



The Children's
Law Center



A Briefing Paper by the ACLU, The
Children's Law Center & The Office of
the Ohio State Public Defender

A Call to Amend the Ohio Rules of Juvenile Procedure to Protect the Right to Counsel

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Ryan*, a 17-year-old boy, represented himself during his delinquency trial on a burglary charge. Like in many Ohio juvenile cases, the record of Ryan's case contained no information indicating whether he was even informed he had a right to be represented by a lawyer. Without a lawyer to guide him, Ryan lost his trial, was adjudicated delinquent and was sentenced to an Ohio Department of Youth Services facility for a minimum of 1 year and a maximum of four years. Ryan appealed his case. After Ryan had served 10 and a half months of his sentence in a correctional facility, the appeals court overturned his conviction and sent the case back to the trial court so that Ryan could be "fully apprised of his right to counsel." When the case was returned to the trial court, the burglary charge against Ryan was ultimately dismissed. In addition to the injustice that Ryan suffered, Ohio taxpayers also paid a price. Ryan's unwarranted incarceration and subsequent legal expenses cost taxpayers roughly \$50,175.¹

*Ryan is a fictitious name we have used to protect the child's confidentiality.

Ryan's story is far from an isolated incident in Ohio. Unfortunately, Ohio stands out as a jurisdiction where the right to counsel in a juvenile delinquency proceeding has become an illusion.

According to a recent report by the Children's Law Center and the National Juvenile Defender

Center, as many as 80 percent of children charged with criminal wrongdoing in some Ohio juvenile courts are not represented by counsel. Most of these children waive their right to legal representation shortly after their arrest.² In many instances, they do so without a full understanding of the consequences of that waiver. Eager to move cases through the

system quickly, judges, magistrates, prosecutors and probation officers do not take the time to ensure that these children are aware of the complexities of the juvenile justice system, the role that defense counsel plays in that system, and the possible repercussions of a finding of delinquency. The National Office of the ACLU, Children's

Law Center, ACLU of Ohio and the Office of the Ohio Public Defender are urging the Ohio Supreme Court to support our effort to protect the right to legal representation in juvenile delinquency proceedings by ensuring that all waivers of that right are knowing and voluntary. The Ohio Rules of Juvenile Procedure currently permit a child to waive his or her right to an attorney in all proceedings except those in which the court considers transferring the case to adult court for criminal prosecution.³ However, the Rules do not require that the child consult with an attorney prior to waiving the right.

Specifically, we have filed a petition to the Ohio Supreme Court to amend the Ohio Juvenile Court Rules to ensure that no child waives his or her right to legal counsel in a juvenile delinquency proceeding without first consulting with an attorney.

The United States Supreme Court has mandated that juveniles facing delinquency proceedings have the right to the aid of counsel to protect their legal interests. In *In re Gault*, 387 U.S. 1 (1967), the Court stated that, given the complexities of our legal system, the “juvenile needs the assistance of counsel to cope with problems of law, to make skilled inquiry into the facts, to insist upon regularity of the proceedings, and to ascertain whether he has a defense and to prepare and submit it.”⁴ “Under our Constitution, the condition of being a [child] does not justify a kangaroo court.”⁵

THE NEED FOR RULE CHANGE IN OHIO

A. WIDESPREAD WAIVER OF COUNSEL HARMS CHILDREN AND SOCIETY, AND IMPEDES THE FAIR ADMINISTRATION OF JUSTICE

The harm from widespread waiver is felt in virtually all areas of the juvenile justice system. Legal counsel for court-involved children is necessary to ensure that the children are not unnecessarily detained prior to the disposition of their case or committed to institutional con-

finement afterwards.⁶ Children who forgo counsel tend to enter admissions of guilt even though they may have meritorious defenses or may be innocent.⁷ According to the CLC report, roughly 15 percent of those children committed to Ohio Department of Youth Services (ODYS) correctional facilities and 20 percent of those placed at community corrections facilities were unrepresented by counsel during their delinquency proceedings.⁸

Greater rates of incarceration are not only dangerous to the children being jailed, but they are also more costly and dangerous for society. Ohio taxpayers spend \$49,440 for each child who is committed to and remains at an ODYS correctional facility for 10.4 months, the average length of stay.⁹ Children placed in

detention or corrections are more vulnerable to assault, suicide and sexual abuse, and they are more likely to commit further crimes after they are released.¹⁰ In Ohio, 35.8 percent of children committed to ODYS facilities will commit another offense within three months of their release¹¹ and 53 percent will recidivate within two and a half years.¹²

Widespread waiver by children causes the public to lose confidence in the fairness of the juvenile justice system. Children without lawyers act hastily under the mistaken belief that their cases will be resolved quickly and positively, especially when they are detained. In an effort to resolve their cases, these children will often act against their legal and rehabilitative interests. Lacking the advice of an attorney, they may admit charges of delinquency without appreciating the consequences of cre-

ating a juvenile court record that may impede their life chances for years to come. As a result, juvenile court judges can neither ensure that they are issuing just or accurate findings, nor can they ensure that the individual needs of each child charged with wrongdoing are met with appropriate responses.

B. CHILDREN NEED THE ASSISTANCE OF COUNSEL TO PROTECT THEIR LEGAL INTERESTS

A growing body of social science research supports the need for the guiding hand of counsel as articulated in *Gault*. Researchers have found that even adult defendants have difficulty understanding judicial admonitions

The “juvenile needs the assistance of counsel to cope with problems of law, to make skilled inquiry into the facts, to insist upon regularity of the proceedings, and to ascertain whether he has a defense and to prepare and submit it.” — UNITED STATES SUPREME COURT, *IN RE GAULT*, 387 U.S. 1 (1967)

when entering pleas. There is no reason to believe that children will have any better understanding of the legal concepts or terminology imbedded in the process.¹³

Other studies indicate that children, particularly children in the juvenile justice system, are less likely than adults to appreciate the consequences of the decisions they make in court. For example, one recent study examining the legal decision-making processes of court-involved children found that adolescents “are more likely than young adults to make choices that reflect a propensity to comply with authority figures,” and less likely or less able to recognize the risks inherent in their choices.¹⁴ Juveniles who are below average in intelligence are more likely than others to be impaired in abilities relevant to legal decision-making. This risk is amplified because a high

proportion of youths in the juvenile justice system are of below-average intelligence.¹⁵

Moreover, it is widely recognized that children charged with wrongdoing suffer from a host of issues that make it less likely that they can safeguard their own interests during their proceedings.¹⁶

According to currently available information:

- **Roughly 75 percent of Ohio’s incarcerated youth need mental health services.¹⁷ Fifty-five percent of the girls incarcerated in the Scioto Correctional Facility have a mental health disorder; 42 percent take psychiatric medication.¹⁸**
- **Over 44 percent of children committed to ODYS have special educational needs as compared to 14 percent of children in the general Ohio school population¹⁹ and 10 percent of children nationally.²⁰**
- **Many children in the juvenile justice system have been victims of abuse or neglect. Abused and neglected kids are 50 percent more likely than other children to be arrested while a juvenile; 40 percent more likely to be arrested for a violent crime once becoming an adult; and 33 percent more likely than other children to abuse drugs.²¹**
- **Nationally, 70 percent of incarcerated girls report physical and sexual abuse.²²**
- **One study found that 48.9 percent of the female juvenile offenders sampled were experiencing symptoms of post-traumatic stress disorder at the time of the study and that female juvenile offenders were 50 percent more likely to suffer from PTSD than their male counterparts.²³**

C. OTHER STATES HAVE TAKEN STEPS TO ENSURE MEANINGFUL ACCESS TO COUNSEL

Other states, including all of Ohio’s neighboring states, have taken steps to implement the mandates of *Gault* by ensuring that children have meaningful access to counsel and are able to make informed decisions about their legal representation. For example, Iowa does not allow a juvenile of any age to waive counsel at any delinquency proceeding. Nine other states (Kansas, Massachusetts, Montana, New Jersey, New Mexico, North Carolina, Oklahoma, West Virginia and Wisconsin) prohibit juveniles from waiving counsel depending on their ages. Fifteen states (Colorado, Connecticut, Indiana, Kansas, Kentucky, Louisiana, Massachusetts, Maryland, Montana, New Jersey, North Carolina, Oklahoma, Vermont, Virginia, and Wyoming) protect the child’s right to counsel by mandating specific guidelines for waiver, like requiring waiver to occur in the presence of, and after consultation with, counsel. In 2005, the Pennsylvania Supreme Court adopted new juvenile court rules that prohibit the child’s guardian from waiving the right to counsel for the child.

D. NATIONAL PROFESSIONAL ORGANIZATIONS AND EXPERTS STRONGLY DISFAVOR WAIVER OF COUNSEL

National professional organizations and experts recognize that children should not be left to navigate the complex and adversarial delinquency proceedings on their own. Juvenile delinquency court judges and judicial officers, and the rules under which they operate, should ensure that children’s due process rights, including the right to counsel, are protected at all costs. As a result, these organizations and experts agree that judges and judicial officers should not permit children to waive counsel except under extreme circumstances, and even then, not before having had the opportunity to meaningfully confer with counsel about the decision.

In August 2005, the National Council of Juvenile and Family Court Judges (NCJFCJ), a membership organization consisting of over 1700 juvenile and family court judges, commissioners, magistrates and referees, issued national juvenile delinquency guidelines which identify 16 Key Principles necessary to form a juvenile delinquency court of excellence. Principle number 7 calls for juvenile court administrators to ensure that “counsel is available to *every youth at every hearing*, including post-disposition reviews and reentry hearings.”²⁴ The NCJFCJ advises that “[j]uvenile delinquency court judges and judicial officers should be extremely reluctant to allow a youth to waive the right to counsel” and on the “rare occasions” that judges do permit children to waive, the “waiver of counsel should only be accepted after the youth has consulted with an attorney about the decision and continues to desire to waive the right.”²⁵

In January 2005, the American Council of Chief Defenders and the National Juvenile Defender Center promulgated core national criteria by which indigent defense delivery systems and the branches of government responsible for the provision of counsel may fully implement the holding of *In Re Gault*.²⁶ First among the ten principles calls upon each juvenile justice system to “uphold juveniles’ right to counsel throughout the delinquency process and recognizes the need for zealous representation to protect children.” A subsection to that principle specifically notes that the “system should ensure that children do not waive appointment of counsel.”²⁷

Similarly, the national juvenile justice standards promulgated by the Institute of Judicial Administration and the American Bar Association recommend that “a juvenile’s right to counsel may not be waived.”²⁸

THE JUDICIARY SHOULD TAKE THE LEAD IN SAFEGUARDING THE RIGHT TO COUNSEL FOR JUVENILES IN OHIO

Judges and judicial officers should take the lead in protecting the right to counsel for juveniles in Ohio because they are the gauge by which the general public evaluates the fairness and efficiency of the juvenile court system. The NCJFCJ has recently stated that the role of the juvenile court judge includes “leadership, collaborative, and advocacy components, as well as commenting on, and if necessary, drafting legislation that the judge believes is necessary to complete the work of the juvenile delinquency court.”²⁹ With respect to ensuring that counsel is available to children prior to entertaining a waiver, the NCJFCJ urges that judges “work with the public defender, private bar, funding sources, and the legislature to overcome” barriers to meaningful access to counsel. ■



TAKE ACTION

More information may be obtained by contacting Vincent Warren and Robin Dahlberg, Senior Staff Attorneys, Racial Justice Working Group, American Civil Liberties Union, at: vwarren@aclu.org or rdahlberg@aclu.org or Kim Brooks Tandy, Executive Director, Children’s Law Center, Inc., at kimbrooks@fuse.net.

ENDNOTES

- ¹ Ryan served 25 days in county detention and 301 days in a DYS facility before his case was reversed on appeal. According to conversations with county detention officials, it costs approximately \$70 per day to house a juvenile in the facility in which Ryan was detained. It costs an average of \$158.46 per day to “house, care, and treat” a juvenile in an Ohio Department of Youth Services correctional facility. See *Ohio Department of Youth Services Annual Report (2004)* at 7. It cost the state \$728.70 for Ryan’s appellate counsel to conduct his appeal.
- ² The Central Juvenile Defender Center of the Children’s Law Center, Inc., and the Juvenile Justice Center and National Juvenile Defender Center of the American Bar Association. *Justice Cut Short: An Assessment of Access to Counsel and Quality of Representation in Delinquency Proceedings in Ohio* (March 2003) (hereinafter “ABA Report”) at 25.
- ³ The Ohio Rules of Juvenile Procedure, Rule 3, reads: Waiver of Rights: “A child’s right to be represented by counsel at a hearing conducted pursuant to Juv. R. 30 may not be waived. Other rights of a child may be waived with the permission of the court.”
- ⁴ See *Gault*, 387 U.S. at 36. To support its position, the Court cited a President’s Crime Commission report: “...[N]o single action holds more potential for achieving procedural justice for the child in the juvenile court than provision of counsel. ... [Due process rights] have substantial meaning for the overwhelming majority of persons brought before the juvenile court only if they are provided with competent lawyers who can invoke those rights effectively. ... [F]ew adults without legal training can influence or even understand [judicial proceedings]; certainly children cannot.”

Id. at 39, n.65, citing Report by the President’s Commission on Law Enforcement and Administration of Justice, “The Challenge of Crime in a Free Society” (1967).
- ⁵ *Id.* at 28.
- ⁶ American Bar Association Juvenile Justice Center. *A Call for Justice: An Assessment of Access to Counsel and Quality of Representation in Delinquency Proceedings* (1995) at 4.
- ⁷ *Id.* at 44.
- ⁸ CLC Report at 25.
- ⁹ Ohio Department of Youth Services. *Ohio Department of Youth Services Annual Report* (2004) at 7.
- ¹⁰ Coalition for Juvenile Justice. *Unlocking the Future: Detention Reform in the Juvenile Justice System* (2003).
- ¹¹ Ohio Department of Youth Services Annual Report (2004) at 7.
- ¹² Edward J. Latessa & Christopher Lowenkamp. *Evaluation of Ohio’s RECLAIM Funded Programs, Community Corrections Facilities, and DYS Facilities* (2005) at 10.
- ¹³ Thomas Grisso et al. *Juveniles’ Competence to Stand Trial: A Comparison of Adolescents’ and Adults’ Capacities as Trial Defendants*. Law and Human Behavior, Vol. 27, No. 4 (Aug. 2003) at 333-363. For example, a recent pilot study conducted in Massachusetts found that court-involved children in that state do not understand the legal terminology used during court proceedings, particularly when waiving rights or taking a plea. See Barbara Kaban & Judith C. Quinlan. *Rethinking a ‘Knowing, Intelligent and Voluntary Waiver’ in Massachusetts’ Juvenile Courts*. Journal of the Center for Families, Children & the Courts (2004) at 35-55. The researchers orally presented a group of 98 court-involved children from the ages of 9 through 17 with 36 commonly used legal words and phrases selected from the Massachusetts tender of plea form and asked each child whether they thought they knew them. If the child responded that thought they knew the word, he was asked to define it. The researchers found that even educated and experienced children failed to correctly define 86 percent of the legal terms. For example, of the 98 children participating in the study: none correctly defined the word “disposition” or the phrase “presumption of innocence;” only three children correctly defined the words “plea” and “waiver;” only seven correctly defined “counsel” (lawyer); and only nine correctly defined the word “right.”
- ¹⁴ Grisso at 333-363.
- ¹⁵ *Id.*
- ¹⁶ National Council of Juvenile and Family Court Judges (NCJDCJ), *Juvenile Delinquency Guidelines: Improving Court Practice in Juvenile Delinquency Cases* (2005) at 14.
- ¹⁷ NAMI Ohio. *To Lift the Burden: Reducing the Costs of Untreated Mental Illness in Ohio While Improving Care* (April 2005) at 3-4.
- ¹⁸ Fred Cohen, Esq. *Interim Report: Scioto Juvenile Correction Facility: Girls Units* (September 2004) at 3-4.
- ¹⁹ Ohio Coalition for the Education of Children with Disabilities Forum. *Students with Disabilities Overrepresented in Juvenile Justice System; Does Disability = Delinquency?* Vol. XXII, Issue 4 (Nov-Dec 2004) at 1.
- ²⁰ Murphy 1985; Brier 1989; Winteres 1997; Robinson and Rapport 1999; National Center on Education, Disability and Juvenile Justice 2001; U.S. Department of Education 2001; National Council on Disability 2002b; Rutherford et al. 2002.
- ²¹ R. Famularo, R. Kinscherff, T. Fenton, and S.M. Bolduc. *Child Maltreatment Histories Among Runaway and Delinquent Children*. Clinical Pediatrics 29 (12) (December 1990) at 713-718.
- ²² Evans, W. et al. *Suicide ideation, attempts, and abuse*. Child & Adolescent Social Work Journal, 13 (1996) at 1.
- ²³ Cauffman, E. et al. *PTSD Among Female Juvenile Offenders*. Journal of American Academy of Child and Adolescent Psychiatry, 37 (1998).
- ²⁴ NCJFCJ at 25. (emphasis supplied).
- ²⁵ *Id.* at 25.
- ²⁶ American Council of Chief Defenders & National Juvenile Defender Center. *Ten Core Principles for Providing Quality Delinquency Representation through Indigent Defense Delivery Systems* (2005).
- ²⁷ *Id.*
- ²⁸ Institute of Judicial Administration & American Bar Association. *Juvenile Justice Standards Relating to Pretrial Court Proceedings*
- ²⁹ NCJFCJ at 32.