behind the HJO statute).

While this Court vacated the appellate court's finding in *In re G.O.*, it did

so only because the sentencing provision for juveniles charged with first degree murder at issue in 1999 was enacted by Public Act 88-680 (commonly known as the Safe Neighborhoods Law), which was declared unconstitutional in *People v. Cervantes*, 189 Ill. 2d 80 (1999). Because the mandatory sentencing provision at issue in that appeal was void by the time this Court heard the case, this Court found that G.O. was no longer similarly situated. *In re G.O.,* 191 Ill.2d at 43. Both G.O. and the State requested this Court to address the issue of equal protection because the mandatory sentencing provision had been reenacted, but this Court refused indicating that it would merely be providing an advisory opinion. *Id.* at 45. The logic and analysis of the appellate court regarding the equal protection violation was not in any way undermined by the this Court's decision, and thus, this Court can rely on the appellate court's decision in *G.O* for persuasive authority. *In re G.O.*, 304 Ill. App. 3d 719.

The *In re G.O.* appellate court held that the purpose of the mandatory confinement sentence upon adjudication of first degree murder is protection of society and rehabilitation of the juvenile. *In re G.O.*, 304 Ill. App. 3d at 724-727 (relying on *People ex rel. Carey v. Chrastka*, 83 Ill.2d 67, 74 (1980) (mandatory confinement for a juvenile adjudicated under the HJO statute, has as its purpose the protection of society, in addition to the rehabilitation of the individual)). In examining the legislative purpose behind the HJO, VJO, and murder under the DOJJ statutes, the *In re G.O.* court held:

> "Each member of the class we have defined is given a nearly identical sentence because the legislative goal was to punish the offender. Each ends up in the same place for substantially the same time. Our examination of the legislative debates that led to

> enactment of all these offenses discloses no indication the General Assembly had any different purposes in mind."
> *In re G.O.*, 304 Ill. App. 3d at 728.

Therefore, the court concluded that juveniles charged with first degree murder under the DOJJ statute and juveniles charged under the HJO and VJO statutes are similarly situated because of the mandatory nature of the punishment for each. *Id.*

In the instant case, the State attempts to persuade this Court, that the punishment for the three classes are not similar because for the offenders charged under the HJO and VJO statutes, the punishment is actually more severe than the punishment for murder under the DOJJ statute; therefore, they are not similarly situated classes. (State Br. 25-33). The State is incorrect because, in fact, it has been found that "the juvenile found delinquent on a first degree murder charge probably is worse off than the other two offenders [HJO and VJO], since they receive day-for-day good time and he does not." *In re G.O.*, 304 Ill. App. 3d at 727. When one calculates the severity of punishment for these different classes, it becomes clear that minors charged with murder could be incarcerated for more time than a juvenile under the HJO or VJO statutes.

If Destiny P., or other 13-17-year-old minors, are found guilty of first degree murder, they would be required to serve a mandatory sentence of incarceration until the age of 21, without the possibility of parole for five years, and are not entitled to day for day credit. 705 ILCS 405/5-750(2) (West 2016). Whereas, offenders adjudicated under the HJO and VJO statutes are required

to be incarcerated until their 21st birthday, with no possibility of parole after five years, however they *are* given day for day credit.[2] 705 ILCS 405/5-820; 705 ILCS 405/5-815 (West 2016). Thus, the most years spent incarcerated for a juvenile convicted of murder under the DOJJ statute is five years, if paroled, or eight years if not paroled early. Whereas, the most years spent incarcerated for juvenile charged under the HJO and VJO statutes would be four years (eight years with day for day good time credit), or eight years if not given day for day credit due to bad behavior.

Ultimately then, first degree murder under the general DOJJ statute actually mandates a longer sentence than that imposed under the HJO and VJO statutes. Therefore, given the shared legislative purpose behind the treatment of both classes of delinquent minors and comparable, if not worse, potential liberty deprivations applicable to a juvenile adjudicated delinquent based on a murder offense under the DOJJ statute, they are similarly situated classes.

The State relies on *Jonathon C.B.,* 2011 IL 107750, as support for its assertion that these classes are not similarly situated. (State Br. 32). The offender in *Jonathon C.B.*, however, did not face mandatory incarceration as Destiny P. will if convicted of first degree murder under the DOJJ statute. Additionally, this Court's decision in *Jonathon C.B.* is not instructive here

---

[2] Recidivist juveniles charged with first degree murder under HJO or VJO are not provided good time credit. However, the numerous other offenses that qualify a juvenile to be charged under the HJO or VJO statutes are provided good time credit.

because the challenge in *C.B.* compared juvenile to adult classifications. *Jonathon C.B.*, 2011 IL 107750 at ¶¶117-18. The issue was whether there was a rational basis for denying a right to a jury trial to a juvenile charged with a sex offense and facing registration under the Sex Offender Registration Act (hereinafter referred to as "SORA"), when an adult charged with a sex offense facing registration requirements under SORA is provided a jury. *Id.*; 730 ILCS 150/1 *et seq*. (West 2016). This challenged classification failed because this Court found adults and juveniles were not similarly situated due to significant differences between delinquency findings and adult convictions, including that the Act is supposed to be less punitive than the Criminal Code. *Jonathon C.B.*, 2011 IL 107750 at ¶¶86-97. In the instant case, however, the comparison is between classes of juveniles facing mandatory incarceration, not adults.

Additionally, this Court in *Jonathon C.B.* found no equal protection violation where jury trials were provided for juveniles charged under the EJJ statute and facing the possibility of an adult punishment, while jury trials to juveniles who faced felony sex offenses under the Act facing the requirement to register under SORA were denied that right. *Jonathon C.B.*, 2011 IL 107750 at ¶¶117-18. This is because the juvenile charged under the EJJ statute may have to serve an adult sentence of incarceration, whereas C.B. did not face such a threat. This Court explained, "juveniles adjudicated delinquent for felony sex offenses do not face more serious consequences than other juvenile offenders," like EJJ offenders. *Id*. at ¶101. Instead, juveniles charged with felony sex offenses face the same sentence as most juveniles, which is an indeterminate

sentence that automatically terminates when the juvenile reaches 21 years of age. *Id*.

Likewise, this Court also found no equal protection violation when comparing the HJO and VJO offenders to juveniles adjudicated delinquent for sex offenses, like *Jonathon C.B.* *Id*. at ¶106. This Court held that the registration obligations under SORA for a juvenile charged with a sex offense, "was not sufficiently burdensome to mandate the additional procedural protection of a jury trial," as is necessary for HJO and VJO offenders facing a punishment of mandatory incarceration. *Id*. (citing *People ex rel. Birkett v. Konetski*, 233 Ill 2d 185, 203 (2009)). This Court concluded that a registration requirement under SORA is not a punishment, but a regulatory requirement imposed by statute on certain offenders. *Jonathon C.B.,* 2011 IL 107750 at ¶ 106 (citing *Konetski,* 233 Ill 2d at 205). Thus, the risk of an adult punishment for an EJJ offender, and mandatory incarceration for a HJO or VJO offender, "cannot be equated with the Act's nonpunitive registration requirement." *Konetski*, 233 Ill. 2d 185 at 205.

In this case, however, the comparison *is* between classes of juveniles who all face mandatory incarceration. Destiny P. is not comparing herself to juveniles who receive adult sentences under the EJJ statute, or to adults sentenced for a murder conviction. Unlike *Jonathon C.B.*, the challenge at issue here *is within* one group – juveniles – and the classes involved face the same severe punishment – mandatory incarceration – but, only two of the three classes are provided a right to a jury trial. As such, applying the analysis in

C.B., these classes – juveniles facing murder under the DOJJ statute, and juveniles facing any offense qualifying under the HJO and VJO statutes – are similarly situated because each member of these classes are juveniles given a nearly identical sentence, with the intent to punish, and each proceeding under the Act involves severe deprivations of liberty in the form of mandatory incarceration. *In re G.O.*, 304 Ill. App. 3d at 727-728 (citing *Chrastka*, 83 Ill. 2d at 74). Thus, because Destiny P. is charged with murder under the DOJJ statute, and is similarly situated to an offender charged under the HJO and VJO statutes, it is a violation of equal protection principles that she not be treated similarly and provided a right to a jury trial.

Next, the State claims that minors charged with murder under the DOJJ statute are not similarly situated to those charged with a crime under the HJO and VJO statutes because they are not recidivist offenders. Thus, the State concludes that the purpose of the legislature providing only juveniles under the HJO and VJO statutes a right to a jury trial is warranted because they are recidivist. (State Br. 25-27). This contention is a "superficial attempt to differentiate them" and "lacks logic." (C. 291). The trial court explained that the simple fact that the juvenile is a repeat offender is not what triggers the right to a jury, but it is the enhanced sentence that follows. (C. 291). The trial court noted, "[i]t makes little sense that a person who has committed two violent but non-lethal offenses has a right to a jury trial as opposed to a person who is alleged to have killed someone. Even less so for someone with three non-violent offenses." (C. 291). The State claims that the language of the HJO and

VJO statutes demonstrates they "cover a different category of juvenile offender: recidivist offenders who have proven themselves to pose a serious danger to the public by their prior adjudications." (State Br. 25). However, it is hard to imagine what could pose a more serious threat to society than a murderer.

Thus, the relevant consideration here is the "severe deprivations of liberty: mandatory incarceration." *Jonathon C.B.,* 2011 IL 107750 at ¶¶117-18. The fact that juveniles charged under the HJO or VJO statutes are recidivist offenders, and juveniles facing murder charges under the DOJJ statute are not, is irrelevant to the issue of whether equal protection principles are violated when the juvenile charged under the DOJJ statue for murder is denied the right to a jury trial but juveniles charged under the HJO or VJO statutes are granted such a right. To hold otherwise, would be tantamount to punishing minors for *not* being repeat offenders by, as noted above, not only punishing them more severely, but also mandating incarceration upon a finding of guilt without the benefit of a right to a jury trial. Therefore, the trial court in this case was correct in finding that juveniles charged under the HJO, VJO, and murder under the DOJJ statutes are similarly situated.

B. There is no rational basis for granting a jury trial to a juvenile charged under the HJO and VJO statutes, while denying such a right to a juvenile facing murder charges under the DOJJ statute.

The equal protection clause guarantees that similarly situated individuals will be treated in a similar fashion unless the government can demonstrate an appropriate reason to treat them differently. *People v. Savage*, 361 Ill. App. 3d 750, 759 (4th Dist. 2005). Under the rational basis standard,

the classification has to be rationally related to, or further a legitimate state interest. *People v. Whitfield*, 228 Ill. 2d 502, 512 (2007); *Breedlove*, 213 Ill.2d at 518.

The Act itself provides no explanation for the inclusion of the right to a jury trial for HJO and VJO offenders, and not those charged with murder. However, Senator Hawkinson, one of the sponsors of the legislation providing that right to HJO and VJO offenders, explained "you're giving them the right to a jury trial for extended due process in *their situation*," (90th General Assembly Senate floor debates, Jan. 29, 1998, 33 (http://www.ilga.gov/senate/transcripts/strans90/ST012998.pdf) (App. at 9)). Senator Hawkinson's referral to "their situation" can no doubt be a reference to the potential for "severe deprivations of liberty: mandatory incarceration." *Jonathon C.B.*, 2011 IL 107750, ¶117 (citing *People ex rel. Birkett v. Koneski*, 233 Ill. 2d 185, 205 (2009)). Thus, the same analysis is also applicable to Destiny P., a juvenile facing "severe deprivations of liberty: mandatory incarceration," but is simply charged under a different section of the Act. *Id.*

The First District Appellate Court decision in *G.O.* is instructive here. Finding that the same classes being challenged by Destiny P. were similarly situated, the *G.O.* court went on to ascertain whether there was any rational basis for granting the right to a jury trial to juveniles charged under VJO and HJO statutes, but not to a juvenile charged with first degree murder under the DOJJ statute. *In re G.O.*, 304 Ill. App. 3d at 727. The court was unable to find any rational basis to treat the classes differently, "nor could it find any

legitimate legislative goal to be served by granting a jury trial right to two members of the class but denying it to a third." *Id.* Accordingly, the court held that the trial court's denial of a jury trial for a juvenile charged with first degree murder was an equal protection violation under both the Illinois and United States Constitutions. *Id.*

In this case, the trial court, following the logic of *In re G.O.* (but not using it as precedent), found that there was no rational basis for granting jury trials to HJO and VJO juveniles while denying it to a juvenile facing a murder charge under the DOJJ statute. (C. 292). To the contrary, the State claims there is a rational basis for treating the classifications differently. (State Br. 33-39). The State asserts that the legislature allowed for a jury trial for an offender charged under the HJO and VJO statutes, because it intended to punish them harsher due to their repeated offenses, and therefore more procedural safeguards were necessary. (State Br. 33). As explained above, the State's attempt to persuade this Court that the punishment under the HJO and VJO statutes is more severe than the punishment for murder under the DOJJ statute is incorrect. (State Br. 25-33). However, the State, working off that flawed logic, concluded:

> "In light of the more punitive sentence, the legislature rationally decided to afford these offenders the right to a jury trial. The legislators reasonably could have concluded that these recidivist proceedings more closely resembled adult proceedings and decided to afford these offenders a jury trial right." (State Br. 39).

This is exactly why Destiny P. should also be afforded the right to a jury trial. Facing first degree murder charges under the DOJJ statute, although a first-

time offender, she is facing mandatory incarceration as well, a more punitive sentence than any other juvenile, other than HJO and VJO juveniles. The honorable Justice Heiple's dissent in this Court's decision *In re G.O.*, accurately recognized that "most attributes of the adult criminal justice system are already permanent features of the juvenile justice system." *In re G.O.*, 191 Ill. 2d at 63-64. He therefore held that a "juvenile, no less than an adult, is entitled to the protection of a jury trial *when faced with incarceration*." *Id.* Hence, under Justice Heiple's sound logic, the three classes of juveniles under the Act that face mandatory incarceration if adjudicated delinquent should be granted the right to a jury trial. "The failure to provide a jury trial should be seen for what it truly is: an anachronism and denial of equal justice for all." *Id.* at 64.

Lastly, the State's assertion that another legitimate state objective in not granting a jury trial to juveniles charged with murder under the DOJJ statute, but granting jury trials to a juvenile charged under the HJO and VJO statutes, is to protect the public from repeat juvenile offenders, is illogical. (State Br. 33-39). As noted above, it simply does not make sense that the public would need to be protected more from a juvenile who has repeatedly committed burglary offenses, or other non-violent offenses (under the HJO statute), more so than a juvenile that has killed someone.

Therefore, there is a shared legislative purpose behind the treatment of these three classes of juvenile offenders, and comparable, if not worse, potential liberty deprivations applicable to juveniles adjudicated delinquent based on a

first degree murder offense. And, there is no rational basis for only granting a jury right to two of the three classes – those charged under the HJO and VJO statutes, and not for a juvenile facing first degree murder charges under the DOJJ statute. As such, this disparate treatment of the similarly situated classes of juveniles facing mandatory incarceration violates state and federal equal protection guarantees.

In conclusion, Destiny P. should be entitled to a jury trial because of the disparate treatment between similarly situated juveniles charged under the HJO and VJO statutes. Thus, this Court should affirm the trial court's ruling granting Destiny P. a jury trial, finding that it was a violation of her equal protection rights to deny her that right. (C. 288-293).

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)

This case raises an issue of first impression regarding the constitutionality of the Juvenile Court Act in denying the fundamental due process right to a jury to 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. 705 ILCS 405/5-750(2) (West 2016). When this Court decided *In re Fucini,* almost 47 years ago, and held that due process does not require a jury trial be extended to juveniles, mandatory incarceration was not a possible disposition, as it is now in only a few circumstances. *In re Fucini*, 44 Ill. 2d 305, 308 (1970); 705 ILCS 405/5-750(2) (West 2016); 705 ILCS 405/5-815 (West 2016); 705 ILCS 405/5-820 (West 2016). As this Court has more recently held, it is this severe deprivation of liberty – mandatory incarceration – that mandates the additional procedural protection of a jury trial as provided to juveniles charges under the Habitual Juvenile Offender (hereinafter referred to as "HJO") and the Violent Juvenile Offender (hereinafter referred to as "VJO") statutes. *In re Jonathon C.B*, 2011 IL 107750, ¶¶ 100-111; *People ex rel. Birkett v. Konetski*, 233 Ill. 2d 185, 201-203 (2009). Therefore, as the only other juvenile facing mandatory incarceration, juveniles charged with first degree murder under the DOJJ, like

Destiny P., also deserve a due process right to a jury trial.

Destiny P. acknowledges that in addition to *In re Fucini*, the United States Supreme Court, over 45 years ago, also held that children in state delinquency proceedings are not constitutionally entitled to jury trial under the Fourteenth Amendment due process clause in *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971). However, *McKeiver*, is no longer applicable because it portrays a picture of a juvenile court that does not meet today's reality given the loss of liberty and long lasting stigma associated with a juvenile adjudication for first degree murder. Even if this Court decides that *McKeiver* is not outdated and is still bound by its holding, the Illinois Constitution provides a due process right to a jury trial in this case. Ill. Const. 1970, art. I, § 2. As this Court has held, the Illinois due process right can provide broader protection than federal due process. *People v. Washington*, 171 Ill.2d 475, 485-486 (1996). Instead, this Court has adopted a "limited lockstep approach," whereby it will look first to the federal constitution for relief, and then turn to the state constitution for a "unique state history or state experience," to justify departure from the federal precedent. *People v. Caballes*, 221 Ill. 2d 282, 309-310 (2006).

Therefore, if this Court does not affirm the trial court's ruling granting Destiny P. the right to a jury trial based on a violation of equal protection principles, this Court should affirm the decision based on due process grounds under the Illinois State Constitution and the United States Constitution instead. U.S. Const., amend. VI; U.S. Const. amend. XIV; Ill. Const. 1970, art. I, § 2.

The constitutionality of a statute is reviewed *de novo. People v. Dinelli,* 217 Ill. 2d 387, 397 (2005). Statutes are presumed constitutional, and the party challenging the validity of a statute bears the burden of establishing its unconstitutionality. *E.g.*, *People v. Sharpe*, 216 Ill.2d 481, 487 (2005).

Since *Fucini* and *McKeiver*, public safety and the need for accountability have led to sweeping changes in the juvenile justice system, leaving juvenile codes more aligned with adult criminal codes than ever before. Like most states, Illinois was swept along by this shifting tide in the juvenile justice system. In 1998, the primary purpose of the Illinois Juvenile Court Act was changed 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," and it remains so today. *People ex rel. Devine v. Stralka*, 226 Ill.2d 445**,** 457-458 (2007) (internal quotes and citations omitted).

The erosion of the protective model of juvenile justice in Illinois was recognized in *In re G.O.,* 304 Ill. App. 3d 719, 724 (1st Dist. 1999) (reversed and vacated on other grounds, *In re G.O.* 191 Ill.2d 37 (2000)), and recently cited by Justice Burke in her dissent in this Court's *In re Jonathon C.B.* decision:

> [t]he passage of time has weakened the underpinnings of *McKeiver* and [*In re*] *Fucini,* [44 Ill. 2d 305 (1970)]. Today's juvenile justice system is a far cry from the aspirations of Jane Addams. The new Juvenile Justice Reform Provisions of 1998 continue a trend toward criminalizing juvenile court delinquency proceedings. Children charged with serious offenses are treated in a manner that 'further underscores the movement away from the rehabilitative ideal.' 958 N.E.2d 227, 272-73, N. 7 (2011) (internal citations omitted).

Indeed, the *G.O.* appellate court noted that it was difficult to find the "unique

benefits referred to in *Fucini* or the idealistic prospect of an 'intimate, informal protective proceeding'" described in *McKeiver* in a punitive, non-discretionary and determinant sentence of incarceration to the age of 21 without the possibility of parole for 5 years, as required for any child found guilty of first degree murder. *In re G.O.*, 304 Ill. App. 3d at 724.

When this Court reviewed the due process concerns raised by the *G.O.* appellate court, it noted only that: "[W]e do not hold that a due process argument is foreclosed by *Fucini*. Instead we hold that, in the absence of the mandatory sentencing provision [found unconstitutional because of a single subject rule violation], respondent does not ask this court to reconsider *Fucini*. The argument . . . . is not before this court and we express no opinion on its merits." 191 Ill. 2d at 44, N. 3. Thus, this Court did not address this issue in *G.O.*, and there is currently no authority regarding the applicability of due process provisions for juveniles charged under the Act with first degree murder and facing the severe punishment of mandatory incarceration, since its radical alteration in 1998.

Although this Court has considered and rejected a due process violation claim in *Jonathon C.B.* and *Konetski*, neither addressed the due process violation raised in the instant case. *Jonathon C.B.*, 2011 IL 107750, ¶117; *People ex rel. Birkett v. Konetski*, 233 Ill. 2d 185, 205 (2009). 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. *Jonathon C.B.*, 2011 IL 107750, ¶117; *Konetski*, 233 Ill. 2d at 205.

Furthermore, this Court found no due process violation in either *Jonathon C.B.* or *Konetski* based on the fact that the requirement to register under SORA was not a punishment, whereas in the case of juveniles charged under the HJO and VJO statutes that face mandatory incarceration, it is a severe punishment requiring the extra protection of a jury trial. *Id.* This Court found punishment of mandatory incarceration, "cannot be equated with the Act's nonpunitive registration requirement." *Konetski*, 233 Ill.2d at 205.

Unlike both *Jonathon C.B.* and *Konetski,* juveniles charged with first degree murder under the DOJJ statute, like Destiny P., do face mandatory incarceration. Therefore, this Court has yet to rule on whether a denial of a right to a jury trial for juveniles charged with murder under the DOJJ statute, and facing mandatory incarceration, is a violation of Illinois due process principles. However, 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. Thus, due to the changes made in the Illinois Juvenile Court Act since *Fucini* – the fact that Destiny P. now faces a severe deprivation of liberty, unlike that facing the juveniles in *Jonathon C.B.* or *Konetski* – this Court should find that punishment of mandatory incarceration for juveniles requires the additional procedural protections of a jury trial.

Similarly, the Kansas State Supreme Court recently recognized that, because of this shift in the juvenile justice system throughout the country, and

specifically in its own state statutes, juveniles have a right to a jury trial under their State's Constitution and under the United States Constitution. *In re L.M.*, 286 Kan. 460, 472-74 (2008). The *L.M.* court found that *McKeiver* was no longer binding precedent to follow and concluded:

> Although we do not find total support from the courts in some of our sister states, we are undaunted in our belief that juveniles are entitled to the right to a jury trial guaranteed to all citizens under the Sixth and Fourteenth Amendments to the United States Constitution.
> *In re L.M.*, 286 Kan. 460 at 471.

In addition to Kansas, there are at least ten states that provide jury trials for all allegedly delinquent juveniles.[3]

Although this Court declined to follow the Kansas Supreme Court's decision in *Jonathon C.B*, 2011 IL 107750 at ¶109, and instead held it was bound by *stare decisis*, Destiny P. requests this Court reconsider its adherence to *McKeiver*. As noted earlier, as of 1998, juveniles charged with murder under the DOJJ are one of three classifications where the juvenile offender, if found guilty, faces mandatory incarceration until the age of 21. 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). However, of those three offenders, juveniles charged with murder under the DOJJ statute are not afforded a right

---

[3] Alaska – Alaska Delinquency R. 21(a); Massachusetts – Mass. Gen. Laws Ann. Ch. 119, § 55A; Michigan – Mich. Comp. Laws § 712A.17(2); Montana – Mon. Code Ann. § 41-5-1502(1); New Mexico – N.M. Stat. Ann. § 32A-2-16(A) (West 2012); Oklahoma – Okla. Stat. Ann. tit. 10, § 7303-4.1 (1998); Texas – Tex. Fam. Code Ann. § 54.03(b)(6) (West 2009); West Virginia – W. Va. Code Ann. § 49-5-6(a) (2006); Wyoming – Wyo. Stat. Ann. § 14-6-223(c) (West 2014).

to a jury trial, despite the severe deprivation of liberty and the stigmatization that will remain with them throughout their lives as a result of their conviction for murder. Fundamental fairness requires that juveniles facing murder charges under the DOJJ statue, like Destiny P., be granted the right to a trial by jury guaranteed by the due process clause of the Fourteenth Amendment and our State Constitution.

It should be noted, that in *McKeiver*, Justices Douglass, Black and Marshall agreed with that assertion. In the dissent, Justice Douglass wrote: "[W]here a State uses its juvenile court proceedings to prosecute a juvenile for a criminal act and to order confinement until the child reaches 21 years of age or where the child at the threshold of the proceedings faces that prospect, then he is entitled to the same procedural protection as an adult." *Id* at 559 (Douglass, J., dissenting, joined by Black and Marshall, JJ).

However, the plurality opinion in *McKeiver* focused on the ideals of the juvenile court without regard to the rights of the juveniles in question. *McKeiver*, 403 U.S. at 545-550. *McKeiver* looked at the form of the juvenile system, without acknowledging the substance of the rights at stake. As a result, state courts are constrained by the form of *McKeiver* and so do not deal with the substance of what is occurring in juvenile courts. The constraints of form imposed by *McKeiver* have created the very troubling third tier of jurisprudence foretold of in *Kent v. United States*: "the child receives the worst of both worlds: that he gets neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children." *Kent v. United States*, 383

U.S. 541, 556 (1966).

The plurality opinion of the *McKeiver* Court was unwilling to abandon "the idealistic prospect of an intimate, informal protective proceeding," by requiring jury trials for juveniles. *McKeiver*, 403 U.S. at 553-55. Despite the hopes espoused in *McKeiver*, however, juvenile courts have continued their inexorable march toward the punitive aims of the criminal justice system in the decades that have followed. By the end of the 1990s most states had made substantial changes to their juvenile court acts. Kristin Henning, *What's Wrong with Victims' Rights in Juvenile Court?: Retributive Versus Rehabilitative Systems of Justice*, 97 Cal. L. Rev. 1107, 1112-15 (2009). The express purposes of these acts shifted from rehabilitation to public safety, greater incursions were made into the confidentiality of juvenile records, and minors became subject to harsher sanctions. Henning, *What's Wrong with Victims' Rights in Juvenile Court?*, 97 Cal. L. Rev. at 1113.

The facilities which house youth who have been adjudicated delinquent are strikingly similar to adult prisons and far less rehabilitative than the *McKeiver* ideal. Youth sentenced to an Illinois Department of Juvenile Justice facility – which is the mandated punishment for the offense of murder – "most often suffer a bleak existence" in facilities which are far from home, provide only limited educational and rehabilitative programs, and "have the look and feel of adult prisons, with grey walls, cement-block barracks, confining cells, and razor-wire perimeters on the grounds." Mark D. Hassakis and Lisa Jacobs, *What if it Were Your Child?*, Illinois Bar Journal, Vol. 99, 8-9 (January 2011),

(available at: http://www.isba.org/sites/default/files/juvenilejustice.pdf) (last visited Nov. 27, 2016). Minors in other states face similar or worse conditions. *See*, *e.g.*, Katherine Twomey, *The Right to Education in Juvenile Detention Under State Constitutions*, 94 Va. L. Rev. 765, 769 (2008).

In addition to making delinquency proceedings more akin to criminal prosecutions and broadening the circumstances under which minors may be imprisoned, today's minors face a broad range of adverse consequences which did not exist at the time *McKeiver* was decided. Juvenile adjudications can now disqualify minors and their families from living in public housing, can interfere with their employment and educational opportunities, and can render them ineligible for future military service. *See* Patricia Puritz & Katayoon Majd, *Ensuring Authentic Youth Participation in Delinquency Cases: Creating a Paradigm for Specialized Juvenile Defense Practice*, 45 Fam. Ct. Rev. 466, 471 (2007) (citations omitted). Delinquent minors 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 is now 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, attempt murder, or sexual assault, and those minors over 12 adjudicated for certain gang, firearm, or drug offenses)). 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). Furthermore,

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).

It is clear that 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. It is time to look at the due process guarantees assured by the Federal and Illinois State Constitutions without regard to intervening decisions that clung to the noble ideals of juvenile court. Although created with the best of intentions, they are contrary to our constitutional notions of fundamental fairness, especially in light of the trend to close the gap between juvenile and criminal codes. *See* Carl Rixey, *The Ultimate Disillusionment: The need for Jury Trials in Juvenile Adjudications*, 58 Cath. U.L. Rev. 885 (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 jurisprudence, 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.

CONCLUSION

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

Respectfully submitted,

PATRICIA MYSZA
Deputy Defender

JESSICA D. FORTIER
Assistant Appellate Defender
Office of the State Appellate Defender
First Judicial District
203 N. LaSalle St., 24th Floor
Chicago, IL 60601
(312) 814-5472
1stdistrict.eserve@osad.state.il.us

COUNSEL FOR RESPONDENT-APPELLEE

CERTIFICATE OF COMPLIANCE

I, Jessica D. Fortier, certify that this brief conforms to the requirements of Supreme Court Rule 341(a) and (b). The length of this brief, excluding pages containing the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a) is 28 pages.

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

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. 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.

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 the penalties provided in law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that an electronic copy of the Brief and Argument in the above-entitled cause was submitted to the Clerk of the above Court for filing on January 6, 2017. On that same date, we personally delivered three copies to the Attorney General of Illinois, personally delivered three copies to opposing counsel and mailed one copy to the petitioner-appellant in an envelope deposited in a U.S. mail box in Chicago, Illinois, with proper postage prepaid. The original and twelve copies of the Brief and Argument will be sent to the Clerk of the above Court upon receipt of the electronically submitted filed stamped brief.

/s/Carol Chatman
CAROL CHATMAN
Legal Secretary
Office of the State Appellate Defender
First Judicial District
203 N. LaSalle St., 24th Floor
Chicago, IL 60601
(312) 814-5472
Service via email will be accepted at
1stdistrict.eserve@osad.state.il.us
COUNSEL FOR RESPONDENT-APPELLEE