JuvenileRequestForJuryTrial[2012]

I.

THE COURT SHOULD GRANT THE REQUEST FOR A JURY TRIAL

In McKeiver v. Pennsylvania, 403 U.S. 528, 545 (1971), a plurality of the Supreme Court held that juveniles prosecuted in state court juvenile adjudications did not possess a constitutional right to a jury trial. That opinion, penned by Justice Blackmun and joined by Chief Justice Burger and Justices Stewart and White, resolved the consolidated cases of two Pennsylvania juveniles, referred to in the opinion as "No. 322," and approximately forty-six North Carolina juveniles, referred to as "No. 128."

Justice Brennan concurred in the plurality's result in No. 322 but dissented in No. 128, in an opinion which hinged upon the essential question of whether the states' juvenile adjudicatory proceedings were open to the public. McKeiver, 403 U.S. 554-56 (Brennan, J., concurring in part and dissenting in part). Justice Brennan reasoned that at stake was the public guardian function served by juries, and this could be satisfied by holding adjudication proceedings open to the public. See id. ("Juveniles able to bring the community's attention to bear upon their trials may therefore draw upon a reserv[oi]r of public concern unavailable to the adult criminal defendant."). By contrast, where a minor's rights are adjudicated in secrecy, with the potential of significant detention lying in the balance, the Due Process guarantee of "fundamental fairness" in the fact finding process compels the conclusion that a jury trial is appropriate, absent some other "feature of [the state's] juvenile proceedings that could substitute for public or jury trial in protecting the petitioners against misuse of the judicial process." Id. at 556. Consequently, United States v. Doe, 627 F.2d 181, 183 (9th Cir. 1980), notwithstanding, this Court should grant the minor CLIENTNAME's request for a jury trial in the instant case. See also United States v. Juvenile

Male, 590 F.3d 924, 931-32 & n. 7 (9th Cir. 2010), cert. granted and vacated as moot, 131 S. Ct. 2860 (2011) (noting the fundamentally non-public character of juvenile proceedings, but citing Circuit precedent applying McKeiver, without discussion of the public-private dichotomy).

II.

THE COURT SHOULD GRANT THE REQUEST FOR AN ADVISORY JURY TRIAL

In the event that the Court denies CLIENTNAME's request for a jury trial, he requests that this Court grant the instant request for an advisory jury.

A. Constitutional Framework.

McKeiver established that "fundamental fairness" is the applicable due process standard in juvenile proceedings. 403 U.S. at 543. Though the Court went on to rule that trial by jury was not a constitutional requirement in the less formal and more protective juvenile justice system, McKeiver, 403 U.S. at 545, it made clear that the holding did *not* preclude a juvenile from being permitted a jury trial. See id. at 548 ("There is, of course, nothing to prevent a juvenile court judge, in a particular case where he feels the need, or when the need is demonstrated, from using an advisory jury."). The Court noted that at the time the opinion was written ten states' statutes provided for a juvenile jury trials "under certain circumstances." Id. at 548-49. Thus, the Constitution does not prohibit juveniles from having their cases adjudicated by an advisory jury.

In addition, Justice Brennan's partial concurrence in McKeiver described that, absent some other constitutionally equivalent feature of a particular juvenile adjudicatory proceeding, it is trial by jury or a public trial that "protect[] [juveniles] against misuse of the judicial process." Id. at 556 (Brennan, J., concurring in part and dissenting in part). Adequate protection against this misuse – specifically, the risks of "oppression by Government" and "the compl[ia]nt, biased, or eccentric judge" – is essential to a finding that a particular juvenile adjudicatory proceeding

protects the juvenile's right to due process of law. Id. at 554. Because federal juvenile proceedings in the Southern District of California are closed to the public, the empaneling of an advisory jury would seem to be the minimum, constitutional requirement.

B. Statutory Framework.

The Juvenile Delinquency Act, 18 U.S.C. §§ 5031-5042 (1994), sets forth the procedures for federal delinquency proceedings in district court. Once a juvenile is certified to federal court for adjudicatory proceedings, the statute allows that "the court may be convened at any time and place within the district, in chambers or otherwise." 18 U.S.C. § 5032. Prior to 1974, the statute specifically stated immediately after this sentence that "[t]he proceeding shall be without a jury." 18 U.S.C. § 5033 (amended 1974); see United States v. Hill, 538 F.2d 1072, 1074 (4th Cir. 1976). Congress omitted that prohibition in its 1974 amendments to the Act. See Hill, 538 F.2d at 1074 (noting that the statute, as amended, "is silent as to trial by jury"). The omission strongly suggests that the legislature wished to eliminate the blanket restriction against jury trials in juvenile cases, thereby providing federal judges with the discretion to use a jury in certain circumstances.

Moreover, the statute's broad language allowing that "the court may be convened at any time and place" suggests that Congress wished to provide district court judges with the latitude to determine how the proceedings should be conducted. In interpreting a similarly broad (though perhaps more concrete) juvenile adjudication statute,[1] the California Supreme Court held that the juvenile court had a discretionary power to empanel an advisory jury to assist the judge. People v. Superior Court (Carl W.), 539 P.2d 807, 813 (Cal. 1975).

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[1] The California statute provides that juvenile court judges "control all proceedings . . . with a view to the expeditious and effective ascertainment of the jurisdictional facts." CAL. WELF. & INST. CODE § 680 (1998).

In Carl W., the juvenile defendant faced four charges in a juvenile proceeding, including murder and lewd and lascivious acts on a child. See id. at 807. Instead of granting the juvenile's motion for a jury trial, the trial court ordered that an advisory jury be empaneled "to aid and assist" the court. Id. at 809. The State sought a writ of mandate to compel the juvenile court to vacate its order, and the Supreme Court of California reviewed the matter. Although the Court acknowledged that the juvenile had neither a constitutional nor a statutory right to a jury, it stated that there was nothing to preclude the judge from using an advisory jury, and that it had not been an abuse of the court's discretion to order the empaneling thereof. See id. at 816. The Court emphasized that its decision was predicated on the fact that the jury was an advisory jury only, and that the juvenile judge was the party who would make the binding determination. See id. at 813 ("The factfinder remains the juvenile court judge (or the referee, as the case may be) who remains free to make a binding determination, supported by the evidence, which is directly contrary to suggested findings of the advisory jury.").

As in the California statute, there is nothing in the Juvenile Delinquency Act which precludes the use of an advisory jury. The facts of the instant case indicate that this would be a particularly appropriate case for an advisory jury to be empaneled.

C. Standard for Determination to Use Advisory Jury.

There is no federal case law addressing the standard applicable to district court judges' determinations on whether an advisory jury would be appropriate in a particular juvenile case. In the absence of federal law, California law is relevant and instructive. In Carl W., the California Supreme Court found no abuse of discretion where a trial court empaneled an advisory jury, because the trial court had addressed factors falling into three general categories:

> (a) [T]he nature and relative difficulty of the factfinding task in the particular case, (b) the seriousness of the charges from the point of view of probable disposition of the minor if they were sustained, and (c) the extent to which any salutary effects attendant upon an informal proceeding remained possible of achievement in the circumstances.

Carl W., 539 P.2d at 816. The trial court had weighed categories (a) and (b) against category (c) and listed the reasons for which an advisory jury was appropriate. See id. Specifically, the trial court had considered six reasons, all of which fit within the described categories: (1) the charges against the juvenile were very serious; (2) there would be a large number of witnesses, including expert witnesses; (3) the prosecution's case largely involved circumstantial evidence; (4) the case had received media coverage and the juvenile's name had been identified by the media as a suspect; (5) the potential sentence was large; and (6) the hearing was expected to last 4-5 days. See id. at 815-16. The trial court found that under those circumstances, the benefits of using an advisory jury outweighed the effect that the jury's presence would have on the informality of the proceedings. See id. at 816. The California Supreme Court upheld the court's finding, largely due to the trial court's careful analysis. See id.

Application of Carl W. to the facts and circumstances in this case supports a ruling that an advisory jury is appropriate. With respect to the first of three categories to be considered in the determination – "the nature and relative difficulty of the factfinding task in the particular case" – it cannot be overlooked that, in this case, the fact finder will have to make the very difficult factual determination of whether the juvenile knew that there was marijuana in the van he was driving. Carl W., 539 P.2d at 816. The government's case will necessarily be based upon circumstantial evidence, because it is impossible to see into the juvenile's mind. Additionally, because this case involves a government informant, the fact finder will be required to evaluate the testimony of this

witness. Listening to live testimony and determining the witness's credibility is precisely the arena in which the presence of a jury is most critical. Given the relative difficulty of the making of these factual determinations, an advisory jury to aid and assist the Court would be appropriate.

Applying the second Carl W. category – "the seriousness of the charges from the point of view of probable disposition of the minor if they were sustained – to the facts of this case also supports the defendant's argument in favor of the empaneling of an advisory jury." Carl W., 539 P.2d at 816. CLIENTNAME faces very serious charges. If found to be a juvenile delinquent, CLIENTNAME could be sentenced to a term of custody that extends beyond the time when he reaches the age of majority. It is appropriate to approach a case involving a possible six-year sentence with a greater degree of formality.

The final category considers whether it remains possible to retain some of the desirable benefits that stem from the informality of a juvenile court proceeding. Here, it should be noted that, aside from the presence of twelve members of the jury, there will be no other members of the public present. This provides more privacy than does the Pennsylvania juvenile court system, examined by the United States Supreme Court in McKeiver, in which there was no statutory ban on the admission of members of the public to juvenile trials. See McKeiver, 403 U.S. at 555 (Brennan, J., concurring in part and dissenting in part). In fact, as mentioned above, Justice Brennan's concurrence in McKeiver was based on the fact that the Pennsylvania system *did* admit the public, which was seen to provide a means for the juvenile to protect herself from possible oppression. See id. This is of particular relevance in the instant case, where CLIENTNAME is a ?-year-old boy, who was involved in a serious offense by an adult who exploited him.

In addition, as in the Carl W. case, an element of formality has already been introduced

and, as a result, the empaneling of an advisory jury will not greatly affect the tone of the proceeding. As it is, the case will require testimony from witnesses, including expert witnesses, cross-examination of those witnesses, and the rules of evidence will be applicable, because the main element of the charged offense – the issue of knowledge – is very much in dispute.

Thus, applying the Carl W. test to the instant case demonstrates that the benefits of an advisory jury clearly outweigh any of its potential problems. The case involves serious charges which require evaluation of the credibility of various witnesses. A jury is particularly suited to complete this task. The presence of the jury will not violate the juvenile's privacy, and the community's presence will lend a welcome protection to CLIENTNAME's due process rights.

D. Weight of the Advisory Jury's Decision.

Although some statutes create frameworks whereby an advisory jury has a specific role in the final decision, most statutes are silent on the precise weight a judge is to give the advisory jury's decision. Compare FED. R. CIV. P. 39(c) ("In all actions not triable of right by a jury the court upon motion or of its own initiative may try any issue with an advisory jury."); with Harris v. Alabama, 513 U.S. 504, 505, 509 (1995) (noting that Florida's capital sentencing statute has been interpreted to require the trial judge to give "great weight" to the jury's recommendation, while Alabama's capital sentencing scheme only requires the judge to "consider" the jury's recommendation). In Hamm v. Nasatka Barriers, 166 F.R.D. 1 (D. D.C. 1996), the court considered whether an advisory jury was permissible in a case arising under the Federal Tort Claims Act, a statute which explicitly states that claims against the government "shall be tried by the court without a jury." 28 U.S.C.A. § 2402 (1997). The court concluded that an advisory jury would be permissible despite the statutory language. See Hamm, 166 F.R.D. at 2. In ruling so,

the court relied upon the language of Federal Rule of Civil Procedure 39(c), which provides for an advisory jury. See FED. R. CIV. P. 39(c). The court wrote:

> An advisory jury is an optional aid to an independent court, not the fact finder or decision-maker . . . An advisory verdict has no force, other than persuasive, on the court, which remains the sole and final decision-maker.

Hamm, 166 F.R.D. at 3. Although a case involving the Federal Tort Claims Act is different from a juvenile criminal proceeding, this explanation of the advisory jury's role applies equally to the latter proceeding. The advisory jury is merely a tool to help the district judge in the fact-finding process. The ultimate fact-finder, however, is the district judge.