

# The Burger Court Opinion Writing Database

*McKeiver v. Pennsylvania*  
403 U.S. 528 (1971)

Paul J. Wahlbeck, George Washington University  
James F. Spriggs, II, Washington University  
Forrest Maltzman, George Washington University



36  
Supreme Court of the United States  
Washington, D. C. 20543

May 26, 1971

CHAMBERS OF  
THE CHIEF JUSTICE

To: Mr. Justice Black  
Mr. Justice Douglas  
Mr. Justice Harlan  
Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Blackmun

No. 322 - McKeiver v. Pennsylvania  
No. 128 - In re Barbara Burrus et al

From: The Chief Justice

Circulated: MAY 26 1971

Recirculated: \_\_\_\_\_

MEMORANDUM TO THE CONFERENCE:

I join the Court's opinion for it marks a pause, at least, in the dismantling of the juvenile court system.

Regards,

WRB

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MR. CHIEF JUSTICE BURGER, concurring.

The inescapable implications of what this Court has held previously in imposing due process requirements on juvenile trials is that if only the juvenile court system had worked out more nearly its extravagant "advance billing," no constitutional difficulties would have been seen to exist. If we measured the whole spectrum of criminal justice by its "success" it would indeed be in grave jeopardy -- as perhaps it is.

The whole concept of juvenile courts rested on an agreed premise that youthful offenders ought to be shielded from the trauma of a criminal trial with its panoply of indictment, preliminary hearings, jury selection, and the contention and tension of the adversary process.

Step by step the Court has abandoned these concepts while wistfully professing to cling to them. And step by step we have moved the juvenile into the very atmosphere society thought to spare him.

It remains to be seen whether we can salvage the hopes for special treatment for youth offenders.

CHAMBERS OF  
THE CHIEF JUSTICE

Supreme Court of the United States  
Washington, D. C. 20543

June 14, 1971

Re: No. 322 - McKeiver v. Pennsylvania  
No. 128 - In re Barbara Burrus

Dear Harry:

Please join me in your latest circulation in the  
above. I withdraw my earlier concurrence.

Regards,

WRB

Mr. Justice Blackmun

cc: The Conference

Deck Copy  
Rec'd  
5-18

4th DRAFT

SUPREME COURT OF THE UNITED STATES.

Nos. 322 AND 128.—OCTOBER TERM, 1970

Joseph McKeiver and  
Edward Terry,  
Appellants,  
322                  *v.*  
State of Pennsylvania. } On Appeal From the Supreme Court of Pennsylvania, Eastern District.

In re Barbara Burrus et al.,  
128 Petitioners. } On Writ of Certiorari to the  
Supreme Court of North  
Carolina.

[May —, 1971]

MR. JUSTICE DOUGLAS, dissenting.

These cases from Pennsylvania and North Carolina present the issue of the right to a jury trial for offenders charged in juvenile court and facing a possible incarceration until they reach their majority. I believe the guarantees of the Bill of Rights, made applicable to the States by the Fourteenth Amendment, require a jury trial.

In the Pennsylvania cases one of the appellants was charged with robbery (18 Pa. Stat. Ann. § 4704), larceny (18 Pa. Stat. Ann. § 4807), and receiving stolen goods (18 Pa. Stat. Ann. § 4817) as acts of juvenile delinquency. 11 Pa. Stat. Ann. § 246. He was found a delinquent and placed on probation. The other appellant was charged with assault and battery on a police officer (18 Pa. Stat. Ann. § 4708) and conspiracy (18 Pa. Stat. Ann. § 4302) as acts of juvenile delinquency. On a finding of delinquency he was committed to a youth center. Despite the fact that the two appellants, aged 15 and 16, would face potential incarceration until their majority, 11 Pa. Stat. Ann. § 250, they were denied a jury trial.

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5-20

5th DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 322 AND 128.—OCTOBER TERM, 1970

Joseph McKeiver and Edward Terry, Appellants, 322 v. State of Pennsylvania.	On Appeal From the Supreme Court of Pennsylvania, Eastern District.
In re Barbara Burrus et al., 128 Petitioners.	On Writ of Certiorari to the Supreme Court of North Carolina.

[May —, 1971]

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE MARSHALL concurs, dissenting.

These cases from Pennsylvania and North Carolina present the issue of the right to a jury trial for offenders charged in juvenile court and facing a possible incarceration until they reach their majority. I believe the guarantees of the Bill of Rights, made applicable to the States by the Fourteenth Amendment, require a jury trial.

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6th DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 322 AND 128.—OCTOBER TERM, 1970

Joseph McKeiver and  
Edward Terry,  
Appellants,  
322                    v.  
State of Pennsylvania. } On Appeal From the Supreme Court of Pennsylvania, Eastern District.

In re Barbara Burrus et al., 128 Petitioners. On Writ of Certiorari to the Supreme Court of North Carolina

[June 1971]

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE BLACK and MR. JUSTICE MARSHALL concur, dissenting.

These cases from Pennsylvania and North Carolina present the issue of the right to a jury trial for offenders charged in juvenile court and facing a possible incarceration until they reach their majority. I believe the guarantees of the Bill of Rights, made applicable to the States by the Fourteenth Amendment, require a jury trial.

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70-322

Supreme Court of the United States

Memorandum

6/6/1921

Dear Henry  
When we know  
+ know come  
our place may  
+ have a decent  
wheel barrow &  
thorough pen  
to you

To: The Chief Justice  
Mr. Justice Black  
Mr. Justice Harlan  
Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Blackmun

From: Douglas, J.

SUPREME COURT OF THE UNITED STATES

STATES circulated:

Nos. 322 AND 128.—OCTOBER TERM, 1978 Recirculated: 6-21

Joseph McKeiver and  
Edward Terry,  
Appellants,  
322 *v.*  
State of Pennsylvania. } On Appeal From the Su-  
preme Court of Pennsyl-  
vania, Eastern District.

In re Barbara Burrus et al., } On Writ of Certiorari to the  
128 Petitioners. } Supreme Court of North  
Carolina.

[June 21, 1971]

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE BLACK and MR. JUSTICE MARSHALL concur, dissenting.

These cases from Pennsylvania and North Carolina present the issue of the right to a jury trial for offenders charged in juvenile court and facing a possible incarceration until they reach their majority. I believe the guarantees of the Bill of Rights, made applicable to the States by the Fourteenth Amendment, require a jury trial.

In the Pennsylvania cases one of the appellants was charged with robbery (18 Pa. Stat. Ann. § 4704), larceny (18 Pa. Stat. Ann. § 4807), and receiving stolen goods (18 Pa. Stat. Ann. § 4817) as acts of juvenile delinquency. 11 Pa. Stat. Ann. § 246. He was found a delinquent and placed on probation. The other appellant was charged with assault and battery on a police officer (18 Pa. Stat. Ann. § 4708) and conspiracy (18 Pa. Stat. Ann. § 4302) as acts of juvenile delinquency. On a finding of delinquency he was committed to a youth center. Despite the fact that the two appellants, aged 15 and 16, would face potential incarceration until their majority, 11 Pa. Stat. Ann. § 250, they were denied a jury trial.

To: The Chief Justice  
Mr. Justice Black  
Mr. Justice Douglas ✓  
Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Blackmun

1st DRAFT

**SUPREME COURT OF THE UNITED STATES.**

From: Harlan, J.

JUN 11 1971

Nos. 322 AND 128.—OCTOBER TERM, 1970

**Circulated**

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Recirculated:

<p>Joseph McKeiver and Edward Terry, Appellants, 322                   <i>v.</i> State of Pennsylvania</p>	<p style="margin: 0;">}</p>	<p>On Appeal From the Supreme Court of Pennsylvania, Eastern District.</p>
<p>In re Barbara Burrus et al., 128                   Petitioners.</p>		<p>On Writ of Certiorari to the Supreme Court of North Carolina.</p>

[June —, 1971]

MR. JUSTICE HARLAN, concurring in the judgments.

If I felt myself constrained to follow *Duncan v. Louisiana*, 391 U. S. 145 (1968), which extended the Sixth Amendment right of jury trial to the States, I would have great difficulty, upon the premise seemingly accepted in my Brother BLACKMUN's opinion, in holding that the jury trial right does not extend to state juvenile proceedings. That premise is that juvenile delinquency proceedings have in practice actually become in many, if not all, respects criminal trials. But see my concurring and dissenting opinion in *In re Gault*, 387 U. S. 1, 65 (1967). If that premise be correct, then I do not see why, given *Duncan*, juveniles as well as adults would not be constitutionally entitled to jury trials, so long as juvenile delinquency systems are not restructured to fit their original purpose. When that time comes I would have no difficulty in agreeing with my Brother BLACKMUN, and indeed with my Brother WHITE, the author of *Duncan*, that juvenile delinquency proceedings are beyond the pale of *Duncan*.

To: The Chief Justice  
Mr. Justice Black  
Mr. Justice Douglas  
Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Blackmun

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

From: Harlan, J.

Nos. 322 AND 128.—OCTOBER TERM, 1970

Circulated:

In re Barbara Burrus et al., } On Writ of Certiorari to the  
128 Petitioners. } Supreme Court of North  
Carolina.

[June 21, 1971]

MR. JUSTICE HARLAN, concurring in the judgments.

If I felt myself constrained to follow *Duncan v. Louisiana*, 391 U. S. 145 (1968), which extended the Sixth Amendment right of jury trial to the States, I would have great difficulty, upon the premise seemingly accepted in my Brother BLACKMUN's opinion, in holding that the jury trial right does not extend to state juvenile proceedings. That premise is that juvenile delinquency proceedings have in practice actually become in many, if not all, respects criminal trials. But see my concurring and dissenting opinion in *In re Gault*, 387 U. S. 1, 65 (1967). If that premise be correct, then I do not see why, given *Duncan*, juveniles as well as adults would not be constitutionally entitled to jury trials, so long as juvenile delinquency systems are not restructured to fit their original purpose. When that time comes I would have no difficulty in agreeing with my Brother BLACKMUN, and indeed with my Brother WHITE, the author of *Duncan*, that juvenile delinquency proceedings are beyond the pale of *Duncan*.

Circulated  
6-7-71

1st DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 322 AND 128.—OCTOBER TERM, 1970

Joseph McKeiver and  
Edward Terry,  
Appellants,  
322 *v.*  
State of Pennsylvania. } On Appeal From the Su-  
preme Court of Pennsyl-  
vania, Eastern District.

In re Barbara Burrus et al., } On Writ of Certiorari to the  
128 Petitioners. } Supreme Court of North  
Carolina.

[June —, 1971]

MR. JUSTICE BRENNAN, concurring in No. 322 and dissenting in No. 128.

I agree with the Court that the proceedings below in these cases were not "criminal prosecutions" within the meaning of the Sixth Amendment. For me, therefore, the question in these cases is whether jury trial is among the "essentials of due process and fair treatment," *In re Gault*, 387 U. S. 1, 30 (1967), required during the adjudication of a charge of delinquency based upon acts which would constitute a crime if engaged in by an adult. See *In re Winship*, 397 U. S. 358, 359 and n. 1 (1970). This does not, however, mean that the interests protected by the Sixth Amendment's guarantee of jury trial in all "criminal prosecutions" are of no importance in the context of these cases. The Sixth Amendment, where applicable, commands that these interests be protected by a particular procedure, that is, trial by jury. The Due Process Clause commands not a particular procedure, but only a result: in the Court's words, "fundamental fairness . . . in factfinding." In the context of these and similar juvenile delinquency proceedings, what this means

1, 3, 4

2nd DRAFT

To : The Chief Justice  
Mr. Justice Black  
Mr. Justice Douglas  
Mr. Justice Harlan  
Mr. Justice Stewart  
Mr. Justice White  
✓ Mr. Justice Marshall  
Mr. Justice Blackmun

## SUPREME COURT OF THE UNITED STATES

Nos. 322 AND 128.—OCTOBER TERM, 1970 from: Brennan, J.

Joseph McKeiver and  
Edward Terry,  
Appellants,  
322                    v.  
State of Pennsylvania.

In re Barbara Burrus et al.,  
128                    Petitioners.

Circulated:

On Appeal From the Supreme Court of Pennsylvania, Eastern District. 6/16/71

On Writ of Certiorari to the Supreme Court of North Carolina.

[June —, 1971]

MR. JUSTICE BRENNAN, concurring in No. 322 and dissenting in No. 128.

I agree with the plurality opinion's conclusion that the proceedings below in these cases were not "criminal prosecutions" within the meaning of the Sixth Amendment. For me, therefore, the question in these cases is whether jury trial is among the "essentials of due process and fair treatment," *In re Gault*, 387 U. S. 1, 30 (1967), required during the adjudication of a charge of delinquency based upon acts which would constitute a crime if engaged in by an adult. See *In re Winship*, 397 U. S. 358, 359, and n. 1 (1970). This does not, however, mean that the interests protected by the Sixth Amendment's guarantee of jury trial in all "criminal prosecutions" are of no importance in the context of these cases. The Sixth Amendment, where applicable, commands that these interests be protected by a particular procedure, that is, trial by jury. The Due Process Clause commands not a particular procedure, but only a result: in my Brother BLACKMUN's words, "fundamental fairness . . . in factfinding." In the context of these and similar juvenile delinquency pro-

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
**JUSTICE POTTER STEWART**

May 17, 1971

Re: Nos. 322 & 128 - McKeiver v. Pennsylvania

Dear Harry,

I am glad to join your opinion for the Court in these cases.

Sincerely yours,

P.S.

Mr. Justice Blackmun

### Copies to the Conference

To: The Chief Justice  
Mr. Justice Black  
Mr. Justice Douglas  
Mr. Justice Harlan  
Mr. Justice Brennan  
Mr. Justice Stewart  
~~✓~~ Mr. Justice Marshall  
Mr. Justice Blackmun

1st DRAFT

SUPREME COURT OF THE UNITED STATES

From: White, J.

Nos. 322 AND 128.—OCTOBER TERM, 1970

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Recirculated:

Joseph McKeiver and  
Edward Terry,  
Appellants,  
322                   v.  
State of Pennsylvania. } On Appeal From the Supreme Court of Pennsylvania, Eastern District.

In re Barbara Burus et al., } On Writ of Certiorari to the  
128 Petitioners. } Supreme Court of North  
Carolina.

[June —, 1971]

MR. JUSTICE WHITE, concurring.

Although the function of the jury is to find facts, that body is not necessarily or even probably better at the job than the conscientious judge. Nevertheless, the consequences of criminal guilt are so severe that the Constitution mandates a jury to prevent abuses of official power by insuring, where demanded, community participation in imposing serious deprivations of liberty and to provide a hedge against corrupt, biased, or political justice. We have not, however, considered the juvenile case a criminal proceeding within the meaning of the Sixth Amendment and hence automatically subject to all of the restrictions normally applicable in criminal cases. The question here is one of due process of law and I join the Court's opinion holding that the States are not required by that clause to afford jury trials in juvenile courts where juveniles are charged with acts.

The criminal law proceeds on the theory that defendants have a will and are responsible for their actions. A finding of guilt establishes that they have chosen to engage in conduct so reprehensible and injurious to others

Supreme Court of the United States  
Washington, D. C. 20549

CHAMBERS OF  
JUSTICE THURGOOD MARSHALL

May 19, 1971

Re: Nos. 128 and 322 - In re Burrus et al.

Dear Bill:

Please join me in your dissent.

Sincerely,

  
T.M.

Mr. Justice Douglas

cc: The Conference

To: The Chief Justice  
Mr. Justice Black  
Mr. Justice Douglas  
Mr. Justice Harlan  
Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall ✓

1st DRAFT

From: Blackmun, J.

SUPREME COURT OF THE UNITED STATES

Circulated: 5/12/71

Nos. 322 AND 128.—OCTOBER TERM, 1970 Recirculated:

Joseph McKeiver and Edward Terry, Appellants, 322 v. State of Pennsylvania.	On Appeal From the Supreme Court of Pennsylvania, Eastern District.
In re Barbara Burrus et al., 128 Petitioners.	On Writ of Certiorari to the Supreme Court of North Carolina.

[May —, 1971]

MR. JUSTICE BLACKMUN.

These cases present the narrow but precise issue whether the Due Process Clause of the Fourteenth Amendment assures the right to trial by jury in the adjudicative phase of a state juvenile court delinquency proceeding.

I

The issue arises understandably, for the Court in a series of cases already has emphasized due process factors protective of the juvenile:

1. *Haley v. Ohio*, 332 U. S. 596 (1948), concerned the admissibility of a confession taken from a 15-year-old boy on trial for first-degree murder. It was held that, upon the facts there developed, the Due Process Clause barred the use of the confession. MR. JUSTICE DOUGLAS, in an opinion in which three other Justices joined, said, "Neither man nor child can be allowed to stand condemned by methods which flout constitutional requirements of due process of law." 332 U. S., at 601.

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P. 21  
B  
To: The Chief Justice  
Mr. Justice Black  
Mr. Justice Douglas ✓  
Mr. Justice Harlan  
Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall

2nd DRAFT

From: Blackmun, J.

Circulated:

Nos. 322 AND 128.—OCTOBER TERM, 1970

Recirculated:

6/3/71

Joseph McKeiver and  
Edward Terry,  
Appellants,      } On Appeal From the Su-  
322              v.      } preme Court of Pennsyl-  
                    State of Pennsylvania.      } vania, Eastern District.  
In re Barbara Burrus et al.,      } On Writ of Certiorari to the  
128              Petitioners.      } Supreme Court of North  
                    Carolina.

[June —, 1971]

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To: The Chief Justice  
Mr. Justice Black  
Mr. Justice Douglas  
Mr. Justice Harlan  
Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall

3rd DRAFT

From: Blackmun, J.

**SUPREME COURT OF THE UNITED STATES**

Nos. 322 AND 128.—OCTOBER TERM, 1970 Recirculated:

6/15/71

Joseph McKeiver and  
Edward Terry,  
Appellants,  
322                   v.  
State of Pennsylvania.

On Appeal From the Supreme Court of Pennsylvania, Eastern District.

In re Barbara Burrus et al.,  
128                   Petitioners.

On Writ of Certiorari to the Supreme Court of North Carolina.

[June —, 1971]

MR. JUSTICE BLACKMUN announced the judgment of the Court and an opinion in which THE CHIEF JUSTICE, MR. JUSTICE STEWART, and MR. JUSTICE WHITE join.

These cases present the narrow but precise issue whether the Due Process Clause of the Fourteenth Amendment assures the right to trial by jury in the adjudicative phase of a state juvenile court delinquency proceeding.

I

The issue arises understandably, for the Court in a series of cases already has emphasized due process factors protective of the juvenile:

1. *Haley v. Ohio*, 332 U. S. 596 (1948), concerned the admissibility of a confession taken from a 15-year-old boy on trial for first-degree murder. It was held that, upon the facts there developed, the Due Process Clause barred the use of the confession. MR. JUSTICE DOUGLAS, in an opinion in which three other Justices joined, said, "Neither man nor child can be allowed to stand condemned by methods which flout constitutional requirements of due process of law." 332 U. S., at 601.