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9 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**  
10 **COUNTY OF VENTURA**

11  
12 PEOPLE OF THE STATE OF  
13 CALIFORNIA,  
14 Plaintiff,

15 vs.

16 BRANDON McINERNEY,  
17 Defendant.

CASE NO. 2008005782

**REVISED DEMURRER;  
POINTS AND AUTHORITIES**

Date: July 24, 2008

Time: 1:30

Courtroom: 14

18  
19  
20 TO: GREGORY TOTTEN, DISTRICT ATTORNEY, VENTURA COUNTY AND  
21 TO THE CLERK OF THE SUPERIOR COURT:

22  
23 PLEASE TAKE NOTICE that on July 24, 2008 at 1:30 p.m. or as soon  
24 thereafter as the matter may be heard in Department 14 of the Ventura County Superior  
25 Court, the defendant Brandon McInerney, by and through his attorneys, will and hereby  
26 does demur to the Complaint, and will and hereby does move the Court for an order  
27 pursuant to Penal Code Sections 1007 and 1008, sustaining this Demurrer and  
28 dismissing this action. This Demurrer is made on all of the grounds stated in

1 Subsection (1) of Penal Code Section 1004. Further, this Demurrer is based on the  
2 Complaint and other documents contained in the file herein, on the accompanying  
3 Memorandum of Points and Authorities, on the attached Exhibits, and on such  
4 argument as may be presented at the hearing on this demurrer.

5  
6 Dated: June 25, 2008.

7  
8 Respectfully submitted,  
9 DUANE DAMMEYER, Public Defender

10  
11 By \_\_\_\_\_  
12 William Quest  
13 Senior Deputy Public Defender  
14 Attorney for Defendant  
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I.  
INTRODUCTION

Brandon McInerny should not be tried as an adult. When the tragic shooting of Larry King occurred on February 12, 2008, Brandon was just 19 days past his 14<sup>th</sup> birthday. If Brandon is convicted of the current charges as an adult, a mere 19 days will have ended any chance of Brandon being rehabilitated and instead will condemn him to a life in adult prison with no chance at parole until he is at least 65 years old. Given the current state of overcrowding and poor medical care in California prisons, it is quite possible that this 14 year old child could die in prison.

The prosecutor's decision to try Brandon as an adult and the law justifying it are unconstitutional on several grounds. First and foremost, the "direct file statute" which gives the district attorney the sole, unbridled discretion to imprison a child for life violates the Eighth Amendment of the United States Constitution prohibition against cruel and unusual punishment. Specifically, this sentencing scheme, codified under Welfare & Institutions Code § 707(d), conflicts with the holdings and reasoning of the U. S. Supreme Court's recent decisions in *Atkins v. Virginia* (2002) 536 U.S. 304 and *Roper v. Simmons* (2005) 543 U.S. 551.

In determining whether § 707(d) is unconstitutional under the Eighth Amendment, this Court is not bound by the California Supreme Court decision, *Mandulay v. Superior Court* (2002) 27 Cal.4th 537. *Mandulay* did not consider the present issue as to whether 707(d) violates the Eighth Amendment. In *Mandulay*, the Court's holding that §707(d) is constitutional is limited to findings that §707(d): (1) does not violate the United States and California constitutional guarantees of equal protection; (2) does not deny procedural due process; and (3) does not contravene the separation of powers principles. Therefore, this Court has the authority to declare §707(d) unconstitutional, regardless of *Mandulay*.

1 Further, the clear path the U.S. Supreme Court is now taking in connection with  
2 excessive penalties for juvenile offenders, coupled with the specific unduly harsh  
3 sentence faced by Brandon McNerny if convicted, invites renewed examination of  
4 whether the statute subjects defendant to the arbitrary whims and unbridled discretion  
5 of the prosecutor, in violation of his right to equal protection under the laws.

6 If the Court sustains this Demurrer on the grounds that charging him in adult  
7 court is unconstitutional, the district attorney may then refile the action in juvenile  
8 court.

## 9 10 **II. STATEMENT OF FACTS**

11 On February 12, 2008, the tragic shooting death of 15-year old Larry King  
12 occurred at E.O. Green Middle School in Port Hueneme. A mere 19 days prior,  
13 Brandon McNerny turned 14 years old. Despite the clear shortness of time between  
14 Brandon's 14<sup>th</sup> birthday and the shooting, within two days after the shooting the district  
15 attorney chose to charge Brandon McNerny as an adult. The District Attorney has  
16 charged Brandon McNerney with one count of murder in violation of Penal Code  
17 section 187. The Complaint further alleges two enhancements pursuant to Penal Code  
18 sections 12022.53 (use of a gun) and 422.75 (hate crime). Count 1 carries a mandatory  
19 minimum of 25 years with no possibility of parole followed by a life sentence. The  
20 gun enhancement carries a mandatory minimum of 25 years with no possibility of  
21 parole followed by a life sentence. The hate crime enhancement carries a 1-3 year  
22 consecutive term. Thus, the District Attorney's Office has exercised its charging  
23 discretion to expose this 14-year old defendant to a mandatory minimum sentence of 51  
24 years, meaning that if convicted, Brandon will reach age 65 before he becomes eligible  
25 for a parole hearing.

26 The District Attorney's power in this regard comes from Proposition 21, entitled  
27 "Gang Violence and Prevention Act of 1998." Approved in 2000, Proposition 21  
28 amended Welfare & Professions Code §707(d) to substantially widen the District

1 Attorney's authority to file charges against minors 14 years of age and older in superior  
2 court, rather than juvenile court, without any judicial determination as to fitness.

3 If Brandon McNerny is tried as a juvenile, and convicted, he will still face a  
4 lengthy incarceration period, and there will exist the very real potential of  
5 rehabilitation.

### 7 III. ARGUMENT

8 **A. Welfare & Institutions Code Section 707(d) - which mandates sentencing**  
9 **14-year old minors to life sentences without parole if the state**  
10 **prosecuting entity determines a minor should be tried as an adult -**  
11 **violates the Eighth Amendment prohibition on cruel and unusual**  
12 **punishment.**

13 The Eighth Amendment to the United States Constitution, applicable to the  
14 states through the Fourteenth Amendment, provides in relevant part that no cruel or  
15 unusual punishment shall be inflicted. “[I]t is a precept of justice that punishment for  
16 crime should be graduated and proportioned to [the] offense.” (*Atkins v. Virginia*  
17 (2002) 536 U.S. 304, 311, quoting, *Weems v. United States* (1910) 217 U.S. 349.) The  
18 Eighth Amendment protects “even those convicted of heinous crimes,” in recognition  
19 of the government’s duty “to respect the dignity of all persons.” (*Roper v. Simmons*  
20 (2005) 543 U.S. 551, 560.)

21 Under Welfare and Institutions Code section 707(d), a California prosecutor has  
22 the authority to file murder charges against a juvenile directly in superior court rather  
23 than in juvenile court. This exercise of prosecutorial discretion – transferring  
24 jurisdiction to adult criminal court for the crimes listed in the statute – is no longer  
25 subject to judicial review, a change effected by the passage of Proposition 21 in March  
26 2000. Once adult criminal charges are filed, the juvenile faces the corresponding adult  
27 sentences, for which mandatory minimums are commonly set by statute. Although  
28 Penal Code sections 1170.17 and Welfare & Institutions Code § 1732.6 appear to give  
an adult court discretion to sentence a juvenile tried in adult court as a juvenile, the

1 California Supreme Court held in *People v. Thomas* (2005) 35 Cal.4th 635 that judicial  
2 discretion to sentence a minor tried in adult court to a juvenile disposition was  
3 unavailable where the adult mandatory minimum sentence resulted in a release date  
4 beyond a juvenile offender's 25<sup>th</sup> birthday.

5 Thus, judicial discretion regarding sentencing, as well as any possibility of a  
6 juvenile or blended adult/juvenile disposition, are precluded by California's sentencing  
7 scheme for a juvenile charged with a serious offense, such as the defendant here.

8 After Proposition 21 was passed and the California Supreme Court decided  
9 *Mandulay*, the U. S. Supreme Court decided two seminal cases which abolished use of  
10 the death penalty on mentally retarded individuals as well as juveniles under the age of  
11 18. These decisions suggest a turning away from older standards - which allowed for  
12 the execution of individuals who are "less culpible" than an average adult - and a  
13 turning towards limiting excessive punishments for these classes of people.

14 In *Atkins, supra*, 536 U.S., at 321, the Court held that executions of mentally  
15 retarded criminals are cruel and unusual punishments prohibited by the Eighth  
16 Amendment. In so holding, the Court reversed its earlier opposite decision in *Penry v.*  
17 *Lynaugh* (1989) 492 U.S. 302. After *Atkins* was decided, the Supreme Court held, in  
18 *Roper, supra*, 543 U.S., p. 579, the Eighth and Fourteenth Amendments "forbid  
19 imposition of the death penalty on offenders who were under the age of 18 when their  
20 crimes were committed." Prior to *Roper*, the Supreme Court had already ruled in  
21 *Thompson v. Oklahoma* (1988) 487 U.S. 815, 838 (a plurality opinion), that the  
22 execution of minors under the age of 16 at the time of the crime violated the Eighth  
23 Amendment. *Roper*, therefore, extended the prohibition on execution of minors by two  
24 years.

25 In deciding *Roper*, the Court relied heavily upon the reasoning from *Atkins* and  
26 drew many parallels between the relative culpability of the mentally retarded as  
27 compared with minors. (*Roper, supra*, 543 U.S. at 564 and 574.) As with *Atkins*, the  
28 Supreme Court in *Roper* overturned a prior decision, *Stanford v. Kentucky* (1989) 492

1 U.S. 361, demonstrating a clear change in thinking on this issue. (*Id.* at 574. )

2 In interpreting the Eighth Amendment, the U.S. Supreme Court has established  
3 the requisite inquiry into the ““evolving standards of decency that mark the progress of  
4 a maturing society’ to determine which punishments are so disproportionate as to be  
5 cruel and unusual.” (*Id.* at 561.)

6 In both *Atkins* and *Roper*, the Court analyzed the question as to whether the  
7 punishment for these two classes of individuals was unconstitutionally disproportionate  
8 by looking at the following factors: (1) the current national consensus and whether  
9 there was a “consistency of direction of change;” (2) The reasons behind the national  
10 consensus, i.e. what about mental retardation and youth justifies finding them less  
11 culpable for the purposes of sentencing; and (3) whether imposition of the harsh  
12 punishment on these two classes meets the dual social purposes of retribution and  
13 deterrence. An analysis of the Supreme Court’s reasoning and conclusions on these  
14 factors as applied to Welfare & Institutions Code §707(d) demonstrates that the §707(d)  
15 sentencing scheme constitutes excessive punishment for minors and is, therefore,  
16 unconstitutional.

17 **1. There is a National Consensus on Prohibiting State Use of Excessive**  
18 **Punishment on Minors Which Welfare & Institutions Code §707**  
19 **Allows.**

20 In determining the current “standards of decency”, or national consensus, to use  
21 in reviewing the proportionality of the punishment to determine whether the  
22 punishment is excessive, the Court views enacted legislation as the “clearest most  
23 reliable objective evidence of contemporary values.” (*Atkins, supra*, 536 U.S. at 312  
24 (quoting *Penry, supra*, 492 U.S. at 331.) In *Atkins*, the Court described how it would  
25 determine whether there was a national consensus against using the death penalty on  
26 mentally retarded criminal offenders, stating:

27 It is not so much the number of States that is significant, but  
28 the consistency of the direction of change. Given the well-

1 known fact that anticrime legislation is far more popular than  
2 legislation providing protections for persons guilty of violent  
3 crime, the large number of States prohibiting the execution of  
4 mentally retarded persons (and the complete absence of States  
5 passing legislation reinstating the power to conduct such  
6 executions) provides powerful evidence that today our society  
7 views mentally retarded offenders as categorically less  
8 culpable than the average criminal. (*Id.* at 316; interior  
9 footnote omitted.)

10 The Court noted that national consensus may further be shown through broader  
11 social and professional consensus, for instance “organizations with germane expertise”  
12 who adopt an official position against the practice. (*Id.* at 316, fn. 21.)

13 In *Roper*, the Court compared the level of national consensus on abolishing use  
14 of the death penalty on the mentally retarded, with that on abolishing the death penalty  
15 use on those under the age of 18. (*Roper, supra*, 543 U.S. at 564-566.) Importantly,  
16 although the Court acknowledged that the change of consensus against use of the death  
17 penalty was less dramatic than seen in *Atkins*, the Court nonetheless concluded that  
18 there was a significant change in the consensus, and that “the same consistency of  
19 direction of change had been demonstrated.” (*Id.* at 565-566.)

20 The Court found support for a national consensus against the death penalty for  
21 juveniles in several forms. First, a majority of the States – 30 – prohibited the  
22 execution of juveniles either by express legislation or judicial mandate. (*Id.* at 564.)

23 Second, even among those states who had legislation allowing juvenile capital  
24 punishment, in practice such executions were rare with only three states having  
25 executed juvenile offenders in the 10 years prior. (*Id.* at 565.)

26 Third, a national trend against juvenile capital punishment was evidenced –  
27 examining the 15-year intervening period between the *Stanford* and the *Roper* decisions  
28 – by the growing number of states that had abandoned the practice legislatively, and the  
absence of states that had since reinstated juvenile executions. (*Id.* at 564-566.)

After review of the indicia of national consensus on prohibiting use of the death

1 penalties on anyone younger than 18, the Court concluded:

2           As in *Atkins*, the objective indicia of consensus in this case –  
3           the rejection of the juvenile death penalty in the majority of  
4           States; the infrequency of its use even where it remains on the  
5           books; and the consistency in the trend toward abolition of  
6           the practice – provide sufficient evidence that today our  
7           society views juveniles, in the words *Atkins* used respecting  
8           the mentally retarded, as “categorically less culpable than the  
9           average criminal.” (*Id.* at 567; quoting *Atkins, supra*, 536  
10           U.S. at 316.)

11           Here, there clearly is a national consensus on prohibiting the state use of  
12           excessive punishment on minors that Welfare & Institutions Code §707 allows. Indeed,  
13           most states do not follow such a harsh statutory scheme, which thwarts judicial review  
14           both at transfer and sentencing and thus removes the constitutional protections against a  
15           disproportionate penalty. Only 14 states other than California have a “direct file  
16           statute” which gives the district attorney unbridled discretion over trying juveniles as  
17           young as 14 years of age as adults and subjecting them to life sentences. (State Juvenile  
18           Justice Profiles, *Trying Juveniles as Adults* (as amended through 2006 legislative  
19           session, P. Griffen; “Trying Juveniles as Adults,” State Juvenile Justice Profiles (as  
20           amended through 2006 legislative), National Center for Juvenile Justice; P. Griffin,  
21           “Trying and Sentencing Juveniles as Adults: An Analysis of State Transfer and  
22           Blended Sentencing Laws” (October 2003), Office of Juvenile Justice and Delinquency  
23           Prevention/ National Center for Juvenile Justice, **(attached as Exhibit A.)**)

24           Further, that discretion is not absolute in a number of those states, including  
25           Nebraska and Wyoming, where a prosecutor must satisfy enumerated criteria. (*See*  
26           *Exhibit A.*)

27           Further, aside from §707(d), California law generally has more strict sentencing  
28           schemes applicable to juveniles in adult courts than nearly any other state. For  
          instance, in California, the sentencing judge is severely restricted in his or her discretion  
          to impose a juvenile disposition. (See Penal Code § 1170.17; Welfare & Institutions

1 Code § 1732.6; and *People v. Thomas* (2005) 35 Cal.4<sup>th</sup> 635 holding judicial discretion  
2 to apply juvenile disposition unavailable where adult statutory sentence extends beyond  
3 a juvenile offender's 25<sup>th</sup> birthday.) In contrast, half of those 14 states with direct filing  
4 statutes also have provisions for blended sentencing in the criminal courts, the broadest  
5 of which allow a juvenile disposition whenever a juvenile has been convicted in adult  
6 criminal court, regardless of the offense. (See Exhibit A, *supra*, at 16-17.) This data  
7 plainly establishes national "objective indicia of consensus" against the statutory  
8 scheme that allows the prosecutor to unilaterally determine Brandon's exposure to the  
9 stark, mandatory minimum sentence of 51 years to life.

10 Beyond a national consensus against the type of unduly excessive sentencing  
11 scheme provided for under §707(d), there is also an international consensus against the  
12 imposition of adult-length sentences for juveniles. In *Roper*, the Court found  
13 confirmation of its holding "in the stark reality that the United States is the only country  
14 in the world that continues to give official sanction to the juvenile death penalty,"  
15 noting that in prior cases the Court had "recognized the relevance of the views of the  
16 international community in determining whether a punishment is cruel and unusual."  
17 (*Roper, supra*, 543 U.S. at 575-76.) Recounting international covenants as well as the  
18 laws of the United Kingdom that prohibit capital punishment for juvenile offenders, the  
19 Court declared that "[i]t is proper that we acknowledge the overwhelming weight of  
20 international opinion against the juvenile death penalty, resting in large part on the  
21 understanding that the instability and emotional imbalance of young people may often  
22 be a factor in the crime." (*Id.* at 578.) Indeed, as discussed in *Roper*, the U.S. Supreme  
23 Court has long recognized the relevance of international law and practice in  
24 interpreting the Eighth Amendment's prohibition of cruel and unusual punishment. (*Id.*  
25 at 575.)

26 Furthermore, international law is emphatic in its prohibition of mandatory  
27 minimum sentences for children. The almost universally accepted United Nations  
28 Convention on the Rights of the Child, 1577 U.N.T.S. 3 (Nov. 20, 1989), explicitly

1 requires a “variety of dispositions [to] be available to ensure that children are dealt with  
2 in a manner appropriate to their well-being and proportionate both to their  
3 circumstances and the offence.” (Art. 41(4).) Similarly, United Nations Rules for the  
4 Protection of Juveniles Deprived of Their Liberty, G.A. Res. 45/113, 2 (Dec. 14,  
5 1990), provide that “[t]he length of the sanction should be determined by the judicial  
6 authority, without precluding the possibility of [the child’s] early release.” (*See also*,  
7 U.N. Standard Minimum Rules for the Administration of Juvenile Justice, G.A. Res.  
8 40/33, 18.1 (Nov. 29, 1985), mandating a “large variety of disposition measures . . .  
9 allowing for flexibility so as to avoid institutionalization to the greatest extent  
10 possible.”)

11 It is particularly significant that the United Kingdom, whose experience has been  
12 accorded special weight by the U.S. Supreme Court due to the “historic ties between  
13 our countries and in light of the Eighth Amendment’s own origins” (*Roper* at 577), had  
14 abolished long sentences without the possibility of parole for children convicted of  
15 murder as far back as 1965. (*See, Regina v. Sec’y of State for the Home Dep’t ex parte*  
16 *V & T*, (1998) A.C. 407, 423-37 (H.L.)) Furthermore, the Supreme Court of Appeal of  
17 South Africa recently reached a similar conclusion, holding that mandatory sentencing  
18 legislation did not apply to children, stating, “[t]he overriding message of the  
19 international instruments . . . is that child offenders should not be deprived of their  
20 liberty except as a measure of last resort and, where incarceration must occur, the  
21 sentence must be individualized with an emphasis on preparing the child offender . . .  
22 for his or her return to society.” (*Brandt v. State* (2005) All SA 1 (SCA) at 16-20 (S.  
23 Afr. 2005).)

24 In addition to the national and international common findings against the  
25 sentencing scheme allowed under §707(d), there has been a local outcry against the  
26 Ventura County District Attorney’s decision to try Brandon McNerny as an adult. A  
27 majority of the staff members of E.O. Green Jr. High School - the site of the shooting  
28 death of Larry King - have signed a petition urging that defendant be tried as a juvenile

1 and not as an adult. (**Attached as Exhibit B.**) Equally important, many of Brandon  
2 McInerney's fellow students spontaneously signed a separate petition requesting that  
3 Brandon be tried as a juvenile. ( **Attached as Exhibit C.**) This outpouring indicates a  
4 strong neighborhood consensus against the §707(d) sentencing scheme and the District  
5 Attorney's ability to make this decision unilaterally.

6 Finally, a national coalition of twenty-seven groups that represent lesbian, gay,  
7 bisexual, and transgender (LGBT) rights, has urged the District Attorney to try Brandon  
8 as a juvenile, stating "we call on prosecutors not to compound this tragedy with another  
9 wrong - we call on them to treat [Brandon] as a juvenile, not as an adult." (**Attached as**  
10 **Exhibit D).**

11 Given the above, it is clear that a sufficient consensus exists against sentencing a  
12 14-year old juvenile to a life in prison. This consensus supports an order declaring that  
13 Welfare & Institutions Code §707(d) allows for cruel and unusual punishment of  
14 juvenile offenders.

15 **2. The reasons behind the national consensus against sentencing 14-year**  
16 **old juveniles to life sentence without parole justifies treating juveniles**  
17 **as less culpable than adult offenders.**

18 In *Atkins* and *Roper*, in reviewing the proportionality of punishment, the Court  
19 looked beyond merely whether there was a national consensus against the use of the  
20 death penalty on the mentally retarded and those under 18, and analyzed why there was  
21 such a consensus. Both Courts found: (1) that substantial cognitive differences between  
22 the two classes as compared with adult offenders justifies treating these two classes as  
23 less culpable; and (2) with these two classes, the imposition of the harsh punishment on  
24 these two classes does not meet the dual social purposes of retribution and deterrence.

25 **i. The three fundamental differences justifying diminished**  
26 **culpability.**

27 In *Atkins*, the Court explained that mentally retarded individuals are considered  
28 less culpable as a result of their impairment because they have diminished capacity to

1 understand and process information, communicate, abstract from mistakes and learn  
2 from experience, engage in logical reasoning, control impulses, understand others'  
3 reactions. (*Atkins, supra*, 536 U.S. at 318.) The Court also stressed that these  
4 individuals' general lack of premeditation and strong tendency to act impulsively  
5 served as further justification to be considered less culpable. (*Id.*)

6 In *Roper*, the Court found that juveniles under the age of 18 did not possess the  
7 "extreme culpability" that would classify them among the "worst offenders" deserving  
8 of the death penalty. (*Roper, supra*, 543 U.S. at 570.) The Court reasoned that there  
9 were three fundamental differences between juveniles and adults which led to this  
10 conclusion.

11 First, the Court noted that juveniles under the age of 18 have "a lack of maturity  
12 and an underdeveloped sense of responsibility" which often results in "impetuous and  
13 ill-considered actions and decisions." (*Id.* at 569; quoting *Johnson v. Texas* (1978) 509  
14 U.S. 350, 367, and citing *Eddings v. Oklahoma* (1978) 438 U.S. 104, 115-116.) The  
15 Court noted that "adolescents are overrepresented statistically in every category of  
16 reckless behavior." (*Id.* citing Arnett, *Reckless Behavior in Adolescence: A*  
17 *Developmental Perspective*, 12 *Developmental Review* 339 (1992).) Finally, the Court  
18 noted that all states recognize juveniles' comparative lack of maturity by prohibiting  
19 those under 18 years of age from voting, serving on juries, or marrying without parental  
20 consent. (*Id.*)

21 The second fundamental difference found by the Court was that juveniles have a  
22 heightened sense of vulnerability and susceptibility to "negative influences and outside  
23 pressures, including peer pressure." (*Id.* at 569.) Citing a psychological study on  
24 adolescence and the juvenile death penalty, the Court noted that: "[A]s legal minors,  
25 [juveniles] lack the freedom that adults have to extricate themselves from a  
26 criminogenic setting." (*Id.* at 569; citing Steinberg & Scott, *Less Guilty By Reason of*  
27 *Adolescence: Developmental Immaturity, Diminished Reponsibility, and the Juvenile*  
28 *Death Penalty*, 58 *Am. Psychologist* 1009, 1014 (2003).)

1 Finally, the third broad difference was characterized by the Court as arising from  
2 the fact that “the character of a juvenile is not as well formed as that of an adult. The  
3 personality traits of juveniles are more transitory, less fixed.” (*Id.* at 570; citing *E.*  
4 *Eriksen, Identity: Youth and Crisis* (1968).)

5 In *Roper*, the Court concluded that these three fundamental differences  
6 supported a finding that individuals under 18 should be forgiven more than adults for  
7 “failing to escape negative influences in their whole environment.” (*Id.*) The Court  
8 further found that because juveniles struggle with defining their identity “it is less  
9 supportable to conclude that even a heinous crime committed by a juvenile is evidence  
10 of a irretrievably depraved character” and that there is a greater possibility that a  
11 juvenile’s character deficiencies will be reformed versus an adult’s character  
12 deficiencies. (*Id.*)

13 Just as the U.S. Supreme Court in *Roper* characterized capital punishment as  
14 limited to the “worst offenders,” life imprisonment is reserved for those convicted of  
15 the most serious crimes and whose culpability makes them deserving of this harsh  
16 penalty. (*Roper, supra*, 543 U.S. at 570.)

17 It is worth noting that the U. S. Supreme Court has characterized “the  
18 punishment of life imprisonment without the possibility of parole” as in itself “a severe  
19 sanction, in particular for a young person.” (*Id.*, at 572.)

20 The defendant here, by virtue of his young age – and utilizing the three factors  
21 outlined by the *Roper* court – does not have the culpability deserving of a life sentence.  
22 This conclusion is supported not only by those three factors but also by an emerging  
23 body of developmental and neurobiological research attesting to the developmental  
24 differences between youth and adults. (See, Amicus Brief in *Roper* of the American  
25 Psychological Association. (**attached as Exhibit E.**))

26 The circumstances leading up to the shooting of Larry King, the occurrence of  
27 the tragic shooting itself, as well as the young age and lack of maturity of Brandon  
28 McNerny at the time, demonstrate exactly why a recently-turned 14-year old lacks the

1 requisite level of cognitive ability and social skills to justify punishing him as an adult.

2 Further, as stated above, *Roper* did not create an abolition of use of the death  
3 penalty on all juveniles, but rather extended the abolition from youths aged under 16  
4 years to youths aged under 18 years. The importance of this extension is that the three  
5 factors in *Roper* used to distinguish juvenile offenders from adult offenders were found  
6 by the Court to be still present in juvenile offenders 16 to 18 years in age.

7 The flip side of this decision is that these three distinguishing factors are  
8 conversely more present and have more of an effect on juveniles' actions, also making  
9 them less culpable, the younger they are. One cannot deny that being two years  
10 younger, especially during adolescence, causes a monumental difference in the effect of  
11 these three factors on a juvenile's actions. Here, we are considering a life sentence of a  
12 14-year old, who was 13 years old a mere 19 days prior to the crime. How can he be  
13 considered to have the same relative maturity as an 18-year old, or even a 16-year old?

14 At the time of the crime, Brandon McNerny was a typical impulsive eighth  
15 grader who was particularly vulnerable to negative influences and outside pressures.  
16 The 14-year old defendant did not have and currently continues to struggle to develop a  
17 fully-formed identity.

18 These three fundamental differences between juveniles and adults, sadly  
19 demonstrated by the defendant here, point to Brandon McNerny's diminished  
20 culpability. To hold this 14-year old defendant to the same level of culpability and  
21 punishment as an adult would breach the Eighth Amendment and the *Roper* mandate to  
22 consider a juvenile offender's young age in assessing the proportionality of criminal  
23 punishment.

24 **ii. The lack of satisfaction of retribution and deterrence.**

25 The Supreme Court in both *Atkins* and *Roper* concluded that usage of the death  
26 penalty on mentally retarded individuals and youths under the age of 18 did not satisfy  
27 the dual social goals of retribution and deterrence. As was found in those cases, it is  
28 likewise true here that the harsh sentencing scheme on minors aged 14 and older

1 provided for under Welfare & Institutions Code §707(d) does not “measurably  
2 contribute” to either goal.

3 In *Atkins*, in finding execution of mentally retarded offenders did not satisfy the  
4 goal of retribution, the Court stated, “the interest in seeing the offender gets his ‘just  
5 desserts’ – the severity of the appropriate punishment necessarily depends on the  
6 culpability of the offender.” (*Atkins, supra*, 536 U.S. at 319.) On the deterrence issue,  
7 the Court concluded that capital punishment can serve as a deterrent only where the  
8 murder results from premeditation and deliberation. The Court further concluded that  
9 given mentally retarded individuals’ cognitive and behavioral impairments causing  
10 them to be impulsive, rather than calculating, that deterrance was not served here,  
11 either. (*Id.* 319-320).

12 Similar to *Atkins*, in *Roper*, the Court concluded that a juvenile’s diminished  
13 culpability likewise diminishes the applicability of the “penological justifications” for  
14 the death penalty. (*Roper, supra*, 543 U.S. at 571.) The Court found first that the  
15 purpose of “[r]etribution is not proportional if the law’s most severe penalty is imposed  
16 on one whose culpability or blameworthiness is diminished, to a substantial degree, by  
17 reason of youth and immaturity.” (*Id.* at 571.) The Court then found that the second  
18 penological purpose, deterrence, is similarly not met, stating, “the likelihood that the  
19 teenage offender has made the kind of cost-benefit analysis that attaches any weight to  
20 the possibility of execution is so remote as to be virtually nonexistent.” (*Id.* at 572.)  
21 Thus the Court concluded that “neither retribution nor deterrence provides adequate  
22 justification for imposing the death penalty on juvenile offenders.” (*Id.* at 572.)

23 Here, again utilizing the *Atkins* and *Roper* analyses, the penological goals  
24 justifying imposition of the mandatory 51-year to life sentence under §707(d) are not  
25 served. Exercising retribution in imposing a life sentence on a 14-year old offender  
26 falls outside the parameters of “proportionate punishment” mandated by our U.S.  
27 Supreme Court. Similarly, no measurable deterrent effect can be realized from  
28 imposing a mandatory minimum 51 years to life sentence on defendant, where it is well

1 established that most teenagers lack the cognitive development to appreciate the  
2 severity of a mandatory minimum sentence, let alone to make a cost-benefit analysis  
3 and fully evaluate the consequences of their actions.

4         The scientific community has provided unequivocal support for the Supreme  
5 Court's conclusions. A prominent report in the journal *Science* concluded that the  
6 adolescent brain does not even begin the development of the ability to look into the  
7 future and evaluate consequences until between the ages of 15 and 18. (Mary  
8 Beckman, "Crime, Culpability, and the Adolescent Brain," 305 *SCIENCE* 596, 596-99  
9 (2004).)

10         The Center for Disease Control recently issued a report finding overwhelming  
11 evidence that transfer decisions and the attendant harsh sentencing options had no  
12 general or specific deterrent value. In analyzing the scientific literature on the effects of  
13 transferring juveniles to the adult system, the CDC Task Force concluded that the  
14 transfer decision in fact resulted in increased violence and recidivism on the part of  
15 those juveniles transferred to adult court. Specifically, the Task Force reported the  
16 troubling fact that children previously tried as adults are 34% more likely to commit  
17 future violent or general crime than similarly-situated children retained in the juvenile  
18 justice system. Such findings, meticulously reported for five states thought to be  
19 sufficiently diverse geographically and demographically to be representative of other  
20 states, led to CDC's ultimate recommendation that transfer statutes run counter to  
21 public safety and should be repealed. (Center for Disease Control, "Effects on Violence  
22 of Laws and Policies Facilitating the Transfer of Youth from the Juvenile to the Adult  
23 Justice System," November 30, 2007 (**attached as Exhibit F**).

24         Another common justification for severe punishment, incapacitation, has no  
25 application here. The mandatory minimum sentence of 51 years to life is likely to  
26 result in the incapacitation of the 14-year old defendant far longer than is necessary for  
27 public safety purposes. Further, the nation's highest court has long recognized  
28 juveniles' greater potential for rehabilitation. (*See, McKeiver v. Pennsylvania* (1971))

1 403 U.S. 528.) “From a moral standpoint it would be misguided to equate the failings  
2 of a minor with those of an adult, for a greater possibility exists that a minor’s character  
3 deficiencies will be reformed.” (*Roper, supra*, 543 U.S. at 570.)

4 The reasoning in *Atkins* and *Roper* as to why neither retribution nor deterrence is  
5 served is directly applicable to the instant matter. A 14-year old has the same or more  
6 impulsive behavior and lowered culpability as those who are mentally retarded and  
7 certainly juveniles of 15, 16 and 17 years of age; therefore, neither retribution nor  
8 deterrence is attained through §707(d).

9 **3. *Roper* and *Atkins* are directly applicable to the question of whether**  
10 **Welfare & Institutions Code §707(d) violates the Eighth Amendment.**

11 Because *Roper* is a case about the constitutional limits on sentencing juveniles as  
12 adults, its findings with respect to the salient features of adolescence are relevant here  
13 as well, even where the sentence at issue falls short of the death penalty. Thus, where  
14 *Roper* drew a bright line at 18 years to categorically bar a particular sentence based on  
15 those adolescent characteristics, its reasoning suggests that states must consider how the  
16 reduced culpability and impaired decision-making of youth bear upon the applicability  
17 of other adult sentences to youthful offenders. In other words, in the context of the  
18 death penalty, the individual characteristics of adolescent offenders are so marked as to  
19 justify excluding all adolescents from eligibility for this penalty.

20 As the severity of the adult sentence drops below the ultimate penalty of death,  
21 adolescent differences must still be taken into account, but in a more individualized  
22 way. Thus, while the categorical approach of *Roper* may not apply to all adult  
23 sentences, state sentencing schemes that give no consideration to youth’s impairments  
24 but rather mandate adult sentences for certain classes of adolescents now run afoul of  
25 the spirit, if not the letter, of *Roper*.

26 **4. Conclusion.**

27 Brandon faces a statutory minimum sentence of 51 years to life, by virtue of the  
28 prosecutor’s unilateral and unreviewable decision to file criminal charges against him

1 directly in superior court. This sentence, and the statutory scheme under which it is  
2 reached, constitutes cruel and unusual punishment prohibited by the Eighth Amendment  
3 because: (1) it defies both national and local consensus against such a harsh sentence  
4 for a child; (2) it fails to consider defendant's unique personal circumstances and  
5 diminished culpability as a 14-year old adolescent; and (3) it ignores international  
6 standards and covenants prohibiting mandatory, lengthy sentences for children.

7  
8 **IV.**

9 **Section 707(d) violates Brandon McInerney's**  
10 **Equal protection rights because it bears no reasonable relation to a**  
11 **legitimate state purpose.**

12 Although The California Supreme Court<sup>1</sup> has previously rejected an equal  
13 protection challenge to section 707(d), since *Manduley* was published, decisions in  
14 *Atkins* and *Roper* now cast doubt on the underlying reasoning supporting the holding in  
15 *Manduley v. Superior Court* (2002) 27 Cal.4th 537, 569. Specifically as discussed in  
16 detail above, *Roper* found that the dual purposes of retribution and deterrence were not  
17 served by a death sentence on juveniles under 18 years old. The clear implication of  
18 this decision is that the United States Supreme Court would also find that the  
19 sentencing scheme under section 707(d) does not contribute to either retribution or  
20 deterrence.

21 Furthermore, since *Manduley* was decided, abundant research on the public  
22 safety failings of juvenile transfer provisions arguably refutes any rational relationship  
23 to legitimate law enforcement interests. Defendant submits that section 707(d) – under  
24 which the arbitrary whims of a prosecutor dictate whether a juvenile is tried in juvenile  
25 or adult court – prescribes different penalties for identical conduct, without rational or  
26 legitimate justification, in plain violation of equal protection guarantees. This violation  
27

28 <sup>1</sup> We concede under *Manduley* that this Court on this motion is precluded from granting relief under either a separation of powers argument or a due process argument. However, we do not waive either issue for future purposes.

1 arbitrarily deprives a certain class of juvenile offenders of sentencing options in  
2 juvenile court, and randomly exposes those youths to the harshness of the adult  
3 criminal system.

4 Section 707(d) allows for the prosecution of two juveniles of the same age,  
5 accused of committing identical crimes, to occur in two distinct courts. Depending on  
6 the discretion of the prosecutor, one may be tried as a juvenile in juvenile court while  
7 the other may be tried as an adult in adult criminal court. This result plainly disregards  
8 the constitutional directive of the equal protection clause that “all persons similarly  
9 situated should be treated alike.” (*City of Cleburne v. Cleburne Living Ctr., Inc.*,  
10 (1985) 473 U.S. 432, 439.) This disparity in treatment cannot be justified by even the  
11 lowest threshold of equal protection scrutiny which is the existence of a “reasonable  
12 relation to a proper legislative purpose” that validates the difference in treatment of  
13 identically situated minors. (*See Id.* at 440-41.) Here, the purported state rationale -  
14 crime prevention - is not achieved by granting the prosecutor unbridled discretion to file  
15 adult criminal charges.

16 First, with respect to the crime prevention goal of deterrence, *Roper* expressly  
17 held that the traditional goals of “retribution and deterrence” are not served by  
18 excessive punishment on juveniles because the very characteristics “that render  
19 juveniles less culpable than adults suggest as well that juveniles will be less susceptible  
20 to deterrence.” (*Roper, supra*, 543 U.S. at 571) No deterrent effect realistically can be  
21 anticipated where it is well established that juveniles lack the cognitive development to  
22 fully evaluate their actions in the context of a prosecutor’s direct-file authority.

23 Second, available research demonstrates that transfer and direct file laws do not  
24 reduce juvenile crime. (*See, e.g.*, Center for Disease Control Task Force Report (Nov.  
25 2007), *supra*, (finding that children previously tried as adults are 34% more likely to  
26 commit future violent or general crime than similarly-situated children retained  
27 in the juvenile justice system); Joshua T. Rose, *Innocence Lost: The Detrimental Effect*  
28 *of Automatic Waiver Statutes on Juvenile Justice*, 41 BRANDEIS L.J. 977, 993 (2003)

1 (“Studies clearly show that juveniles adjudicated in the adult system are more likely to  
2 re-offend, are more likely to suffer from the terrible consequences of being incarcerated  
3 in adult facilities . . . and are less likely to be rehabilitated than juveniles adjudicated in  
4 juvenile court.”); Ellie D. Shefi, *Waiving Goodbye, Incarcerating Waived Juveniles in*  
5 *Adult Correctional Facilities Will Not Reduce Crime*, 36 U.MICH.J.LAW & REFORM  
6 653, 665 (2003) (“While incarcerating waived juveniles in adult facilities quenches the  
7 public’s thirst for “justice,” and provides the community with a sense of security,  
8 incarcerating juveniles with adults does not, in fact, increase public safety”); Christina  
9 DeJong & Eve Schwitzer Merrill, *Getting “Tough on Crime:” Juvenile Waiver and the*  
10 *Criminal Court*, 27 OHIO N.U.L.REV. 175, 176, n.10 (2001) (“Assessing general  
11 deterrence has always been a difficult task”); Donna M. Bishop et al., *The Transfer of*  
12 *Juveniles to Criminal Court: Does it Make a Difference?*, 42 CRIME & DELINQ. 171,  
13 184-85 (1996.)

14 In addition, case law from other jurisdictions supports the equal protection  
15 analysis set forth above. The Utah Supreme Court, in *State v. Mohi* (Utah 1995) 901  
16 P.2d 991, 997, utilized a similar “rational basis” test in overturning the state’s  
17 discretionary direct-file statute because it “treat[ed] similarly situated juveniles in an  
18 unreasonably different fashion.” Acknowledging the legitimacy of the state’s public  
19 safety goals, the Utah court nevertheless stated: “Legitimacy of a goal cannot justify an  
20 arbitrary means” and a system in which a prosecutor “may choose for any reason or no  
21 reason” to subject a particular juvenile to the adult criminal justice system is certainly  
22 arbitrary. (*Mohi*, 901 P.2d at 999.) The court further warned that “[s]uch unguided  
23 discretion opens the door to abuse without any criteria for review or insuring  
24 evenhanded decision making.” (*Id.* at 1002.)

25 In *Hughes v. State* (Del. 1994) 653 A.2d 241, 252, the Delaware Supreme Court  
26 found unconstitutional a state provision that precluded all judicial review of the  
27 prosecutor’s charging decision that effectively placed certain juveniles, and not others  
28 charged with similar crimes, in adult court. By statute, a prosecutor could circumvent

1 the otherwise-available judicial hearing on transfer by placing a felony charge against a  
2 juvenile offender whose 18th birthday would occur before trial. The Hughes court  
3 ruled that this “patently arbitrary” statute failed rational basis review. (*Id.* at 252.)  
4 Moreover, the court issued this apt warning: “The good faith of the [prosecutor] . . . is  
5 not sufficient to protect a child’s constitutional rights.” (*Id.* at 250.)

6 Even those cases that have upheld direct file statutes against equal protection  
7 challenges have distinguishable grounds that dictate the contrary result here. (See, e.g.,  
8 *Robert K.*, 496 S.E.2d at 892 (safety valve of sentencing hearing to consider “suitability  
9 and amenability of a juvenile for the rehabilitative purposes of the court’s juvenile  
10 jurisdiction”); *Hansen* 904 P.2d at 822-23 (waiver hearing upon motion by juvenile  
11 defendant); *Bishop* 462 S.E.2d at 718 (adult court’s retention of authority to transfer  
12 juvenile to juvenile jurisdiction); *Cain* 381 So.2d at 1367 (disposition hearing to  
13 consider juvenile’s amenability to juvenile disposition).

14 Thus Section 707(d), with little or no evidence in support of its goals, denies  
15 defendant access to a juvenile disposition – available to another similarly situated  
16 juvenile offender – by virtue of a prosecutor’s unilateral and unfettered discretion. In  
17 light of *Roper*, the underlying developmental research relied upon by the U.S. Supreme  
18 Court, as well as the conflicting decisions from other states, it is clear that imposing  
19 such radically different sentences on teenage youth convicted of the same criminal  
20 conduct without any examination of their developmental differences lacks any rational  
21 basis.

## 22 23 24 **CONCLUSION**

25 The District Attorney has exercised his discretion to file adult criminal charges  
26 against defendant, exposing this 14-year old child to a statutorily mandated prison term  
27 of at least 51 years until he reaches the age of 65. He would then become eligible for a  
28 parole hearing. This result, authorized by Welfare & Institutions Code section 707(d)

1 which allows the prosecutor to make a discretionary filing decision and: a) triggers a  
2 mandatory minimum sentence that constitutes cruel and unusual punishment; and b)  
3 subjects the defendant to a disparate sentence does not withstand constitutional  
4 scrutiny.

5 Therefore, defendant respectfully requests that the court grant this demurrer.

6  
7 Dated: June 25, 2008.

8  
9 Respectfully submitted,  
10 DUANE DAMMEYER, Public Defender

11  
12 By \_\_\_\_\_  
13 WILLIAM QUEST  
14 Senior Deputy Public Defender  
15 Attorney for Defendant  
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