Nos. D036356, D036456
SUPREME COURT
OF THE STATE OF CALIFORNIA

MORGAN VICTOR MANDULEY, et al.,
Petitioners,
v.
SUPERIOR COURT OF THE STATE OF CALIFORNIA,
FOR SAN DIEGO COUNTY,
Respondent.

PEOPLE OF THE STATE OF CALIFORNIA,
Real Party In Interest.

On Appeal from the
California Superior Court, County of San Diego
Case No. SCD 154096

On Appeal from the California Court of Appeal
Fourth Appellate District
Case Nos. D036356, D06456

APPLICATION FOR LEAVE TO FILE AN AMICUS BRIEF AND AMICUS BRIEF OF THE CENTER ON JUVENILE AND CRIMINAL JUSTICE, THE NATIONAL CENTER FOR YOUTH LAW, LEGAL SERVICES FOR CHILDREN, THE NATIONAL ASSOCIATION OF COUNSEL FOR CHILDREN, THE AMERICAN SOCIETY FOR ADOLESCENT PSYCHIATRY, THE AMERICAN ACADEMY OF CHILD AND ADOLESCENT PSYCHIATRY, THE CENTER FOR YOUNG WOMEN'S DEVELOPMENT, THE TRAUMA FOUNDATION, THE ASIAN LAW CAUCUS, THE ELLA BAKER CENTER FOR HUMAN RIGHTS, AND CHILDREN NOW ON BEHALF OF PETITIONERS MORGAN VICTOR MANDULEY, ET AL.

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APPLICATION OF THE CENTER ON JUVENILE AND CRIMINAL JUSTICE, THE NATIONAL CENTER FOR YOUTH LAW, LEGAL SERVICES FOR CHILDREN, THE NATIONAL ASSOCIATION OF COUNSEL FOR CHILDREN, THE AMERICAN SOCIETY FOR ADOLESCENT PSYCHIATRY, THE AMERICAN ACADEMY OF CHILD AND ADOLESCENT PSYCHIATRY, THE CENTER FOR YOUNG WOMEN'S DEVELOPMENT, THE TRAUMA FOUNDATION, THE ASIAN LAW CAUCUS, THE ELLA BAKER CENTER FOR HUMAN RIGHTS, AND CHILDREN NOW ON BEHALF OF PETITIONERS MORGAN VICTOR MANDULEY, ET AL. TO FILE AN AMICUS CURIAE BRIEF

TO THE HONORABLE RONALD M. GEORGE, CHIEF JUSTICE OF CALIFORNIA:

Pursuant to Rule 14(b), California Rules of Court, The Center on Juvenile and Criminal Justice, The National Center for Youth Law, Legal Services for Children, The National Association of Counsel for Children, The American Society for Adolescent Psychiatry, The American Academy of Child and Adolescent Psychiatry, The Center for Young Women's Development, The Trauma Foundation, The Asian Law Caucus, The Ella Baker Center for Human Rights, and Children Now respectfully request permission to file the attached amicus brief.

The Center on Juvenile and Criminal Justice ("CJCJ") is a private non-profit organization that runs model programs for juveniles and adults involved in the criminal justice system and offers technical assistance to government agencies and community-based organizations in reforming America's justice system. In 1997, CJCJ formed the Justice Policy Institute ("JPI"), a policy development and research body which, along with its parent organization, works to promote a progressive criminal justice agenda

through policy formulation, research, media events, education, and public speaking.

The National Center for Youth Law ("NCYL") is a private non-profit legal organization devoted to improving the lives of poor children in the United States. For more than twenty-five years, NCYL has provided support services to child advocates nationwide and direct representation in cases involving child welfare, public benefits for children and their families, legal issues involving child and adolescent health, fair housing for families with children, and juvenile justice.

Legal Services for Children ("LSC") was founded in 1975 as the first non-profit law firm established to provide free direct legal and social services to children and youth. LSC represents youth in dependency (foster care), guardianship, emancipation, school expulsion, and special education. LSC uses attorney-social worker teams to assist at-risk youth in the Bay Area who need access to the legal system to stabilize or improve their lives. It conducts workshops in San Francisco's Youth Guidance Center on civil legal issues facing youth in the juvenile justice system, and works as a partner with San Francisco's Community Assessment and Referral Center to provide civil legal services to arrested youth.

The National Association of Counsel for Children ("NACC"), founded in 1977, is a nonprofit membership association of attorneys, judges and other professionals with a mission of enhancing the welfare of children by promoting excellence in children's law. The NACC provides training and education of attorneys, judges and other professionals, and it runs an Amicus Curiae Program through which the organization participates in appellate cases of importance to children. The NACC maintains membership in all 50 states, the District of Columbia and numerous foreign countries. NACC programs have received the support of the American Bar Association, the National Council of Juvenile and Family Court Judges, the

American Academy of Pediatrics and the American Professional Society on the Abuse of Children.

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The Center for Young Women's Development ("CYWD") is one of the nation's first peer-run education and community reintegration programs for incarcerated girls. CYWD's mission is to promote economic self-sufficiency, community building, and youth-led organizing by providing peer-run employment and leadership opportunities to low-income young women and girls who are involved in the juvenile justice system. CYWD provides an intensive training and employment program for young women and engages in advocacy on juvenile justice issues. The organization's staff have conducted workshops in Juvenile Hall that have reached more than

250 incarcerated young women, and have conducted outreach in the streets that reached more than 10,000 young women.

The Trauma Foundation's mission is to prevent traumatic death and injury, and to reduce the resulting disability through survivor advocacy, public health policy, research, and education. For more than twenty-five years, the Trauma Foundation has worked on injury and violence prevention. The Pacific Center for Violence Prevention, a project of the Trauma Foundation, has worked with community-based youth violence prevention advocates and health professionals throughout the State of California since 1993.

The Asian Law Caucus ("ALC") is a nonprofit, public-interest legal organization that promotes, advances, and represents the civil rights of Asian-Pacific Islander communities. Founded in 1972, the ALC provides direct legal services to at-risk youth in the public education system, conducts advocacy to protect the interests of immigrant youth in the juvenile justice system, and provides community education about civil rights and due process to at-risk youth.

The Ella Baker Center for Human Rights ("EBC") is a civil rights organization that seeks to ensure accountability of law enforcement agencies and to address human rights abuses in the U.S. prison system. EBC focuses especially on reducing police violence against youth of color, and on securing the rights of youth in the juvenile justice system. Through its Books Not Bars campaign, it aims to shift the allocation of public resources from prisons toward education.

Children Now is a private nonprofit organization that serves as an independent voice for America's children. Since 1988, Children Now has developed innovative research and communication strategies to promote pioneering solutions to problems facing children. Recognized nationally for its policy expertise and up-to-date information on the status of children,

Children Now focuses particular attention on the needs of children who are poor or at risk.

The brief submitted by the Petitioners addresses the broad range of legal questions presented by this case, including, in part, why the choice between adult criminal prosecution and juvenile civil proceedings is a sentencing decision reserved to the authority of the courts. This issue is critical to the resolution of the separation of powers question presented on this appeal.[1] As both California courts to address the issue have recognized, whether Section 707(d) of the Welfare and Institutions Code violates separation of powers principles depends on whether this "choice given to the district attorney . . . is in its nature a charging decision that is properly allocated to the executive branch or is instead a sentencing decision that is properly allocated to the judicial branch." *Manduley v. Superior Court* (2001) 104 Cal.Rptr.2d 140, 147; *Bravo v. Superior Court* (2001) 108 Cal. Rptr. 514, 517.

Amici have special insight into the nature of the decision involved. Since the inception of the juvenile system, the decision whether to subject a youth to criminal adult trial or civil juvenile proceedings has been made by courts and based on a determination of whether a youth has behaved like a sophisticated criminal or has a history of criminal behavior, and whether the youth is likely amenable to efforts at rehabilitation. *See* Welfare & Institutions Code Section 707(a). These factors, in turn, depend on complex evidentiary considerations about youth psychology, background and behavior that Amici organizations encounter every day. Because of the complexity and the individualized nature of the "fitness" determination, courts have long been empowered to take evidence, hear testimony, and impartially balance competing concerns on the subject before a juvenile

[1] On May 2, 2001, this Court ordered: "The issues to be briefed and argued in this Court shall include all issues raised in the Court of Appeal."

may be subject to the jurisdiction of an adult court. Given that the primary effect of that decision is to determine which of two categorically different sentencing schemes the youth will face – punishment as an adult or rehabilitation as a youth – there can be no question that the decision is judicial in nature.

Petitioners/Real Party in Interest filed its reply brief in this matter on August 7, 2001. On September 5, 2001, this Court ordered the time for the above listed Amici to serve and file an amicus curiae brief extended to September 20, 2001. Accordingly, the Amici's application and proposed brief are timely under Rule 14(b). Copies of the attached brief and this application have been served on all parties to the case.

For these reasons, The Center on Juvenile and Criminal Justice, The National Center for Youth Law, Legal Services for Children, The National Association of Counsel for Children, The American Society for Adolescent Psychiatry, The American Academy of Child and Adolescent Psychiatry, The Center for Young Women's Development, The Trauma Foundation, The Asian Law Caucus, The Ella Baker Center for Human Rights, and Children Now respectfully request that the Court accept the attached amicus curiae brief for filing.

Respectfully submitted,

Dated: September 20, 2001

MUNGER, TOLLES & OLSON LLP

By: _____
JEFFREY L. BLEICH
Attorneys for THE CENTER ON JUVENILE AND CRIMINAL JUSTICE, THE NATIONAL CENTER FOR YOUTH LAW, LEGAL SERVICES FOR CHILDREN, THE NATIONAL ASSOCIATION OF COUNSEL FOR CHILDREN, THE AMERICAN SOCIETY FOR ADOLESCENT PSYCHIATRY, THE AMERICAN ACADEMY OF CHILD AND ADOLESCENT PSYCHIATRY, THE CENTER FOR YOUNG WOMEN'S DEVELOPMENT, THE TRAUMA FOUNDATION, THE ASIAN LAW CAUCUS, THE ELLA BAKER CENTER FOR HUMAN RIGHTS, AND CHILDREN NOW

On behalf of Petitioners
MORGAN VICTOR MANDULEY, et al.

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I. ISSUE PRESENTED FOR REVIEW

On May 2, 2001, this Court granted certiorari to review the above-captioned matter and ordered that "[t]he issues to be briefed and argued in this court shall include all issues raised in the Court of Appeal." Among those issues is whether Section 707(d) of the Welfare and Institutions Code violates constitutional separation of powers principles by placing within the discretion of the executive branch a decision about which of two sentencing approaches may be employed by the courts – a decision traditionally reserved to the judicial branch.

II. INTEREST OF AMICI CURIAE

The question presented to this Court is of great significance to each of the amici organizations. The Center on Juvenile and Criminal Justice ("CJCJ") is a private non-profit organization that runs model programs for juveniles and adults involved in the criminal justice system and offers technical assistance to government agencies and community based organizations in reforming America's justice system. CJCJ maintains a professional staff with diverse backgrounds and expertise in the various components of criminal justice with its senior staff members possessing over fifteen years experience in the justice field. Based in San Francisco, California and Washington D.C., CJCJ direct services have grown to include programs in Maryland and Pennsylvania, and its advocacy and public education efforts are nationwide. In 1997, CJCJ formed the Justice Policy Institute ("JPI"), a policy development and research body which promotes effective and sensible approaches to criminal justice. The Institute includes a national panel of advisors to research and formulate public policy in juvenile and criminal justice.

The National Center for Youth Law ("NCYL") is a private, non-profit legal organization devoted to improving the lives of poor children in the United States. For more than twenty-five years, NCYL has provided

support services to child advocates nationwide and direct representation in cases involving child welfare, public benefits for children and their families, legal issues involving child and adolescent health, fair housing for families with children, and juvenile justice.

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The National Association of Counsel for Children ("NACC") is a nonprofit membership association of attorneys, judges and other professionals involved with children and the legal system. The NACC was founded in 1977 with a mission of enhancing the welfare of children by promoting excellence in children's law. The NACC promotes high quality representation of children and provides training and education of attorneys, judges and other professionals. The NACC also runs an Amicus Curiae Program through which the organization participates in appellate cases of importance to children and has appeared as amicus in such cases in many state and federal appellate courts and the Supreme Court of the United

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and employment program for young women from the streets and the juvenile justice system, and by engaging in advocacy on juvenile justice issues. In the past eight years, CYWD has employed 102 young women between the ages of 14 and 18, most of whom had been involved in the juvenile justice system. The organization's staff have conducted workshops in juvenile hall that have reached more than 250 incarcerated young women, and have conducted outreach in the streets that reached more than 10,000 young women.

The Trauma Foundation's mission is to prevent traumatic death and injury and to reduce the resulting disability through survivor advocacy, public health policy, research, and education. For more than twenty-five years, the Trauma Foundation has worked on injury and violence prevention issues from fire-safe cigarettes and gun policy to alcohol policy and motor vehicle safety. The Pacific Center for Violence Prevention, a project of the Trauma Foundation, has worked with community-based youth violence prevention advocates and health professionals throughout the state of California since 1993. The Pacific Center's strategy and activities are based on the belief that violence prevention is best achieved through community-based solutions that enrich the environments in which our youth mature and grow, and provide youth with positive opportunities for their future. The Pacific Center has provided leadership and technical assistance to California communities on a variety of issues, including local gun ordinances, alcohol advertising, full-service schools and alternatives to incarceration.

The Asian Law Caucus ("ALC") is a nonprofit, public-interest legal organization which promotes, advances and represents the civil rights of Asian-Pacific Islander communities. Founded in 1972, the ALC is the nation's oldest Asian-Pacific Islander civil rights legal organization. ALC provides direct legal services to at-risk youth in the public education

system, conducts advocacy to protect the interests of immigrant youth in the juvenile justice system, and provides community education about civil rights to at-risk youth.

The Ella Baker Center for Human Rights ("EBC") is a civil rights organization that works to ensure accountability of law enforcement agencies and to address human rights abuses in the United States prison system. EBC focuses especially on reducing police violence against youth of color, and on securing the rights of youth in the juvenile justice system. Through its Books Not Bars campaign, it aims to shift the allocation of public resources from prisons toward education.

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III. INTRODUCTION

As the courts below recognized, the principle of separation of powers prohibits concentrating in one governmental branch the power both to charge a person with a criminal offense and to sentence that person for the offense. Welfare & Institutions Code Section 707(d) violates this core principle by granting prosecutors the ability both to charge juvenile suspects and to determine which of two distinct sentencing regimes should be applied to juveniles accused of criminal offenses. Since the courts of this State were established, the sentencing function has been among the judiciary's fundamental duties. This allocation of power reflects both the need to avoid the accumulation of governmental power in any single branch, and the special competence of the respective branches. Amici,

organizations intimately familiar in legal proceedings involving juveniles, submit this brief to explain their concern that the conflation of prosecutorial and sentencing power is not merely theoretical under Section 707(d); as a factual and practical matter it accords the most significant element of the youth sentencing decision to state prosecutors in violation of constitutional law.[2]

As set forth below, the primary difference between proceedings against youth in criminal court or in civil juvenile court is the purpose to be achieved. Although the same offense is *charged* in either proceeding, the selection of judicial forum depends upon considerations fundamental to the sentencing function, *i.e.* whether the offender's individual circumstances warrant retributive punishment or rehabilitation and treatment. Unlike traditional prosecutorial choices about what offense to charge, the choice between proceeding in juvenile and criminal court is a difference that goes directly to the societal objectives and individual considerations that courts have long been entrusted to resolve. Thus, while prosecutors may determine which offense is the most appropriate to charge, the decision whether a youth should be treated as an adult for sentencing purposes must rest – subject to legislative guidelines – with the Court.

Long-standing practice, as well as the competence and functions of the various branches, confirm that the power to decide whether a youth should face punishment or rehabilitation rests with the judiciary.

First, the coordinate branches of government have long observed the importance of maintaining the charging of youthful offenders and the sentencing of those same offenders in separate spheres. Prior to the recent amendments to Section 707, California law provided that with narrowly constrained exceptions, the prosecution was required to file civil

[2] All statutory references hereinafter are to the Welfare and Institutions Code unless otherwise specified.

proceedings in juvenile court, rather than criminal proceedings in adult court, when a youth offender was accused of violating the Penal Code. While the prosecution could request that certain juveniles be tried in adult court, resolution of such requests was performed by the courts following a fitness hearing to determine whether such a transfer was appropriate. *See* former Section 707(a) (requiring the court to consider multiple evidentiary factors).

The law challenged in the instant case radically alters this traditional allocation of power by, for the first time in California history, granting prosecutors unilateral discretion to select between two fundamentally different sentencing regimes for a broad category of youth offenders. If the prosecutor files and prevails in proving criminal charges against the youth in adult court, the court is constrained to sentence the youth according to the dictates of the adult criminal sentencing laws, Pen. Code Section 1170.17(a) – laws uniformly designed to *punish* – rather than choosing from the range of remedial options under the Welfare and Institutions Code – options designed to *rehabilitate*. By virtue of this change, Section 707(d) empowers the prosecutor to make a fundamental, categorical decision about the nature of the sentence. Unlike the traditional court role – which involved a non-charging governmental body applying legislatively prescribed criteria – the new law gives one branch both the power to charge and to sentence.

The difference between sentencing regimes is not merely one of theory; the difference between proceeding in criminal or juvenile courts is profoundly different in effect. The dispositions available in juvenile court range from home probation to community service to residential treatment to secure institutionalization – all of which are required to provide rehabilitative services. In criminal court, the sentence must be within a statutorily defined range of institutional confinement – up to and including

death – as to which this sentencing judge has little discretion. These differences strike at the very core of the sentencing function – determining whether an individual should be subjected to penalties that have lifelong consequences for his or her individual liberty, or whether the interests of society are better served by treatment and rehabilitation.

Finally, in addition to upsetting the carefully developed divisions among the branches, Section 707(d) grants prosecutors improper discretion beyond their institutional competency. Under the Constitution, the executive branch's discretion in criminal proceedings is confined to determining "whether to bring charges, against whom to bring charges, and what charges to bring." *Manduley v. Superior Court* (2001) 104 Cal.Rptr.2d 140, 143. Section 707(d) extends the prosecutor's discretion to choosing the sentencing regime that will apply to particular offenders. Significantly, this discretion is unbounded either by the factual circumstances of the offense (the limit traditionally associated with prosecutorial charging discretion) or by any statutory guidance. Rather, Section 707(d) empowers the executive, without guidance, to select both charge and sentence.

Unlike courts, prosecutors are, with good reason, not entrusted to balance the legislature's competing objectives in establishing sentencing regimes, or to attempt to accomplish those legislative objectives through the individualized application of sentences. Prosecutors have no access to, or expertise in evaluating, the complex cluster of factors that go into making the choice between punitive or rehabilitative sentences – such as a youth's psychological and psychiatric condition, amenability to treatment, and past family and social history. Indeed, as an institutional matter, at the time these judgments must be made, a prosecutor is the youth's adversary and thus has no means even to compel the release of information necessary to make such judgments.

By contrast, the courts are uniquely competent among the coordinate branches to assess an individual's fitness for juvenile or criminal court. In a host of analogous contexts – whether in choosing among criminal sentencing options or in determining competency to stand trial – courts routinely apply criteria established by the legislature to accomplish the legislature's purpose within a statutorily determined sentencing scheme. This traditional allocation of power reflects not only the importance of separating powers under our constitutional scheme, but also courts' institutional superiority over prosecutors in making a judgment about what punishment is appropriate, and how best to accomplish legislative goals of deterrence, retribution, or rehabilitation.

For the reasons set forth below, Amici urge this Court to affirm the decision of the court below and restore the separation of powers between courts and prosecutors in this crucial area.

IV. DISCUSSION

A. Separation of Powers Principles Require This Court To Determine Whether Section 707(d) Discretion Is Executive Or Judicial In Nature

Article III, section 3 of the California Constitution embodies the State's commitment to maintaining the powers of State Government in separate spheres: "The powers of state government are legislative, executive and judicial. Persons charged with the exercise of one power may not exercise either of the others except as permitted by this Constitution." Separation of powers constraints exist "to prevent the combination in the hands of a single person or group of the basic or fundamental powers of government." *People v. Superior Court (Romero)* (1996) 13 Cal. 4th 497, 509.

As both California courts to address the constitutionality of Section 707(d) recognized, whether this new law violates California separation of

powers principles depends first and foremost on whether this "choice given to the district attorney . . . is in its nature a charging decision that is properly allocated to the executive branch or is instead a sentencing decision that is properly allocated to the judicial branch." *Manduley, supra,* 104 Cal.Rptr.2d at 147; *see* also *Bravo v. Superior Court* (2001) 108 Cal. Rptr.2d 514, 517. Second, this Court has emphasized that a delegation of power from the Legislature to the executive runs afoul of separation of powers principles when the delegation exceeds the executive's traditional function of applying legislatively fixed criteria to objective facts. Thus, legislation is impermissible if it confers such discretion on the prosecutor as to pose a significant risk of arbitrary prosecutorial action at the expense of individual liberty. *See, e.g., Sledge v. Superior Court* (1974) 11 Cal.3d 70, 74; *People v. Tenorio* (1970) 3 Cal.3d 89, 95; *People v. Clay* (1971) 18 Cal.App.3d 964, 969-70. In this case, the Legislature has both taken a power traditionally exercised by the judiciary – that of sentencing and punishment – and awarded it, without any guidance, to the same body vested with the power to investigate and charge. This unconstrained concentration of power in a single branch plainly violates separation of powers principles under California law.

The first requirement that sentencing decisions reside with the courts was addressed squarely in *People v. Superior Court (On Tai Ho)* (1974) 11 Cal. 3d 59, 68: "[T]he issue [of] whether a power is judicial in nature depends not on the procedural posture of the case but on the substance of the power and the effect of its exercise." In that case, the Court invalidated on separation of powers grounds a Penal Code provision that conditioned on a prosecutor's approval, a judge's pre-trial decision to divert first-time drug offenders from criminal trial and make them eligible for treatment and rehabilitation. Applying doctrinal standards developed in the line of separation of powers cases preceding *On Tai Ho*, the Court concluded that

the power to divert, in "substance," was judicial in nature because it required the judge to "weigh[] evidence, resolve[] conflicts and give[] or withhold[] credence to particular witnesses," and because requiring district attorney consent would "reduce this function to an ex parte act and render meaningless the magistrate's independent determination." *Id.*, at 66-67.

The latter requirement – that the exercise of prosecutorial discretion not be so unbounded as to pose a significant risk of arbitrary action – is a theme emphasized in virtually every separation of powers case to come before the Court. In *Tenorio, supra*, the Court held prosecutorial discretion unconstitutional when it was "unreviewable, and may therefore be exercised in a totally arbitrary fashion." The very next year, *People v. Clay* (1971) 18 Cal.App.3d 964, 970, invalidated a provision that conditioned a judge's probation decision on prosecutorial approval, holding that such prosecutorial approval was subject to the "possibility of abuse through imposition of arbitrary policies," and as such, was unconstitutional. Likewise, *Esteybar v. Municipal Court* (1971) 5 Cal. 3d 119, 126, found a regulation unconstitutional when it conditioned the exercise of judicial discretion to reclassify a drug offense from a felony to a misdemeanor upon district attorney permission, because "[a] defendant is entitled to have an independent determination of whether he should be held to answer on a felony or a misdemeanor, and this is not possible when the exercise of judicial discretion depends on the 'pleasure of the executive.'"

In *Sledge v. Superior Court* (1974) 11 Cal. 3d 70, this Court made explicit what had long been evident in its case law: If the prosecutorial power at issue involves only the non-discretionary task of applying legislatively fixed criteria to objective facts, the function ordinarily will not encroach on judicial power. *Sledge* upheld a district attorney's authority to refuse to find a defendant eligible for a specific drug diversion program because, *inter alia*, unlike other diversion programs where eligibility is

determined by the weighing of relevant evidence, "the district attorney [here] need not decide what facts are material and relevant to eligibility, as the Legislature has specified them in the statute." *Sledge*, 11 Cal. 3d at 74. As the Court explained: "[T]he statute leaves [the prosecutor] no room for weighing *the effect* of the facts . . . . [t]here is not provision here . . . for the [prosecutor's] exercise of judicial discretion to admit an otherwise ineligible defendant to the program 'in the interests of justice.'" *Id.* (emphasis added).

Consistent with this line of cases, *Davis v. Municipal Court* (1988) 46 Cal. 3d 64, on which the State heavily relies, Brf. at 19, does nothing to alter the basic doctrine prohibiting prosecutors from making sentencing decisions. *Davis* reaffirmed that the constitutionality of a legislative delegation of authority to the executive depends on an accurate "characterization of the source and nature of the authority which the provision permits the district attorney to exercise," *id.*, at 74; *see also id.*, at 77 (emphasizing that "a prosecutor's decision to decline to prosecute a particular defendant on condition that he participate in an alternative program . . . has *traditionally been viewed* as a subset of the prosecutor's broad charging discretion") (emphasis added), and that prosecutorial discretion may violate separation of powers principles if it involves other than the "limited, quasi-ministerial function[s]" that otherwise define its nature, *id.*, at 85.

The *Davis* court's decision to uphold the discretion afforded a prosecutor in that case – namely, the effective discretion to determine whether an offender should be charged with a misdemeanor or a felony – has no parallel in the choice afforded the prosecutor here. The distinction between a misdemeanor and felony criminal conviction is fundamentally one of *degree* of punishment. As is explained in detail, *infra*, the distinction between a juvenile disposition and a criminal court conviction is

not a matter of the difference in the amount of punishment, but a choice between punishment and rehabilitation – a fundamental difference in kind for persons *charged with the same offense*. Moreover, the *Davis* court underscored that the power afforded prosecutors in making a defendant's eligibility for diversion dependent on the offense charged was strictly limited by the prosecutor's traditional discretion to evaluate the objective facts of the case for charging purposes. Thus, "[i]f a prosecutor charges a defendant with a felony and, after the preliminary hearing, it is found that the facts do not establish probable cause to hold the defendant to answer for the charged felony but only for a divertible misdemeanor, the fact that the prosecutor had initially charged a felony would not, in itself, necessarily preclude diversion." *Id.*, at 86. In contrast, the decision whether to proceed in juvenile court is made independent of the facts giving rise to the selection of a charging offense, and is traditionally based on a set of complex, subjective factors prosecutors are ill-suited to assess. *See infra*, pp. 27-35.

The State's interpretation of *Davis* mistakes the Court's recognition that prosecutorial control is *especially* troubling when it is exercised after charges have been filed for a declaration that all pre-charging exercises of prosecutorial control are constitutionally permissible. This Court has of course never suggested that prosecutorial control over core judicial power is immune from constitutional infirmity simply because it happens to be exercised before charges have been formally lodged.[3] Indeed, such an

[3] *On Tai Ho* squarely refutes this interpretation. Prior to that decision, this Court had found unconstitutional prosecutorial control over judicial discretion only in situations where such control occurred during the sentencing phase of a criminal trial. In *On Tai Ho*, this Court considered a statutory provision that gave judges discretionary authority to place accused drug offenders in *pretrial* diversion programs, but subjected these judicial decisions to district attorney approval. *On Tai Ho* squarely rejected the prosecutor's narrow emphasis on timing: "[T]he Legislature's choice of pre-conviction rather than post-conviction intervention is easily understandable in the light of its dual purpose of sparing appropriately selected first offenders the stigma of a criminal judgment and avoiding the delays and costs of unnecessary trials. At whatever stage such intervention

interpretation of that case would require *Davis* to have repudiated the long doctrinal ancestry that precedes it – and on which the *Davis* court expressly relied – a result this Court surely would have made clear had that been its intention. *See Sierra Club v. San Joaquin Local Agency Formation Com.* (1999) 21 Cal. 4th 489, 510 (making explicit the Court's decision to overrule prior case law).

B. The Decision Whether To Proceed Against A Youth In Adult Or Juvenile Court Is Inherently Judicial In Nature

Applying the separation of powers principles just described, there can be no question that the decision whether to charge a youth in juvenile or adult court is a sentencing determination that "is fundamentally judicial in nature." *People v. Tenorio* (1970) 3 Cal. 3d 89, 94; *People v. Navarro* (1972) 7 Cal. 3d 248, 258-59.[4] Civil juvenile proceedings and criminal adult court proceedings are distinguished primarily by the remedial purpose to be achieved, *i.e.* whether the offender should be rehabilitated after his offense or be punished for it. Such determinations of appropriate remedy are quintessentially judicial. *See, e.g., People v. Tenorio* (1970) 3 Cal. 3d 89, 94; *People v. Navarro* (1972) 7 Cal. 3d 248, 258-59. Accordingly, the power to decide whether an offender should face punishment or rehabilitation has traditionally been vested with the judiciary and guided by a set of express, detailed statutory criteria. The reason for this traditional allocation of power is clear: sentencing determinations require an

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occurs, however it is an integral step in the process leading to the disposition of the case before the court, and therefore constitutes an exercise of judicial authority within the meaning of the constitutional doctrine of separation of powers." *On Tai Ho*, 11 Cal. 3d at 68 (emphasis added).

[4] As the Penal Code provides: "The several sections of this Code which declare certain crimes to be punishable as therein mentioned, devolve a duty *upon the Court authorized to pass sentence, to determine and impose the punishment prescribed.*" Pen. Code § 12 (emphasis added). Moreover, "Whenever in this Code the punishment for a crime is left undetermined between certain limits, *the punishment to be inflicted in a particular case must be determined by the Court* authorized to pass sentence, within such limits as may be prescribed by this Code." *Id.* § 13 (emphasis added).

individualized evaluation of multiple, complex factors that prosecutors are inherently ill-suited to make.

1. Civil Juvenile Court Proceedings And Criminal Adult Court Trial Are Distinguished Primarily By Their Sentencing Or Dispositional Goals

At the outset, it is critical to distinguish prosecutorial power "to determine whether to bring charges, against whom to bring charges, and what charges to bring," *Manduley, supra*, 104 Cal.Rptr.2d at 143, from the determination where to file the charges selected. In the former set of decisions – traditionally within the power of the executive – the prosecutor is naturally constrained by basic information to which the prosecutor has immediate access: what happened, how, and to whom. *See United States v. Armstrong* (1996) 517 U.S. 456, 465. In stark contrast, the decision whether to proceed in juvenile court or in criminal court is *independent from* and is made *subsequent to* the selection of the charging offense and the determination that the identified defendant should be charged. Both adults and juveniles alike are charged with the offenses described by the Penal Code; the substantive offense and the identified offender are identical whatever the forum. Thus, as relevant to separation of powers concerns, the essential difference between filing charges in juvenile court and filing them in adult court is what sentencing outcome will be produced.[5]

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[5] Indeed, among the many purposes apparently underlying Proposition 21, the voters of California expressly stated their intention in Section 707 to empower prosecutors to enhance sentences: "It is the intent of the people of the State of California in enacting this measure that if any provision in this act conflicts with another section of law which provides for a *greater penalty or longer period of imprisonment* that the latter provision shall apply, pursuant to Section 654 of the Penal Code." Section 707 (Section 37 of Proposition 21, quoted in Historical and Statutory Notes, 2000 Legislation) (emphasis added). Proposition 21 in this respect was aimed at changing sentencing outcomes, not at guiding the selection of the charging offense. While it is surely within the Legislature's power to lengthen sentences for a specific offense, the decision to award a more punitive sentence or not *beyond* that legislative guidance lies with the court – not the executive. *See, e.g., Esteybar, supra*, 5 Cal.3d at 127.

Since the advent of American juvenile courts in 1899, the system has been designed to account for differences between youth and adults in reasoning ability and moral development by taking categorically different approaches to sentencing for public offenses.[6] As this Court had by then already acknowledged, the purpose of "sentencing" for a child "is not punishment for offenses done, but reformation and training of the child to habits of industry, with a view to his future usefulness when he shall have been reclaimed to society, or shall have attained his majority." *Ex Parte Ah Peen*, 51 Cal. (1876) 280, 281. Since California adopted its own juvenile court law in 1903, *Navarro, supra,* 7 Cal.3d at 276 (citing Stats. 1903, p.44), this Court has repeatedly underscored that fundamental difference. *See, e.g., In re Colar* (1970) 9 Cal.App.3d 613, 615-616 ("The Juvenile Court Law is to be construed liberally to carry out its purpose, which is not to punish, but to determine what is best for the welfare of the minor."); *In re Van Vlack* (1947) 81 Cal.App.2d, 838, 842, 185 P.2d 346, 348 (1947) ("The main purpose of the Juvenile Court Act is to safeguard the morality and character of children of tender years."). Put simply, the aim of a juvenile disposition is to rehabilitate, rather than punish.

The decision to create a separate system of juvenile justice in California was based on differences between children and adults that society has long acknowledged; compulsory education, alcohol consumption laws, minimum driving and voting age laws were all designed to protect children from harm resulting from having decision-making skills less developed than those of adults'. In more recent years, science has begun to shed some light on why children and adults differ so greatly in their ability to understand the consequences of their actions.[7] Among other

[6] Myers, Excluding Violent Youths From Juvenile Court: The Effectiveness of Legislative Waiver (2001).

[7] One study using magnetic resonance imaging technology has suggested that children and adolescents process emotionally charged information far less accurately than adults.

manifestations of this difference, young people tend to underestimate negative consequences of their actions, overestimate their own understanding of situations, and make decisions based on incomplete information.[8] Critically, learning right from wrong is also part of cognitive development during adolescence – an aspect of development that often leads to experimentation with provocative behavior. Because such behavior is so closely tied to this period in cognitive growth, many adolescents exhibit violent behavior only once.[9]

Reflecting this reality, California law makes explicit that the purposes of civil proceedings in juvenile court or criminal trial in adult court are categorically different. The Penal Code, which defines substantive criminal offenses and prescribes punishments for those offenses, explains the aim of trial court sentencing as follows:

> The Legislature finds and declares that the purpose of imprisonment for crime is punishment. This purpose is best served by terms proportionate to the seriousness of the offense with provision for uniformity in the sentences of offenders committing the same offense under similar circumstances. The Legislature further finds and declares that the elimination of disparity and the provision of uniformity of sentences can best be achieved by determinate sentences fixed by statute in proportion to the seriousness of the offense as determined by the Legislature to be imposed by the court with specified discretion.

Penal Code Section 1170(a)(1).[10]

Committee on Law and Justice, *et al.*, Panel on Juvenile Crime: Prevention, Treatment, and Control, (June 2001) p. 16 (citing Baird, *et al.*, Functional Magnetic Resonance Imaging of Facial Affect Recognition in Children and Adolescents, Journal of the American Academy of Child and Adolescent Psychiatry (1999) 38(2) pp. 195-199).

[8] *Id.*, at 15 (citing Quadrel, *et al.*, *Adolescent (In)vulnerability*, (1993) American Psychologist 48(2) pp. 102-116.).

[9] Thornberry, *et al.*, The Prevention of Serious Delinquency and Violence: Implications From the Program of Research on Causes and Correlates of Delinquency, in Serious Violent and Chronic Juvenile Offenders (Howell, *et al.*, edits., 1995) pp. 213-237).

[10] The Legislature has identified a set of objectives to be observed in sentencing a criminal defendant: 1) protecting society; 2) punishing the defendant; 3) deterring the

In contrast, the Welfare and Institutions Code, which establishes the rules and procedures governing juvenile court and provides for various remedial dispositions, says nothing about punishment in the retributive sense meant by the Penal Code. Rather, "'[p]unishment,' for purposes of this chapter [establishing the juvenile court], does not include retribution." Section 202(e)(5). Instead, the "purpose" of the juvenile court system is:

> [T]o provide for the protection and safety of the public and each minor under the jurisdiction of the juvenile court and to preserve and strengthen the minor's family ties whenever possible, removing the minor from the custody of his or her parents only when necessary for his or her welfare or for the safety and protection of the public. When removal of a minor is determined by the juvenile court to be necessary, reunification of the minor with his or her family shall be a primary objective. When the minor is removed from his or her own family, it is the purpose of this chapter to secure for the minor custody, care, and discipline as nearly as possible equivalent to that which should have been given by his or her parents.

Section 202(a). Indeed, even with respect to the most serious youth offenders:

> [T]he purpose of [the chapter setting forth the powers and goals of the Youth Authority, the equivalent of youth prison] is to protect society from the consequences of criminal activity and to that purpose community restoration, victim restoration, and offender training and treatment shall be substituted for retributive punishment and shall be directed toward the correction and rehabilitation of young persons who have committed public offenses [as defined by the Penal Code].

Welfare and Institutions Code Section 1700.

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defendant from engaging in further criminal activity; 4) deterring others from criminal conduct; 5) isolating the defendant to prevent further criminal activity; 6) securing restitution for the victims of crime, and 7) achieving uniformity in sentencing. California Rules of Court ("CRC") 4.410(a)-(g).

Neither does the Legislature insist upon strict uniformity in juvenile court sentencing pursuant to express legislative guidance.[11] On the contrary, "this chapter shall be liberally construed to carry out these purposes." Section 202(a). Thus, where the Penal Code mandates that the criminal court must apply the punishment prescribed by statute (imprisonment, fine, jail, probation or a suspended sentence) and the sentencing rules provided by the Judicial Council, Penal Code Section 1170(a)(3), the juvenile court makes clear that the court may impose "sanctions" (including fines, community service, probation or parole, restitution or other victim impact program, or commitment to a youth treatment or disciplinary facility) according to the *court's* assessment of "the safety and protection of the public, the importance of redressing injuries to victims, and the best interests of the minor," Welfare & Institutions Code Sections 202(d), (e). Such broad considerations play no role in an adult court's imposition of criminal penalties.

Thus, unlike the quantitative effect on sentence length or severity that usually flows from a prosecutor's choice of charging offense, the effect on sentencing as between adult and juvenile court is qualitative in nature – the offender will either be subject to a strictly constrained, punitive sentence or will be the beneficiary of a system designed to provide non-punitive, rehabilitative disposition. The difference is more than philosophical. Whereas the Penal Code provisions are not intended "to preclude programs . . . designed to rehabilitate," Penal Code Section 1170(a)(2), the juvenile court provisions governing the Youth Authority are *required* to direct "community restoration, victim restoration, and offender

[11] A primary goal in the implementation of California's determinate sentencing scheme was to obtain uniformity among the sentences imposed for similarly circumstanced criminal activity. *See* Cal. Penal Code § 1170(a)(1) (noting that the purpose of sentencing is "best served by terms proportionate to the seriousness of the offense with provision for uniformity in the sentences of offenders committing the same offense under similar circumstances"); *see also People v. Cheatham* (1979) 23 Cal.3d 829.

training and treatment . . toward the correction and rehabilitation of young persons," Section 1700. In this respect, the choice between criminal and juvenile court is defined by the nature – not the quantity – of the sentence.

2. Discretion For Assessing Factors Relevant To A Juvenile's Fitness Has Traditionally Been Vested In The Courts

Precisely because of the difference in purpose between the two systems, the determination of whether an individual is "fit" for remediation has long resided in the sound discretion of the juvenile court. *People v. Wolff* (1920) 182 Cal. 728, 732-733. Through all of the amendments to California juvenile law in the eight decades prior to Proposition 21, the primary means for determining fitness has remained with the judiciary.[12] *See, People v. Dotson* (1956) 46 Cal.2d 891, 896; *People v. Superior Court (Zaharias M.)* (1993) 21 Cal.App.4th 302, 306. In certain cases involving older youths, the prosecutor could (and still may) request that the court hold a hearing to determine the juvenile's "fitness" to remain in juvenile court or be transferred to adult court. *Green v. Municipal Court* (1976) 67 Cal.App.3d 794. But the court's authority to conduct such a fitness determination could not, as a matter of separation of powers, be made dependent on the prosecutor's decision to request such an evaluation. *Id.*, at 804. Just like a court's discretion to impose sentence, the court's "function in the fitness determination involves the use of the judicial power in taking evidence, hearing argument and finding operative facts." *Id.*, at

[12] The rule that the prosecution of charges against juvenile offenders be brought, in the first instance, in juvenile court, was subject to a few narrow exceptions, providing that the prosecutor was required to file charges against certain 16 and 17-year-old offenders in adult court if the juvenile (1) had been made a ward of the court after having committed prior felonies after the age of 14, and (2) the current charge alleged that the juvenile had committed one of a handful of serious offenses. Section 602(b). In addition, the prosecutor could file charges directly in adult court if the juvenile had already once been either convicted in adult court of an offense that had led to a finding of unfitness or had been previously found unfit for juvenile proceedings as a result of prior delinquency or failure at rehabilitation efforts. Section 707.01.

802-803; *see also People v. Toscano* (1977) 69 Cal.App.3d 140, 148; *Sledge*, 11 Cal.3d at 73 ("[I]f it appears [that] the defendant might be eligible [for diversion from the criminal system], 'the process of adjudication begins.'"). The fitness determination thus embodied core adjudicatory powers preventing "intrusion by the executive branch." *Id.*, at 804.

The factors weighed by the judge in a fitness hearing are specified by statute and remain the same since the passage of Proposition 21.[13] The criteria to be considered include the juvenile's "degree of criminal sophistication," the likelihood that rehabilitation efforts can succeed before the minor reaches adulthood, prior history of delinquency and rehabilitation, and the nature of the offense charged. Section 707(a). Unlike the information a prosecutor relies on when he makes a decision whether to charge, whom to charge and with what substantive offense – namely, the nature and "strength of the evidence, the availability of resources, [and] the visibility of the crime," *United States v. Redondo-Lemos* (1992) 955 F.2d 1296, 1299 – the information needed to evaluate the fitness criteria is almost certainly not available to the prosecutor at the time the charging decision is made.[14] For this reason, courts have been vested

[13] In relevant part, the statute provides:

> Following submission and consideration of the report [on the behavioral patterns and social history of the minor, submitted following probation officer investigation], and of any other relevant evidence which the petitioner or the minor may wish to submit, the juvenile could may find that the minor is not a fit and proper subject to be dealt with under the juvenile court law if it concludes that the minor would not be amenable to the care, treatment, and training program available through the facilities of the juvenile court, based upon an evaluation of the following criteria: (1) The degree of criminal sophistication exhibited by the minor. (2) Whether the minor can be rehabilitated prior to the expiration of the juvenile court's jurisdiction. (3) The minor's previous delinquent history. (4) Success of previous attempts by the juvenile court to rehabilitate the minor. (5) The circumstances and gravity of the offense alleged in the petition to have been committed by the minor.

Section 707(a).

[14] *See* Bishop, Juvenile Offenders in the Adult Criminal Justice System, 27 Crime & Just. (2000) pp. 81, 125 ("In practice, [prosecutorial waiver statutes] frequently require

with the authority to solicit evidence, hear testimony, and evaluate the claims of competing experts on the question of fitness after a prosecutor has decided who should be charged and with what offense but before the court hears any further evidence on the truth of the underlying alleged offense.

3. Fitness Determinations And Sentencing Decisions Require The Performance Of Precisely The Same Function

Perhaps most telling, the statutory criteria for determining "fitness" are closely analogous to the statutory criteria provided for assessing an appropriate disposition under the juvenile code and an appropriate sentence under criminal sentencing rules, and competency to stand trial in adult court. First, juvenile courts imposing dispositions are to consider public safety, the need to hold the juvenile "accountable" for his behavior, and should prescribe such "care, treatment and guidance" that is "consistent with their best interest" and as is "appropriate for their circumstances." Section 202(a), (d). The former considerations (accountability and public safety) turn squarely on the seriousness of the offense; the latter considerations (treatment consistent with best interests) pose precisely the same questions that amenability to rehabilitation requires answered.

Moreover, such instructions are precisely *opposite* to those considered relevant to a prosecutorial decision whether to charge an offender with a misdemeanor or a felony, wherein "[f]actors such as community attitude generally have been given no weight." Prosecutorial Discretion § 1.26 (1979) (cited in *Davis*, 46 Cal.3d at 77). Indeed, prosecutors are generally advised *not* to make a charging decision based on the impact that prosecution would have on the individual defendant. *Id.* § 1.38 (citing California Uniform Crime Charging Standards).

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inexperienced assistant prosecutors to make quick decisions based on minimal information.").

Second, criminal sentencing standards in California demand much the same type of evaluation, requiring courts to consider a set of factors specific to the crime and to the defendant in aggravation and mitigation of the offense. *People v. Tatlis* (1991) 230 Cal.App.3d 1266, 1274. When making this determination, the Court is guided by the factors set forth in California Rules of Court 4.421 and 4.423 but may consider any factors in mitigation or aggravation appropriate to a particular case. *Tatlis, supra,* 230 Cal.App.3d at 1273 (noting that in addition to the CRC factors, "a broad scope of information may be considered" in mitigation). The Court is required to consider not only the circumstances of the crime but also the character and circumstances of the defendant when making its sentencing determination. *People v. Cheatham* (1979) 23 Cal.3d 829, 836 (holding that "the Legislature intended the sentencing court to consider the defendant's prior history and record, as well as facts relating to the commission of the crime, in determining whether there are circumstances that justify imposition of the upper or lower term").

The evaluation of "fitness" for juvenile court relies on criteria commonly used in assessing offender eligibility for federal sentencing departures as well. *See, e.g.*, U.S.S.G. §§ 5K2.13 (providing for departure from guideline sentence if the offender suffers from "significantly reduced mental capacity"); §5K2.14 ("If national security, public health, or safety was significantly endangered, the court may increase the sentence above the guideline range to reflect the nature and circumstances of the offense."). Although the prosecutor in such contexts may be permitted to make recommendations for sentencing, it is uniformly the courts that are charged with determining the applicability of such criteria to the individual case.

A final parallel may be found in the determination of competence to stand trial in adult court. *See* Penal Code Section 1376, *et seq.* Under California law, a defendant cannot stand trial for a criminal offense if "as a

result of mental disorder or developmental disability, the defendant is unable to understand the nature of the criminal proceedings or to assist counsel in the conduct of a defense in a rational manner." Penal Code Section 1367. To make this assessment of a defendant's developmental state and mental condition, the courts are required to seek expert testimony, hear affirmative and rebuttal evidence from both sides, entertain closing arguments, and render a judgment. Penal Code Section 1369. Both in the substantive issue to be addressed – an individual's relative sophistication and developmental circumstances – and in the functions performed by the court in making a determination – hearing testimony, weighing adversarial positions, and making a judgment on the basis of evidence – the competency determination and the fitness determination are all but identical.

Put simply, the determination of "fitness," the assignment of "sentence," and the assessment of "competency" all require that precisely the same function be performed. Describing that function as prosecutorial in the first instance and judicial in the latter instances is illogical, inconsistent, and impermissibly blurs the respective roles of the coordinate branches.

4. Prosecutors Lack The Institutional Competence To Make Individualized Sentencing Determinations, Particularly For Juveniles.

It is often noted that the reason prosecutors retain broad charging discretion is because they are in the best position to evaluate the facts of the case and how those facts best fit into a criminal charge. *See, e.g.*, Robert Heller, Selective Prosecution and the Federalization of Criminal Law, 145 U.Pa.L.Rev. 1309, 1325-26 and nn. 71-76 (1997) (recounting justifications for prosecutorial discretion). Traditional prosecutorial discretion enables prosecutors to evaluate the evidence and make a factual determination

about what substantive offense under the Penal Code best describes the facts of the crime committed. The facts of the case and the requirement that the prosecutor demonstrate probable cause provide a clear limiting device; a prosecutor would not, for example, charge someone who has been writing bad checks with manslaughter. Sentencing, in contrast, requires a judgment about what punishment is appropriate, and how best the system might accomplish its goals of deterrence, retribution, or rehabilitation. C.R.C. Rule 4.410 (listing general objectives in sentencing and explaining that "[b]ecause in some instances these objectives may suggest inconsistent dispositions, the sentencing judge shall consider which objectives are of primary importance in the particular case"). In this judgment, knowledge of the offender's personal history and the availability of different remedial services are necessarily relevant. *Id.*, Rule 4.409 *et seq.*; *On Tai Ho* 66-67 (power to divert judicial in nature because it required the judge to "weigh[] evidence, resolve[] conflicts and give[] or withhold[] credence to particular witnesses").

Even if a prosecutor were inclined to make an individualized determination of a child's amenability to rehabilitation, she will likely be unable to do so. The decision about where to file the charges is one that must be made early in the process, before any such fact-finding is completed. Indeed, the only details the State needs to provide in filing the initial pleading (by indictment, information or complaint) are, as a general matter: "(1) The title of the action, specifying the name of the court to which the same is presented, and the names of the parties; (2) A statement of the public offense or offenses charged therein." Penal Code Section 950. Indeed, the information about a youth that may seem most readily apparent to the prosecutor – such as a youth's seemingly adult appearance – may be

among the most misleading.[15] Limitations in time and resources alone, as well as the prosecutor's adversarial position, make certain that prosecutors are unlikely to discover such essential information during the course of a standard criminal investigation.

In the case of juvenile offenders in particular, the determination whether a child is amenable to the rehabilitative services of the juvenile justice system depends on a number of social, psychological and physiological factors that an untrained lay person will not be able to evaluate without the assistance of expert evaluation and an open hearing process. Among the more common are a history of physical or sexual abuse or domestic violence in the household; substance or alcohol abuse and the availability of drugs; low school attainment and attachment; pregnancy; failure to form appropriate emotional bonds or neurological impairments; depression, anger, or other forms of psychopathology;[16] family or neighborhood history of criminal violence; access to lethal

[15] As one scholar explains: "[B]ecause there is no systematic relation between the timing of puberty and the timing of the normative, intellectual, emotional, or social changes of adolescence, it is inappropriate to draw inferences about a juvenile's psychological or social maturity from his or her physical appearance. Because adults tend to do just this, early maturing juveniles may be at a disadvantage in the courtroom, since their more adult like appearance may suggest to adults a higher capacity for responsible decision making than is warranted." Kazdin, *Adolescent Development, Mental Disorders, and Decision Making of Delinquent Youths* in Youth On Trial: A Developmental Perspective on Juvenile Justice (Grisso and Schwartz, edits., 2000) p. 40.

[16] Scientific studies have consistently demonstrated that youth offenders have significantly higher rates of such disorders. For example, half of females and a third of males in the incarcerated juvenile population meet the diagnostic criteria for post-traumatic stress syndrome. Lewis, *et al., A Clinical Follow-Up of Delinquent Males: Ignored Vulnerabilities, Unmet Needs, and The Perpetuation of Violence* in J. Am. Child Adolesc. Psych., (1994) 33(4) pp. 518-28. Another study found that 28% of juvenile delinquents sampled met the diagnostic criteria for dissociative disorder. Carrion & Steiner, Trauma and Dissociation In Delinquent Adolescents, J. American Acad. of Child and Adolesc. Psych. (2000) 39, 353-359. A study of boys and girls in the California Youth Authority found that 20% suffered from clinical depression and anxiety, with an additional ten percent falling into the borderline clinical range; 30% of girls and 19% of boys had additional clinical diagnoses for externalizing disorders (aggression), and an additional 8-12% were diagnosed in the borderline range. Steiner & Redlich, *Child Psychiatry and The Juvenile Court* in Child and Adolescent Psychiatry: A Comprehensive Textbook (3d ed., Lewis, ed. [forthcoming]).

weapons; delinquent peers or siblings or gang membership; poverty; family disintegration; lack of cohesion in poor or crime-ridden neighborhoods.[17] In addition, juvenile offender populations suffer from a wide range of physical conditions, including tuberculosis, HIV, nutritional deficits, seizure disorders, and head trauma – all of which can exacerbate their psychiatric morbidity and in some cases cause their delinquent behavior.[18] Even if a prosecutor has happened in everyday practice to encounter, for example, adult defendants with mental disorders, this experience will not necessarily provide useful information in assessing a juvenile, who may suffer from the same mental illness as an adult but may manifest the symptoms of that illness in starkly different ways.[19]

Such inadequacy is exacerbated by the prosecutor's mission in the juvenile and criminal processes: to obtain a conviction. She is necessarily in an adversarial position to the accused child. She is likely to make her determination based on the alleged offense, not the individual characteristics of the accused child, and the allegations that form the basis

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[17] Researchers have identified a host of social and environmental factors that place a youth at risk of committing violent acts in the future, the elimination or amelioration of which can decrease a youth's risk of future violence. *See, e.g.*, Hawkins, *et al.*, Predictors of Youth Violence (2000) NCJ 179065, p. 2; Brewer, *et al.*, *Preventing Serious, Violent, and Chronic Juvenile Offending* in Serious, Violent, & Chronic Juvenile Offenders (Howell, *et al.*, edits., 1995); DuRant, *et al.*, The Association of Weapon Carrying and Fighting on School Property and Other Health Risk and Problem Behaviors Among High School Students, Arch. Pediatric Adolesc. Med. (1997) 151 p. 360-366. Additional sources may be found attached at Appendix A.

[18] *See, e.g.*, Steiner, *supra*, note 17; citing Lewis, *et al.*, *supra*, note 17; Thompson & Farrow, Edits., (National Center for Education in Maternal and Child Health) Hard Time, Healing Hands: Developing Primary Health Care Services for Incarcerated Youth (1993); Needleman, *et al.*, Bone Lead Levels and Delinquent Behavior, J.Am. Med. Assoc. (1996) 275(5) p. 363-404.

[19] Kazdin, *supra*, at 87 ("[S]ome types of adolescent mental disorders do not meet the clinical thresholds typically employed in adult criminal cases. . . . For example, some youths who are developing psychotic disorders do not manifest the classic symptoms – such as delusions and hallucinations in schizophrenia – until they enter adulthood. Thus the early form of their disorder may be responsible for deficits in capacities associated with the standard for adjudicative competence, yet may not be identified as the cause of the deficits if criminal courts are using as a guide the severity of disorders that they are accustomed to associating with adjudicative incompetence in adults.").

of such a decision will necessarily be those found in the police report, produced at the earliest possible stage of investigation, benefiting neither from having tested the allegations in court or having been evaluated by a neutral magistrate.

C. Adult Sentences And Juvenile Dispositions Have Profoundly Different Effects On A Youth's Life

The difference in sentencing consequences in criminal and juvenile courts is profound. Unlike a choice of charging offense that happens to yield a difference in sentence length, the choice between adult and juvenile proceedings mandate the application of a wholly different sentencing regime. The dispositions available in juvenile court range from home probation to community service to residential treatment to secure institutionalization – all of which are required to provide extensive rehabilitative services; in criminal court, the Court must impose a sentence within a statutorily defined range – up to and including death. Criminal penalties have lifelong consequences for individual liberty; juvenile dispositions never do.

First, the most visible difference between juvenile dispositions and adult court sentences is in the severity of the outcome to which a youth is exposed: one system is designed to rehabilitate and the other to punish.[20] The difference in severity is also a function of the juvenile system's structure: juvenile courts retain jurisdiction only over youth (not previously subject to juvenile court disposition) until they reach the age of twenty-one. Section 607(a). Even if a juvenile were to be subject to the harshest penalties available in juvenile court – for example, a lifetime sentence to the California Youth Authority ("CYA") – that sentence could remain in

[20] As the U.S. Supreme Court recognized in *Kent v. United States* (1966) 383 U.S. 541, 558, because the sentencing consequences for a juvenile tried in adult court were so severe, due process required that the juvenile petitioner receive a hearing, access to background records relevant to his amenability to rehabilitation, and a statement of reasons by the juvenile court for its decision either way.

effect only until the offender reached his twenty-fifth birthday. Section 607(b). Life imprisonment in the adult system, however, means a lifetime spent in prison. Finally, among the most dramatic differences is the availability of the death penalty in adult criminal court. While the Federal Constitution does not generally bar the execution of offenders who were minors at the time they committed the offense,[21] a youth's presence in the juvenile court system (even if he is otherwise old enough to receive the death penalty) provides insulation from capital punishment. *See* Sections 727 (treatment programs), 730 (juvenile home, ranch, camp, or forestry service), 731 (CYA commitment).

Second, apart from the categorical difference in *intended* penal consequences, the effects of an adult sentence on a youth while in the adult system are as profound. In measuring whether the prosecutor's unconstrained choice between a juvenile disposition and a criminal sentence effectuates a fundamentally different sentence, such post-conviction "collateral consequences" most be considered. *Cf. Carafas v. LaVallee* (1968) 391 U.S. 234 (release from prison does not moot habeas corpus petition because civil disabilities and burdens associated with prior imprisonment follow the prisoner after release). Youth held in adult facilities are far more likely to be raped or sexually assaulted than youth in juvenile facilities.[22] Youth held in adult facilities also face higher risks of other types of physical assault by other inmates or by staff. One study

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[21] The Supreme Court has held that executing minors of 16 years and older does not violate the Constitution. *Stanford v. Kentucky* 492 U.S. 361 (1989).

[22] Austin, *et al.*, Juveniles in Adult Prisons and Jails: A National Assessment (Bureau of Justice Assistance, U.S. Department of Justice) (October 2000) p. 8; Zeidenberg and Schiraldi, The Risks Juveniles Face When They are Incarcerated with Adults (Justice Policy Institute) (July 1997) (citing Fagan, *et al.*, Youth in Prisons and Training Schools: Perceptions and Consequences of the Treatment-Custody Dichotomy, (1989) Juvenile and Family Court, No. 2; Bartollas & Sieverdes, *The Sexual Victim in a Co-educational Juvenile Correctional Institution* in The Prison Journal, (1983) Vol. 68, No. 1; Struckman-Johnson & Struckman-Johnson, *Sexual Coercion Reported by Men and Women*, The Journal of Sex Research, (1996) Vol. 33, No. 1.

found that youth in adult facilities were twice as likely to be beaten by staff as children held in juvenile facilities.[23] And youth locked in adult facilities are at a much higher risk of taking their own lives. Recent studies indicate that the suicide rate of youth in adult jails is eight times higher than that in juvenile detention facilities.[24]

Third, once an adult criminal sentence has been served, the collateral post-conviction consequences are far more severe than for former members of the juvenile offender population. The fact that proceedings in juvenile court result in a civil disposition, not a criminal conviction, has profound subsequent effects. Among other punitive burdens, youths with criminal convictions face loss of confidentiality (thought essential to rehabilitation efforts for juveniles), *T.N.G. v. Superior Court* (1971) 4 Cal. 3d 767, 776; the adverse effect of a "conviction" on future job prospects, the loss of the right to vote; Cal. Const. art. II, sec. 4; and to serve on a jury, Code. Civ. Proc. § 203; and severe social stigma, *see Carafas, supra*, 391 U.S., at 237. Indeed, juveniles convicted in adult court may be excluded from certain professions altogether, including law, Bus. & Prof. Code § 6106; peace officer, Gov. Code § 1029; medicine, Bus. & Prof. Code § 2236; and education, Educ. Code §§ 44830.1, 45122.1; and individuals convicted of certain crimes cannot hold public elected office, Cal. Const. art VII, sec. 8. And under the existing statutory scheme, once a juvenile has been found eligible for trial in adult court, any subsequent allegations that the juvenile

[23] The Sentencing Project: Prosecuting Juveniles in Adult Court: An Assessment of Trends and Consequences <http//www.sentencingproject.org/ brief/juveniles.html> (as of July 18, 2001) (citing Fagan, *et al.*, *Youth in Prisons and Training Schools: Perceptions and Consequences of the Treatment-Custody Dichotomy* in Juvenile and Family Court (1989) No. 2). Although youth in California are not housed with adult inmates, Section 208, contact with adult inmates is still possible, *see* Section 208(c), and there may be a risk of violence from other youth offenders who become accustomed to the practices and norms of the adult facilities.

[24] Austin, et al, *supra*, at 8; Zeidenberg and Schiraldi, The Risks Juveniles Face When They are Incarcerated with Adults (Justice Policy Institute) (July 1997) (citing Flaherty, An Assessment of the National Incidence of Juvenile Suicide in Adult Jails And Lockups and Juvenile Detention Centers (1980)).

has violated the criminal code must be filed in adult court. Section 707.01(a)(6). While it is as yet unclear whether this provision will apply to prosecutorial decisions as it does to court-made fitness determinations, the prospect that it will is of great concern. Put simply, once a prosecutor decides, on the basis of no particular information, training, or other statutory constraint, to subject a youth to adult criminal court, the youth is automatically subject to those far more severe pains and penalties for the rest of his life.

Perhaps most significant, youths sentenced to adult prison confinement lose the opportunity – an opportunity retained by youths that prosecutors decide, in their absolute discretion, to proceed against in juvenile court – to benefit from the targeted, extensive rehabilitative services that are mandated to be available in the juvenile justice system.[25] The more promising programs in juvenile justice systems include: restitution or reimbursement to the victim; case management or increased supervision;[26] education, training and social skill development;[27] individual,

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[25] The deprivation of such a tangible benefit, no less than the deprivation of physical property, implicates protected interests of the highest order. *Cf., e.g., Goldberg v. Kelly* (1970) 397 U.S. 254 (due process requires that welfare recipients be afforded a hearing prior to the termination of benefits).

[26] California's juvenile justice laws provide for case management services, with the aim of ensuring that a youth's rehabilitative counseling, health care, education, vocational training and other services are integrated and individually tailored to meet the needs of a youth. There is no direct parallel obligation available for youth who are transferred to the adult system.

[27] Under the juvenile justice system, educational achievement remains a specified goal; an established system helps youth achieve these goals. Pursuant to Welfare & Institution Code Section 1120, the CYA is required to assess the educational needs of each ward upon commitment and at least annually thereafter until released on parole. The assessment includes a review of academic, vocational and psychological needs and this assessment must be used to develop an appropriate educational program for the youth and to measure progress in subsequent assessments. Section 1120. In addition, youth in the juvenile justice system must be enrolled in an appropriate education program if they have not graduated and the juvenile authorities must develop a graduation plan for the youth. Section 1120.1. Finally, CYA must also adopt standards of proficiency for grades 7 to 12 inclusive. Section 1120.2.

group and family counseling services;[28] clear and consistent consequences for misconduct; close involvement in achievements made by a juvenile; and reintegration (closely involving the community).[29]

The deprivation of such opportunities can make the lives of these youth and their families far worse. Study after study has found that most juvenile offenders are adolescence-only offenders who "are likely to engage in antisocial behavior in situations where such responses seem profitable to them, but they are also able to abandon antisocial behavior when pro-social styles are more rewarding."[30] Conversely, systems that aim to punish youths for bad behavior often serve to increase youths' propensity for crime. One study of 200 intervention programs found that the best programs (which included components such as social skills training, anger management counseling, and community based family-style group homes) reduced recidivism by up to 40%, while "get tough" programs such as boot camp and "scared straight" showed weak to negative results.[31]

Unsurprisingly, an additional collateral aspect of adult sentencing is its tendency to increase the likelihood of future offenses. Studies have consistently found that youth sentenced as adults were more likely to re-

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[28] Pursuant to Section 727: "When counseling or other treatment services are ordered for the minor, the parent, guardian, or foster parent shall be ordered to participate in those services, unless participation by the parent, guardian, or foster parent is deemed by the court to be inappropriate or potentially detrimental to the child." There is no comparable mandate for family counseling services in the adult system.

[29] *See* Krisberg *et al.*, What Works With Juvenile Offenders? A Review of "Graduated Sanction" Programs, 10 Crim. Just. 20, 59. For a description of the most effective therapy thus far identified in decreasing adolescent violence, consult Henggeler, *et al.*, Family Preservation Using Multisystemic Therapy: An Effective Alternative To Incarcerating Serious Juvenile Offenders, J. Consult. Clin. Psychol. (1992) 60 pp. 953-961.

[30] Moffitt, *Adolescence-Limited and Life-Course-Persistent Antisocial Behavior: A Developmental Taxonomy* in Psych. Rev. (1993) 100 pp. 164-701.

[31] Dahlberg & Potter, Youth Violence, Developmental Pathways and Prevention Challenges, Am. J. Prev. Med. (2001) 20(1S):11 (citing Lipsey & Wilson, *Effective Interventions for Serious Juvenile Offenders: A Synthesis of Research* in Serious And Violent Juvenile Offenders: Risk Factors And Successful Interventions (Loeber & Farrington, edits. 1998) pp. 313-45).

offend, and to do so almost twice as fast as control group juveniles who remained in the juvenile system.[32] There are thought to be various reasons for this increase in recidivism. Among others, exposure to adult criminals increases the likelihood that a juvenile will engage in violent acts later in life.[33] Likewise, conviction tends severely to limit employment opportunities, which is crucial in avoiding recidivism.[34] Youths who have suffered physical or sexual abuse and neglect, including rape in adult prisons, are also more likely to commit violent crimes later in life.[35] Perhaps most critical, youth sent to adult facilities forego the potential benefits of the juvenile rehabilitation services that are simply absent or greatly diminished in the adult criminal system.

D. Section 707(d) Vests Unbounded Discretion In The Prosecution

This Court has established that a constitutional separation of powers violation exists when a prosecutor's exercise of authority can be executed without clear direction and when there are no statutory provisions for the judicial oversight of that discretion. *See Tenorio*, *supra*, 3 Cal. 3d at 95 (finding unconstitutional a statutory provision that "purports to vest in prosecutors . . . unreviewable . . . [discretion that may be] exercised in a totally arbitrary fashion"); *Esteybar*, *supra*, 5 Cal. 3d at 125-26 (finding unconstitutional a statutory provision that "purports to vest in the

[32] Report to the Committee on the Judiciary U.S. Senate, Violent and Repeat Juvenile Offender Act of 1997. (October 9, 1997) p. 149 (*citing* Bishop, *et al.*, The Transfer of Juveniles to Criminal Court: Does it Make a Difference?, 42 Crime & Delinquency 171 (1996)); *see also,* Snyder & Sickmund, Office of Juvenile Justice & Delinquency Prevention, Juvenile Offenders & Victims: 1999 National Report at 182; Blegen, Creating Options for Dealing with Juvenile Offenders, Juvenile Crime Bill, 52 J. Mo. B. 46 (1996); Fagan, *Separating the Men from the Boys: The Comparative Advantage of Juvenile Versus Criminal Court Sanctions on Recidivism Among Adolescent Offenders* in A Sourcebook: Serious, Violent, Chronic Juvenile Offenders (Howell, *et al.*, edits. 1995) pp. 245, 248-251.

[33] Hawkins, Herrenkohl, et al., Predictors of Youth Violence, NCJ 179065, at 5 (April 2000).

[34] Bishop, *supra*, note 33.

[35] Hawkins, *et al.*, *supra*, at .

prosecutor, admittedly an advocate, a power which may be exercised in a totally arbitrary fashion without regard to the circumstances of individual cases").

As has been detailed, the choice between juvenile and adult court is one concerning the kind of sentence imposed, which in turn has profound implications for an accused juvenile's protected liberty interests. Yet under Section 707(d), youths are at risk of suffering the far more serious consequences of a criminal conviction as a result of a prosecutorial decision that is neither naturally constrained by the offense-related facts of the case nor otherwise limited by statutory guidance. Because prosecutors are unlikely to have access to information relevant to a juvenile's "fitness" for proceeding in juvenile or adult court, and because prosecutors are not as a matter of institutional competence well positioned to evaluate such information that may be available, the risk that a juvenile will be arbitrarily deprived of substantial liberty interests under Section 707(d) is severe.

Even the most cursory examination of Section 707 (d) reveals that the newly instituted prosecutorial waiver provision offers no guidance to prosecutors in the exercise of their discretion, and as such, presents the very real possibility that this provision will be exercised in an arbitrary manner. Unlike the other subdivisions of 707, namely (a) and (c), there are no statutory guidelines enumerated in 707 (d) to guide the exercise of discretion that this provision affords. Furthermore, also unlike subdivisions 707 (a) and (c), 707 (d) contains neither a judicial oversight provision of prosecutorial decisions, nor a requirement that the youth offender has actually committed the triggering crime.

From the face of the statute, a prosecutor's discretionary decision under Section 707(d) is not subject to review by either the adult criminal

court, the juvenile court, or any appellate court.[36] The availability of judicial review of sentencing decisions is a critical part of the reason such decisions are vested in the courts, rather than the executive. In *Tenorio*, *supra*, the Court held prosecutorial discretion unconstitutional when it was "unreviewable, and may therefore be exercised in a totally arbitrary fashion." As the *Davis* court made clear, "[i]f a prosecutor charges a defendant with a felony and, after the preliminary hearing, it is found that the facts do not establish probable cause to hold the defendant to answer for the charged felony but only for a divertible misdemeanor, the fact that the prosecutor had initially charged a felony would not, in itself, necessarily preclude diversion." 46 Cal.3d at 86. Here, there is no provision for review even if the prosecutor were to make a decision based on constitutionally impermissible factors – such as racial or gender bias.

E. Whether The Legislature Could, If It Chose, Subject All Juveniles To Adult Sentences Has No Bearing On Whether The Legislature May Delegate The Power To Do So To The Executive

Contrary to the suggestion of the *Bravo* court, *Bravo, supra*, 108 Cal. Rptr. 2d at 519, the separation of powers issue is not whether the legislature has the constitutional authority to mandate that all juveniles be subject to adult criminal penalties. Worse, it is a well recognized logical and doctrinal fallacy that the "greater" power – here, to subject all juveniles

[36] Although Section 707(d)(4) provides that "the magistrate shall make a finding that reasonable cause exists to believe that the minor comes within the provisions of this subdivision" and, if cause is not found, shall transfer the case to juvenile court, that provision only extends to an evaluation of the juvenile's eligibility according to the "provisions of this subdivision." The criminal court's "reasonable cause" inquiry is thus limited to the eligibility criteria for prosecution in criminal court provided by Section 707(d) itself, namely, that the minor is age fourteen or older and is accused of committing an offense enumerated in Section 707(b).

to adult punishment – includes the "lesser" power to allow prosecutors to subject some of them to such punishment.[37]

First, there is nothing obviously "greater" about the power of the Legislature to make *all* juveniles subject to adult punishment than the significant power of a *different kind* to affect a sweeping delegation of power to decide what punishment is appropriate. The comparison between the Legislature's power to define punishment, on the one hand, and to delegate its authority to do so (the issue presented here), on the other, is one of apples and oranges – not greater and lesser. Indeed, when viewed in terms of their relative interference with the established power of the judiciary to decide what sentence is appropriate within a statutorily defined range, the latter action – delegating sentencing authority to prosecutors – is a far greater interference in the existing allocation of power between the branches. *Cf. Apprendi v. New Jersey* (2000) 530 U.S. 466, 481 (describing courts' longstanding discretion in England and early America to determine "the kind and extent of punishment to be imposed within limits fixed by law") (quoting *Williams v. New York* (1949) 337 U.S. 241, 246).

Second, as a matter of separation of powers doctrine, such a greater-includes-the-lesser argument begs the question presented. The issue in this case is not whether there is a "constitutional right to the juvenile justice system," *Bravo*, 108 Cal. Rptr. at 519, barring which the Legislature may subject juveniles to whatever degree of punishment it wishes. Rather, the Court here must determine whether the Legislature, having created a juvenile justice system and sentencing scheme, may forego exercising its power to prescribe punishment and instead give that power to the executive at the expense of power already vested in the judiciary. The case law uniformly recognizes that the Legislature may give only such power to the

[37] *Cf.* 44 *Liquormart, Inc. v. Rhode Island* (1996) 517 U.S. 484, 513 (opinion of Stevens, J.) (noting that the "entire Court" recognized as a matter of logic and law the error of such "greater includes the lesser" argument in the First Amendment context).

executive as requires the prosecutor to decide "whether to bring charges, against whom to bring charges, and what charges to bring," *Manduley, supra*, 104 Cal.App.Cal.Rptr.2d at 147, but not so as to authorize the prosecutor to determine what sentence to impose. As to this question, whether or not the power to impose the "lesser" burden of a juvenile court disposition is incorporated within the power to impose the "greater" burdens of an adult criminal sentence sheds no light.

Finally, contrary to the *Bravo* court's suggestion, *id.*, at 518, it is without question within the province of the judiciary to determine whether the power afforded prosecutors under Section 707(d) is in the nature of a "charging" decision traditionally held by the executive or a "sentencing" decision traditionally held by the judiciary. *See Marbury v. Madison* (1803) 5 U.S. 137. Separation of powers principles, codified expressly in Article III, section 3 of the California Constitution, are no less "law" subject to interpretation by the judiciary than any provision in the California Constitution or laws. On the contrary, interpreting the meaning of structural constitutional provisions is among the most important tasks of the judicial branch.

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V. CONCLUSION

Because Proposition 21 plainly violates the letter and the spirit of the law of separation of powers, and because the consequences of this violation are so harmful to California's youth, Amici request that this Court reverse the judgment of the court below.

Respectfully submitted,

Dated: September 20, 2001

MUNGER, TOLLES & OLSON LLP

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On behalf of Petitioners
MORGAN VICTOR MANDULEY, et al.

CERTIFICATE OF SERVICE

I, Cheryl Cunningham, declare as follows:

I am over the age of 18 years and not a party to the above-entitled action. On September 20, 2001, I sent a copy of the following document(s):

APPLICATION OF THE CENTER ON JUVENILE AND CRIMINAL JUSTICE, THE NATIONAL CENTER FOR YOUTH LAW, LEGAL SERVICES FOR CHILDREN, THE NATIONAL ASSOCIATION OF COUNSEL FOR CHILDREN, THE AMERICAN SOCIETY FOR ADOLESCENT PSYCHIATRY, THE AMERICAN ACADEMY OF CHILD AND ADOLESCENT PSYCHIATRY, THE CENTER FOR YOUNG WOMEN'S DEVELOPMENT, THE TRAUMA FOUNDATION, THE ASIAN LAW CAUCUS, THE ELLA BAKER CENTER FOR HUMAN RIGHTS, AND CHILDREN NOW FOR LEAVE TO FILE AN AMICUS CURIAE BRIEF
AND
AMICUS BRIEF OF THE CENTER ON JUVENILE AND CRIMINAL JUSTICE, THE NATIONAL CENTER FOR YOUTH LAW, LEGAL SERVICES FOR CHILDREN, THE NATIONAL ASSOCIATION OF COUNSEL FOR CHILDREN, THE AMERICAN SOCIETY FOR ADOLESCENT PSYCHIATRY, THE AMERICAN ACADEMY OF CHILD AND ADOLESCENT PSYCHIATRY, THE CENTER FOR YOUNG WOMEN'S DEVELOPMENT, THE TRAUMA FOUNDATION, THE ASIAN LAW CAUCUS, THE ELLA BAKER CENTER FOR HUMAN RIGHTS, AND CHILDREN NOW ON BEHALF OF PETITIONERS MORGAN VICTOR MANDULEY, ET AL.

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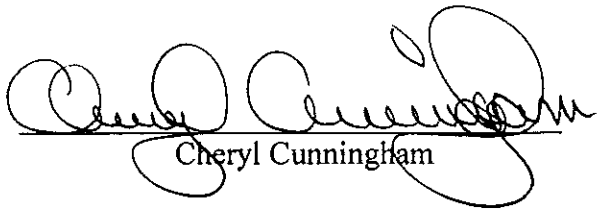
I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct. Signed this 20th day of September, 2001, in San Francisco, California.



Cheryl Cunningham