



March 9, 2006

Secretary Jo Ellen Cline
Commission on the Rules of Practice and Procedure
Supreme Court of Ohio
65 S. Front St.
Columbus, OH 43215

Dear Secretary Cline:

The American Civil Liberties Union (ACLU), the Children's Law Center, the ACLU of Ohio, and the Office of the Ohio Public Defender have come together to ask the Supreme Court of Ohio's Commission on the Rules of Practice and Procedure to consider changes to the Ohio Rules of Juvenile Procedure regarding waiver of the right to counsel.

An estimated two-thirds of the 147,867 juveniles who were the subject of delinquency or unruly complaints resolved in 2004 faced those proceedings without an attorney. (See Attachment 2.) A recent report from the Children's Law Center found that roughly 15% of children committed to Ohio Department of Youth Services facilities and 20% of those placed at community corrections facilities were unrepresented by counsel during their delinquency proceedings. (See Attachment 3.)

Most of these children waive their right to counsel. They do so, however, without an appreciation of their constitutional rights and without fully understanding the consequences of their waiver.

Transcripts and observations of juvenile court proceedings reveal that many judges, magistrates, prosecutors, and probation officers do not take sufficient time to ensure that these children are aware of the role that defense counsel can play and the possible repercussions of a finding against them. (See Attachment 4.) In addition, social science researchers have found that a disproportionate number of children in the juvenile justice system suffer from mental illness or have learning disabilities and developmental delays that compromise their abilities to safeguard their own interests. (See Attachment 5.)

Standards set forth by the Institute of Judicial Administration, the American Bar Association, the American Council of Chief Defenders, and the National Juvenile Defender Center state that children should never be permitted to waive appointment of counsel. (See Attachment 6.) In 2005, the National Council of Juvenile and Family Court Judges published "Juvenile Delinquency Guidelines: Improving Court Practice in Juvenile Delinquency Cases," a

handbook of best practices for juvenile delinquency courts. Regarding waiver of the right to counsel, this handbook recommends:

Juvenile delinquency court administrative judges are responsible to ensure that counsel is available to every youth at every hearing, including post-disposition reviews and reentry hearings. Juvenile delinquency court judges and judicial officers should be extremely reluctant to allow a youth to waive the right to counsel. On the rare occasion when the court accepts a waiver of the right to counsel, the court should take steps to ensure that the youth is fully informed of the consequences of the decision. A 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.

(See Attachment 7.)

We respectfully request that the Supreme Court of Ohio's Commission on the Rules of Practice and Procedure consider amendments to Rules 3 and 29(B) of the Ohio Rules of Juvenile Procedure to ensure that no juvenile waives his or her right to legal counsel in a juvenile delinquency proceeding without first consulting with an attorney. Doing so would bring Ohio in line with the best-practices recommendations from the National Council of Juvenile and Family Court Judges. Draft language of this proposal is enclosed with this letter. (See Attachment 1.)

Other states, including all of Ohio's neighboring states, have taken steps to ensure 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, depending on their ages, from waiving counsel. Fifteen states (Colorado, Connecticut, Indiana, Kansas, Kentucky, Louisiana, Massachusetts, Maryland, Montana, New Jersey, North Carolina, Oklahoma, Vermont, Virginia, and Wyoming) protect a child's right to counsel by mandating specific guidelines for waiver, like permitting waiver to occur only in the presence of, and after consultation with, counsel. Last year, the Pennsylvania Supreme Court adopted new juvenile court rules that prohibit the child's guardian from waiving the right to counsel for the child.

While there may be financial effects from such a rule change, there are also repercussions from not making a change. Children who forgo counsel are more likely to admit to the charges against them, even though they may be innocent or have meritorious defenses. Once adjudicated delinquent, they are more likely to be incarcerated, even if their rehabilitative needs could be met by less expensive alternatives. Widespread waiver by children undermines public confidence in the fairness of the juvenile justice system, results in the unnecessary expenditure of taxpayer dollars, and undermines the rehabilitative function of the juvenile court. (See attachments 8 and 9.)

The rule amendments we propose are supported by a wide range of Ohio and national organizations, including the National Juvenile Defender Center; the National Center on Education, Juvenile Justice and Disabilities; Public Children Service Association of Ohio; Children's Defense Fund Ohio; and the Ohio Council of Churches. (See Attachment 10.)

We would welcome an opportunity meet with members of the Rules Commission to speak further about this important issue. Thank you for your time and consideration.

Sincerely,

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by authorization

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ACLU of Ohio
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Office of the Ohio Public Defender

Attachments:

1. Draft language of proposed amendments
2. Data sheet: Estimated Waiver Rates by County
3. Excerpt from "Justice Cut Short"
4. Fact sheets: Ohio Juvenile Justice Overview and Why Youth Waive Their Right to Counsel
5. Fact sheet: A Demographic Profile of Children in the Juvenile Justice System
6. National standards: IJA-ABA standards on juvenile waiver of counsel and The Ten Core Principles for Providing Quality Delinquency Representation
7. Excerpt from NCJFCJ recommendations
8. "White Paper" on juvenile waiver of counsel in Ohio
9. Examples of Ohio children affected by waiver of counsel
10. Letters of support from other organizations

Contact information:

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Juvenile Waiver of Counsel
Proposed amendments to Rule 3 and Rule 29(B)
Ohio Rules of Juvenile Procedure

Rule 3: 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~~ A child's right to counsel at all other court proceedings may be waived with the permission of the court subject to subsections (a) through (c) of this Rule. Other rights of a child may be waived with the permission of the court.

- a. A child may waive his or her right to counsel only if:
 - (i) the child is in the presence of counsel at the time of waiver and, prior to the waiver, has consulted with counsel about the role counsel can play in a juvenile delinquency proceeding and the consequences of waiver; and
 - (ii) the court determines that the waiver is knowing, intelligent, and voluntary.

- b. In determining knowing, intelligent, and voluntary the court shall consider and place specific written findings in the record with respect to whether or not the child fully comprehends:
 - (i) the nature of the allegations and the proceedings and the range of allowable dispositions;
 - (ii) the right to assistance of counsel without charge if the child is financially unable to obtain counsel;
 - (iii) that even if the child intends not to contest the charge, counsel may be of substantial assistance in developing and presenting material that could affect the disposition;
 - (iv) the child's right to obtain counsel at any stage of the proceedings; and
 - (v) that the child's rights at any hearing include the rights to:
 - i. call witness on the child's behalf;
 - ii. offer evidence on the child's behalf;
 - iii. cross examine witness;
 - iv. obtain witness by compulsory process; and
 - v. require proof beyond a reasonable doubt in juvenile traffic offense, delinquency, and unruly proceedings; by clear and convincing evidence in dependency, neglect, and abuse cases, and in a removal action; and by a preponderance of the evidence in all other cases.

- c. A parent, guardian, custodian or other person may not waive the child's right to counsel.

Rule 29 – Adjudicatory Hearing

(B) Advisement and findings at the commencement of the hearing. At the beginning of the hearing, the court shall do all of the following:

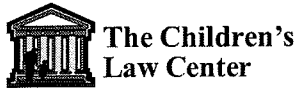
- (1) Ascertain whether notice requirements have been complied with and, if not, whether the affected parties waive compliance;

(2) Inform the parties of the substance of the complaint, the purpose of the hearing, and possible consequences of the hearing, including the possibility that the cause may be transferred to the appropriate adult court under Juv. R. 30 where the complaint alleges that a child fourteen years of age or over is delinquent by conduct that would constitute a felony if committed by an adult;

(3) Inform unrepresented parties of their right to counsel and determine if those parties are waiving their right to counsel pursuant to Juv. Rule 3;

(4) Appoint counsel for any unrepresented party under Juv. R. 4(A) who does not waive the right to counsel;

(5) Inform any unrepresented party who waives the right to counsel of the right: to obtain counsel at any stage of the proceedings, to remain silent, to call witnesses, obtain witness by compulsory process, to offer evidence, to cross-examine witnesses, to require proof beyond a reasonable doubt in juvenile traffic offense, delinquency, and unruly proceedings, and, upon request, to have a record of all proceedings made, at public expense if indigent.



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

Ensuring Access to Counsel in Ohio: Estimated Waiver Rates By County

MARCH 2006

As a preliminary note, it is important to recognize that there is no completely accurate way to calculate the rate at which youth waive the right to counsel in Ohio. There are several reasons for this, but primarily it is the result of inconsistent methodology among counties as to how this information is kept, if it is kept at all. For instance, counties may record waiver rates by actual case (i.e., one youth whose case was assigned a docket number), or by individual proceeding (i.e., counsel was waived at the adjudication hearing but not the disposition hearing). Unlike in some states (e.g., Indiana), courts in Ohio do not include in their annual report to the Supreme Court the number of unrepresented individuals for various proceedings.

The estimates here were calculated by taking 80%¹ of the total number of delinquency and unruly cases terminated in each county during 2004 and dividing that number by the total number of terminated cases in which the child was represented by a public defender or appointed counsel who actually billed the Office of the Ohio Public Defender office for reimbursement.

When *Justice Cut Short* was released in March of 2003, investigators noted that in the 12 counties visited (representing a mix of large urban, small urban and rural counties), there were significantly high rates of waiver in all but 2 counties - as high as 80%. These figures were reported by judges, lawyers, and others in the system, and as witnessed by investigators who sat in on numerous juvenile hearings. Now, three years later, there does not appear to have been any significant changes statewide in these high waiver rates, and it appears from our estimates that youth continue to go unrepresented in alarmingly high numbers across the state.

Given the data below, it appears that:

- In 73 of Ohio's 88 counties, 60% of juveniles or more lacked legal representation, or there was no claim for reimbursement by the attorney;
- In 24 of those counties, 90% or more went without counsel or there was no claim for reimbursement by the attorney.
- Statewide, two-thirds of the 147,867 juveniles who were the subject of delinquency or unruly complaints resolved in 2004 faced those proceedings without an attorney, or there was no claim for reimbursement by the attorney.

County Estimated Waiver Rate

Adams.....	73%
Allen.....	62%
Ashland.....	100%
Ashtabula.....	13%
Athens.....	89%
Auglaize.....	90%
Belmont.....	78%
Brown.....	94%
Butler.....	60%
Carroll.....	93%
Champaign.....	75%
Clark.....	83%
Clermont.....	67%
Clinton.....	66%
Columbiana.....	82%
Coshocton.....	49%
Crawford.....	93%
Cuyahoga.....	60%
Darke.....	86%
Defiance.....	97%
Delaware.....	28%
Erie.....	85%
Fairfield.....	45%
Fayette.....	94%
Franklin.....	31%

continued on reverse

CountyEstimated Waiver Rate

continued from page 1

Fulton.....	91%	Montgomery.....	55%
Gallia.....	90%	Morgan.....	77%
Geauga.....	60%	Morrow.....	83%
Greene.....	73%	Muskingum.....	76%
Guernsey.....	80%	Noble.....	95%
Hamilton.....	63%	Ottawa.....	93%
Hancock.....	79%	Paulding.....	80%
Hardin.....	74%	Perry.....	93%
Harrison.....	17%	Pickaway.....	98%
Henry.....	91%	Pike.....	96%
Highland.....	49%	Portage.....	69%
Hocking.....	92%	Preble.....	92%
Holmes.....	81%	Putnam.....	87%
Huron.....	36%	Richland.....	88%
Jackson.....	85%	Ross.....	84%
Jefferson.....	76%	Sandusky.....	86%
Knox.....	69%	Scioto.....	46%
Lake.....	22%	Seneca.....	71%
Lawrence.....	62%	Shelby.....	71%
Licking.....	80%	Stark.....	31%
Logan.....	91%	Summit.....	48%
Lorain.....	68%	Trumbull.....	69%
Lucas.....	74%	Tuscarawas.....	64%
Madison.....	86%	Union.....	47%
Mahoning.....	64%	Van Wert.....	90%
Marion.....	90%	Vinton.....	56%
Medina.....	72%	Warren.....	92%
Meigs.....	92%	Washington.....	90%
Mercer.....	89%	Wayne.....	63%
Miami.....	86%	Williams.....	85%
Monroe.....	61%	Wood.....	79%
		Wyandot.....	100%

ENDNOTE

¹ National experts estimate that 80% of all criminal defendants and juveniles in delinquency proceedings are indigent and therefore eligible for public defender services. Arguably, this is even higher for juveniles since all youth are presumed to be indigent. See also Ohio Admin. Code § 120-1-03(D) which provides as follows:

In determining eligibility of a child for court-appointed counsel in juvenile court, only the child's income shall initially be considered. The court is encouraged to order parents who are not indigent to pay for the necessary costs of representation for the child in delinquency, unruly, and traffic cases. In no case shall a child be denied appointed counsel because a parent refuses to disclose their financial information or to participate in a reimbursement, recoupment, contribution, or partial payment program.

JUSTICE CUT SHORT:
AN ASSESSMENT OF ACCESS TO COUNSEL AND
QUALITY OF REPRESENTATION IN DELINQUENCY
PROCEEDINGS IN OHIO

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EXECUTIVE SUMMARY

INTRODUCTION

In 1995, a national assessment regarding access to counsel and the quality of representation in juvenile delinquency proceedings was conducted by the American Bar Association, Juvenile Justice Center, in collaboration with the Juvenile Law Center, Inc. in Philadelphia, and the Youth Law Center, Inc. in Washington, D.C. The findings were published in *A Call for Justice: An Assessment of Access to Counsel and Quality of Representation in Delinquency Proceedings*. The study laid the foundation for closer examination of access and quality issues regarding representation of juveniles in this country, and recommended that each state assess its indigent defense system to ensure adequate protections for poor children in the justice system.

In 2002, the Central Juvenile Defender Center, through the Children's Law Center, Inc. in Covington, Kentucky, in conjunction with the ABA National Juvenile Defender Center and the Juvenile Justice Coalition, Inc. embarked upon a statewide study of Ohio's indigent juvenile defense system. The study included extensive surveying of judges, magistrates and defense attorneys, and detention center superintendents, and interviews with hundreds of youth incarcerated throughout Ohio in the adult prison system, Ohio Department of Youth Service facilities, and community corrections facilities. Even more importantly, the methodology utilized a team of highly trained and experienced attorneys recommended by the ABA Juvenile Justice Center to conduct site visits to juvenile courts throughout Ohio to observe proceedings, interview key participants and provide demonstrative and anecdotal data for the report.

The study, which utilizes the ABA protocol for assessing indigent juvenile defense services, was designed to assess three major areas: 1) whether indigent youth have access to counsel in Ohio juvenile courts, 2) the quality of representation being provided to youth throughout Ohio, and 3) structural and other systemic barriers that impact upon access and quality, including a number of substantive issues faced by juvenile courts in this state. The findings and recommendations of the study, as attached in draft form to this report, are compelling and indicative of a system plagued with poor policies and practices, lack of funding, and perhaps most important, lack of any real leadership to effect positive reforms on behalf of poor children and youth in our courts.

SIGNIFICANT FINDINGS

Among the most significant findings outlined in the report are:

- **Numerous obstacles exist for Ohio's poor children to obtain lawyers in the juvenile justice system.**

It has become a tolerated if not accepted practice that large numbers of poor youth waive their right to an attorney in Ohio, even during the most critical stages of proceedings, without proper colloquies from judges and magistrates. While many factors contribute to this high waiver rate, it is most commonly the result of the lack of any defense counsel visibility, the

failure of attorneys to understand their role as advocates, the lack of understanding on the part of youth and parents about the process, the prevalence of a culture that devalues the defense bar as an important part of the system, and funding constraints.

- **Zealous representation from well-trained attorneys in the juvenile justice system seems to be the exception rather than the rule for indigent youth in Ohio.**

The quality of representation for youth who are assigned counsel varied by jurisdiction, but overall there was a lack of meaningful representation at the arrest or detention hearing stage, little pre-trial or trial advocacy, and appellate and post-disposition work were extremely limited or non-existent in many jurisdictions. Of particular concern is that critical issues in Ohio's juvenile justice system such as mental health, special needs for female offenders, and lack of prevention and alternative programming are not being addressed adequately by defense counsel.

- **Numerous systemic barriers hamper effective representation to children.**

Effective representation is hampered by the state's appointment process, including the lack of qualifications of attorneys handling cases, lack of clarity in determining eligibility, and the timing of appointment. Many attorneys are unclear about the role they play in a delinquency proceedings, and often juvenile courts in Ohio function without the routine presence of prosecutors or defense attorneys. The Office of the Ohio Public Defender has limited administrative oversight or authority over local practices, thus resulting in substantial discrepancies how programs are structured and funded. Lack of compensation, lack of training, and inconsistency in technology and other support systems for attorneys is also pervasive.

- **Ohio lacks leadership on juvenile justice issues that can effectively ensure that the rights of children are protected.**

An overall void in leadership concerning the rights and needs of children in the juvenile justice system is pervasive in Ohio, and has resulted in a failure to address many of the substantive issues facing children in Ohio courts. In particular, the study's findings suggest the existence of a significant over-dependence upon probation services, overdependence upon detention and incarceration for treatment or punishment, criminalization of mentally ill children, high rates of disproportionate minority confinement, and a "schoolyard to jail yard" pipeline on school related conduct.

Youth interviewed for the study were quite vocal about their experiences with attorneys in the justice system. Those youth with private attorneys reported much better experiences than those with public defenders or appointed counsel. Youth were most concerned that attorneys spent little time with them or on their case, and often did not follow through on any preparation or defense for the young person. As one young girl noted, "*I always waive my right to an attorney because it's easier and quicker than waiting for somebody who won't care about my case anyhow.*"

RECOMMENDATIONS

The report concludes with a series of recommendations for the Governor, Legislature, and judicial branch, as well as local counties and defender organizations, Executive Branch agencies, and Ohio law schools and bar associations. Among these recommendations are:

I. THE GOVERNOR AND LEGISLATURE:

Should enact and implement an unwaivable right to counsel for all children and youth for every stage of delinquency and unruly proceedings, including probation revocation hearings where loss of liberty is a possible outcome;

Should enact and implement due process protections for children and youth found incompetent or criminally insane in conformity with the recommendations made by the Ohio Sentencing Commission; and,

Should enact and implement a juvenile defense delivery system for the State of Ohio that ensures:

- Adequate funding and resources for salaries, contractual rates, expert services, case support, and ancillary services; and,
- Provides ready access to and quality representation by trained and competent defense counsel.

II. THE JUDICIARY:

Should ensure that all jurists handling juvenile matters receive ongoing training in juvenile matters;

Should encourage leadership among the judiciary on juvenile justice issues; and

Should require training and education of attorneys appointed to represent indigent youth that focused on the special needs of juveniles in the justice system.

III. LOCAL COURTS AND COUNTIES:

Should institute systems for the appointment of counsel to all children and youth at the earliest possible time in all delinquency and unruly cases where loss of liberty is a possible outcome;

Should ensure that Ohio's juvenile defender system is sufficiently and adequately funded, including costs for appointed counsel, expert services, investigative resources and ancillary services;

Should develop and implement standardized procedures for the eligibility and appointment of counsel for children and youth, including, but not limited to, minimum practice

requirements to be eligible for appointment, requirements of ongoing professional education in juvenile law and related issues, periodic review of attorney performance, and equitable distribution of appointments;

Should engage in a thorough and ongoing review of detention practices, including the role of defense counsel, to prevent the overuse and abuse of detention; and,

Should address the issues of disproportionate minority representation in the juvenile justice system in real and meaningful ways, including the collection and dissemination of data related to race in every aspect of the system.

IV. OFFICE OF THE OHIO PUBLIC DEFENDER:

Should provide increased opportunities for all juvenile defense attorneys to participate in meaningful and intensive training on relevant issues facing children and youth in the system, including child development issues, motion practice, dispositional advocacy, detention advocacy, trial skills, competency and capacity litigation, education advocacy, and post-disposition advocacy;

Should provide and promote leadership among the entire juvenile defense bar and take a leadership role on substantive juvenile law issues such as bindover and serious youthful offender trends, disproportionate minority confinement issues, mental health issues, girls issues and school-based referrals to juvenile court;

Should increase appellate and other post-dispositional advocacy initiatives;

Should provide strong legislative advocacy on right to counsel issues and other substantive issues involving children and youth in the justice system; and,

Should develop and implement a strategic plan, including staffing, support, resources, training, expert services and adequate funding, for the formation of state public defender offices and/or standardized appointment procedures in every county.

V. LOCAL PUBLIC DEFENDER OFFICES:

Should implement a system which ensures that every child and youth will consult with counsel at all critical stages of juvenile proceedings and that every child, youth, parent and guardian have all necessary information concerning the importance of representation prior to decisions of waiver being made;

Should directly address the overuse and abuse of detention within the juvenile justice system through increased detention advocacy, ensuring due process in all proceedings available to children and youth, and effective advocacy on behalf of alternatives to secure detention;

Should implement a system of representation:

- that provides juvenile defense practitioners with adequate and ongoing training in child development issues, motion practice, disposition advocacy, detention advocacy, basic and advanced trial skills, competency and capacity litigation, education advocacy and appellate work;
- that provides structured mentoring to all attorneys inexperienced in juvenile law practice and procedure;
- that provides ready and available access to client information, sample motions and pleadings, caseload data, and current level of resources;
- that allows adequate appellate advocacy on behalf of all children and youth in the system;
- that provides a fair and standardized policy to address conflicts of interest among clients within the system;
- that tracks and sets caseload and workload limits for all counsel handling juvenile matters.

Should provide leadership on juvenile justice issues in local communities to further educate the public on issues such as bindover and serious youthful offender trends, disproportionate minority representation, mental health issues, girls' issues and school-based referrals to juvenile court.

VI. BAR ASSOCIATIONS:

Should take a greater role in the further development and implementation of a fair and just juvenile justice system;

Should take an active role in ensuring that there are sufficient continuing legal education offerings for juvenile law practitioners; and

Should ensure that practice standards are met by practitioners and the juvenile justice system supported by adequate funding and resources.

VII. OHIO LAW SCHOOLS:

Should examine the nature and content of law school courses related to juvenile practice to ensure appropriate educational opportunities are provided to law students that can support high standards in juvenile court practice; and,

Should provide prestigious internships, externships and fellowship opportunities to public interest organizations such as juvenile defender units, juvenile law centers, and juvenile justice policy initiatives to attract quality students into the juvenile practice area.



The Children's
Law Center



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

Ensuring Access to Counsel in Ohio: Ohio Juvenile Justice Overview

MARCH 2006

Juvenile Court System

- Courts of Common Pleas exercise jurisdiction over delinquency matters. Ten of Ohio's 88 counties have separate juvenile court divisions. The remaining 78 counties have juvenile court divisions combined with domestic and/or probate divisions.¹
- Over 143,216 delinquency cases were filed in juvenile courts across Ohio in 2004.²

Detention Facilities

- Ohio has 40 county or multi-county run detention facilities. These facilities are generally used as short-term detention locations for both pre-trial and post-disposition.³
- In total, the 40 facilities have 1,693 beds.⁴
- Detention facilities had 44,720 admissions in 2004.⁵

Department of Youth Services Facilities (DYS)

- Ohio has eight DYS facilities where judges may send youth found responsible for delinquent acts that would have been considered a felony if they had been an adult.⁶
- Average per diem cost to house, care and treat a juvenile offender is \$184.26.⁷
- On average, an incarcerated youth will be detained for 10.4 months in DYS.⁸
- The 2004 DYS budget was \$274 million.⁹
- Nearly 61% of the youth in DYS facilities are not in the system for violent offenses.¹⁰

ENDNOTES

¹ *State Juvenile Justice Profiles: Ohio*, National Center for Juvenile Justice, available at <http://www.ncjj.org/stateprofiles/profiles/OH04.asp?state=OH04.asp&topic=Profile>, (2004)

² 2004 Ohio Court's Summary, pg. 99, available at

<http://www.sconet.state.oh.us/publications/annrep/04OCS/sectionH.pdf>.

³ *Services for Students with Disabilities In Ohio Detention Facilities*, Children's Law Center, at 17-20 (August 200).

⁴ *Id.*

⁵ *Supra*, note 1.

⁶ *A Parent's Guide to the Ohio Juvenile Justice System*, Children's Law Center, at 20, (December 2005).

⁷ *Youthful Offender Statistics*, Ohio Department of Youth Services, available at www.dys.ohio.gov/youthfuloffender-stat.html, 2004.

⁸ *Id.*

⁹ *Id.*

¹⁰ Ohio Department of Youth Services Annual Report, at 7, (2004)



The Children's
Law Center



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

Ensuring Access to Counsel in Ohio: Why Youth Waive Their Right to Counsel

In March, 2003, the findings in *Justice Cut Short: An Assessment of Access to Counsel and Quality of Representation in Delinquency Proceedings In Ohio*, suggested that large numbers of poor youth throughout Ohio go unrepresented, even during some of the most critical proceedings that affect their liberty interest. This widespread practice of allowing youth to waive the right to counsel has created a juvenile justice system in which little if any advocacy exists for the rights of youth in many jurisdictions.

MARCH 2006

The reasons why children in Ohio waive counsel in such alarming numbers are varied. Nearly one-third of attorneys interviewed for *Justice Cut Short* believed that youth are intimidated into waiving counsel. The attorneys also frequently noted that children waive because they think that nothing bad will happen to them if they proceed in their cases unrepresented. Available demographic information suggests that children who stand before the court alone are uniquely vulnerable to misinformation and intimidation during delinquency proceedings. Generally, a high proportion of youths in the juvenile justice system are of below-average intelligence. In Ohio, roughly 75% of Ohio's incarcerated youths need mental health services and nearly half of those incarcerated at ODYS facilities need special educational services.

Justice Cut Short site investigators noted several other reasons why kids waive their right to counsel:

1 Incomplete or Inadequate Colloquies by the Court Discourage Youth and Parents from Seeking Counsel

Prior to accepting a waiver of counsel from a child, a judge or magistrate normally conducts a record-based discussion of the youth's rights known as a colloquy. In Ohio courts, however, the content of the colloquies are often inadequate or improper and lead to misapprehension and confusion on the part of the child. Because these colloquies do not provide the children with a full understanding of the consequences of their waiver of counsel, courts cannot ensure

that children waive their rights in a knowing and voluntary manner. Some of the problematic practices of judges and magistrates noted in *Justice Cut Short* included the following:

- Failure to ask the youth if he or she wanted an attorney, even though the right to counsel was noted;
- Failure to explain the consequences of admitting the charge;
- Failure to make any determination that the youth understood the rights explained to him or her
- Relying upon the parent to determine if the youth should be appointed counsel;
- Failure to afford a meaningful opportunity for the youth to ask questions about his or her case and rights;
- Failure to inform youth of the right to counsel at any stage of the proceedings even if they waived at an earlier time; and
- Admonishing the youth that "if you did it, you should admit it here today."

2 Parents Assert and Waive Right to Counsel for their Children

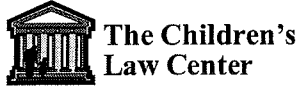
- In spite of the law's clear mandate in Ohio that youth have the right to an attorney as a party in a delinquency action, courts will often permit parents to decide whether the youth will waive this right.
- The interests of the parents are often adverse to those of the youth, particularly in matters such as alleged domestic violence or unruly charges filed by the parents.
- In many instances, parents have their child waive counsel so the child and parent will not have to return to court on another day.
- Many youth do not understand the proceedings, do not understand the elements of the offenses for which they were charged, but plead guilty because a parent thinks they should.

3 Lack of Defense Counsel Visibility

- In some jurisdictions, neither defense counsel nor prosecutors take an active role in juvenile court proceedings, except in notably serious or contested hearings.
- Probation staff often handles hearings without any lawyers on either side.
- Probation staff advises youth on what to do in court, and explain the proceedings to them after the fact.

4 Court Culture Devalues the Child Advocate

- In jurisdictions where youth routinely waived their right to counsel, there is a general lack of understanding about the role that defense counsel plays within the system.
- Many attorneys surveyed did not view their role as an advocate for their client's expressed wishes in adversarial delinquency proceedings. Instead, they saw their role as representing the youth's "best interests" as a guardian *ad litem* would do.
- Many youths enter the system believing that they do not need attorneys. However, of those incarcerated youth interviewed, nearly half believed their case would have been handled differently if they had not waived this right.



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

Ensuring Access to Counsel in Ohio: A Demographic Profile of Children in the Juvenile Justice System

MARCH 2006

Children in the juvenile justice system, who are indigent and thus eligible for appointed counsel, often come from poor educational settings. In addition, researchers have found that a high proportion of these children are of below-average intelligence and many have educational, mental health or other disabilities that impede their ability to protect their own legal interests. For example, a recent pilot study found that court-involved children in Massachusetts do not understand the legal terminology used during court proceedings, particularly when waiving rights or taking a plea. 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."¹

According to currently available information, the demographics of children in Ohio's juvenile justice system suggest that, like their counterparts nationally, they cannot effectively navigate the complex and adversarial juvenile justice system on their own.

JUVENILE JUSTICE POPULATION IN OHIO

- Roughly 75% of incarcerated youth need mental health services.² 55% of the girls incarcerated in the Scioto Correctional Facility have a mental health disorder; 42% take psychiatric medication.³
- Over 44% of children committed to ODYS have special educational needs as compared to 14% of children in the general Ohio school population⁴ and 10% of children nationally.⁵
- According to ODYS, almost half of incarcerated youth with special educational needs are emotionally disturbed, roughly 24% have a specific learning disability and 22% have cognitive disabilities.⁶

JUVENILE JUSTICE POPULATION NATIONALLY

- Many children in the juvenile justice system have been victims of abuse or neglect. Children who are abused and neglected are 50% more likely than other children to be arrested

while a juvenile, 40% more likely to be arrested as an adult for a violent crime, and 33% more likely than other children to abuse drugs.⁷

- Nationally, 70% of incarcerated girls report physical and sexual abuse.⁸
- Nearly 60% of female juvenile offenders had symptoms that were diagnosed as an Anxiety Disorder, as compared to 32% among boys.⁹
- One study found that 48.9% of the female juvenile offenders sampled were experiencing symptoms of post-traumatic stress disorder at the time of the study and that female offenders were 50% more likely to suffer from PTSD than their male counterparts.¹⁰

ENDNOTES

¹ 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.

² NAMI Ohio *To Lift the Burden: Reducing the Costs of Untreated Mental Illness in Ohio While Improving Care* (April 2005) at 3-4.

³ Fred Cohen, Esq. *Interim Report: Scioto Juvenile Correction Facility: Girls Units* (September 2004) at 3-4.

⁴ Ohio Coalition for the Education of Children with Disabilities Forum. *Students with Disabilities Over-represented in Juvenile Justice System; Does Disability = Delinquency?* Vol. XXII, Issue 4 (Nov-Dec 2004) at 1.

⁵ 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.

⁶ *Students with Disabilities Over-represented in Juvenile Justice System* at 2

⁷ 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.

⁸ Evans, W et al. *Suicide ideation, attempts, and abuse* Child & Adolescent Social Work Journal, 13 (1996) at 1.

⁹ Coalition for Juvenile Justice, *Handle with Care: Serving the Mental Health Needs of Young Offenders* (2000).

¹⁰ Cauffman, E et al. *PTSD Among Female Juvenile Offenders* Journal of American Academy of Child and Adolescent Psychiatry, 37 (1998).

IJA-ABA

Juvenile
Justice
Standards

A Balanced Approach

Robert E. Shepherd, Jr.

- exists between the juvenile and the parent and should notify the court and the parties of any finding that a conflict exists.
- C. If a parent has retained counsel for a juvenile and it appears to the court that the parent's interest in the case conflicts with the juvenile's interest, the court should caution both the parent and counsel as to counsel's duty of loyalty to the juvenile's interests. If the parent's dominant language is not English, the court's caution should be communicated in a language understood by the parent.

**PART VI: WAIVER OF THE JUVENILE'S RIGHTS; THE
ROLE OF PARENTS AND GUARDIANS AD LITEM
IN THE DELINQUENCY PROCEEDINGS**

Waiver of the Juvenile's Rights

- 6.1 Waiver of the juvenile's rights: in general.
- A. Any right accorded to the respondent in a delinquency case by these standards or by federal, state, or local law may be waived in the manner described below. A juvenile's right to counsel may not be waived.
- B. For purposes of this part:
1. A "mature respondent" is one who is capable of adequately comprehending and participating in the proceedings;
 2. An "immature respondent" is one who is incapable of adequately comprehending and participating in the proceedings because of youth or inexperience. This part does not apply to determining a juvenile's incapacity to stand trial or otherwise participate in delinquency proceedings by reason of mental disease or defect.

In re Lisa G., 127 N.H. 585, 504 A.2d 1, 4 (1986). If a juvenile client is "immature," counsel should request the appointment of a guardian *ad litem* to "act as a substitute decision maker for the juvenile." (Citing Standard 6.1 B.2.)

- C. Counsel for the juvenile bears primary responsibility for deciding whether the juvenile is mature or immature. If counsel believes the juvenile is immature, counsel should request the court to appoint a guardian *ad litem* for the juvenile.
- D. A mature respondent should have the power to waive rights on his or her own behalf, in accordance with Standard 6.2. Subject

American Council of Chief Defenders National Juvenile Defender Center

TEN CORE PRINCIPLES FOR PROVIDING QUALITY DELINQUENCY REPRESENTATION THROUGH INDIGENT DEFENSE DELIVERY SYSTEMS

January 2005

Preamble¹

A. Goal of These Principles

The Ten Core Principles for Providing Quality Delinquency Representation through Indigent Defense Delivery Systems are developed to provide criteria by which an indigent defense system may fully implement the holding of *In Re: Gault*.² Counsel's paramount responsibilities to children charged with delinquency offenses are to zealously defend them from the charges leveled against them and to protect their due process rights. The Principles also serve to offer greater guidance to the leadership of indigent defense providers as to the role of public defenders, contract attorneys or assigned counsel in delivering zealous, comprehensive and quality legal representation on behalf of children in delinquency proceedings as well as those prosecuted in adult court.³

While the goal of the juvenile court has shifted in the past decade toward a more punitive model of client accountability and public safety, juvenile defender organizations should reaffirm the fundamental purposes of juvenile court: (1) to provide a fair and reliable forum for adjudication; and (2) to provide appropriate support, resources, opportunities and treatment to assure the rehabilitation and development of competencies of children found delinquent. Delinquency cases are complex, and their consequences have significant implications for children and their families. Therefore, it is of paramount importance that children have ready access to highly qualified, well-resourced defense counsel.

Defender organizations should further reject attempts by courts or by state legislatures to criminalize juvenile behavior in order to obtain necessary services for children. Indigent defense counsel should play a strong role in determining this and other juvenile justice related policies.

In 1995, the American Bar Association's Juvenile Justice Center published *A Call for Justice: An Assessment of Access to Counsel and Quality of Representation in Delinquency Proceedings*, a national study that revealed major failings in juvenile defense across the nation. The report spurred the creation of the National Juvenile Defender Center and nine regional defender centers around the country. The National Juvenile Defender Center conducts state and county assessments of juvenile indigent defense systems that focus on access to counsel and measure the quality of representation.⁴

B. The Representation of Children and Adolescents is a Specialty

The Indigent Defense Delivery System must recognize that children and adolescents are at a crucial stage of development and that skilled juvenile delinquency defense advocacy will positively impact the course of clients' lives through holistic and zealous representation.

The Indigent Defense Delivery System must provide training regarding the stages of child and adolescent development and the advances in brain research that confirm that children and young adults do not possess the same cognitive, emotional, decision-making or behavioral capacities as adults. Expectations, at any stage of the court process, of children accused of crimes must be individually defined according to scientific, evidence-based practice.

The Indigent Defense Delivery System must emphasize that it is the obligation of juvenile defense counsel to maximize each client's participation in his or her own case in order to ensure that the client understands the court process and to facilitate the most informed decision making by the client. The client's minority status does not negate counsel's obligation to appropriately litigate factual and legal issues that require judicial determination and to obtain the necessary trial skills to present these issues in the courtroom.

C. Indigent Defense Delivery Systems Must Pay Particular Attention to the Most Vulnerable and Over-Represented Groups of Children in the Delinquency System

Nationally, children of color are severely over-represented at every stage of the juvenile justice process. Research has demonstrated that involvement in the juvenile court system increases the likelihood that a child will subsequently be convicted and incarcerated as an adult. Defenders must work to increase awareness of issues such as disparities in race and class, and they must zealously advocate for the elimination of the disproportionate representation of minority youth in juvenile courts and detention facilities.

Children with mental health and developmental disabilities are also over-represented in the juvenile justice system. Defenders must recognize mental illness and developmental impairments, legally address these needs and secure appropriate assistance for these clients as an essential component of quality legal representation.

Drug- and alcohol-dependent juveniles and those dually diagnosed with addiction and mental health disorders are more likely to become involved with the juvenile justice system. Defenders must recognize, understand and advocate for appropriate treatment services for these clients.

Research shows that the population of girls in the delinquency system is increasing, and juvenile justice system personnel are now beginning to acknowledge that girls' issues are distinct from boys'. Gender-based interventions and the programmatic needs of girls, who have frequently suffered from abuse and neglect, must be assessed and appropriate gender-based services developed and funded.

In addition, awareness and unique advocacy are needed for the special issues presented by lesbian, gay, bisexual and transgender youth.

The American Council of Chief Defenders (ACCD), a section of the National Legal Aid & Defender Association, is dedicated to promoting fair justice systems by advocating sound public policies and ensuring quality legal representation to people who are facing a loss of liberty or accused of a crime who cannot afford an attorney. For more information, see www.nlada.org or call (202) 452-0620.

The National Juvenile Defender Center (NJDC) is committed to ensuring excellence in juvenile defense and promoting justice for all children. For more information, see www.njdc.info or call (202) 452-0010.

Ten Principles

1 The Indigent Defense Delivery System Upholds Juveniles' Right to Counsel Throughout the Delinquency Process and Recognizes The Need For Zealous Representation to Protect Children

A. The indigent defense delivery system should ensure that children do not waive appointment of counsel. The indigent defense delivery system should ensure that defense counsel are assigned at the earliest possible stage of the delinquency proceedings.⁵

B. The indigent defense delivery system recognizes that the delinquency process is adversarial and should provide children with continuous legal representation throughout the delinquency process including, but not limited to, detention, pre-trial motions or hearings, adjudication, disposition, post-disposition, probation, appeal, expungement and sealing of records

C. The indigent defense delivery system should include the active participation of the private bar or conflict office whenever a conflict of interest arises for the primary defender service provider.⁶

2 The Indigent Defense Delivery System Recognizes that Legal Representation of Children is a Specialized Area of the Law

A. The indigent defense delivery system recognizes that representing children in delinquency proceedings is a complex specialty in the law and that it is different from, but equally as important as, the legal representation of adults. The indigent defense delivery system further acknowledges the specialized nature of representing juveniles processed as adults in transfer/waiver proceedings.⁷

B. The indigent defense delivery system leadership demonstrates that it respects its juvenile defense team members and that it values the provision of quality, zealous and comprehensive delinquency representation services.

C. The indigent defense delivery system leadership recognizes that delinquency representation is not a training assignment for new attorneys or future adult court advocates, and it encourages experienced attorneys to provide delinquency representation.

3 The Indigent Defense Delivery System Supports Quality Juvenile Delinquency Representation Through Personnel and Resource Parity⁸

A. The indigent defense delivery system encourages juvenile representation specialization without limiting attorney and support staff's access to promotional progression, financial advancement or personnel benefits.

B. The indigent defense delivery system provides a professional work environment and adequate operational resources such as office space, furnishings, technology, confidential client interview areas⁹ and current legal research tools. The system includes juvenile representation resources in budgetary planning to ensure parity in the allocation of equipment and resources

4 The Indigent Defense Delivery System Utilizes Expert and Ancillary Services to Provide Quality Juvenile Defense Services

A. The indigent defense delivery system supports requests for essential expert services throughout the delinquency process and whenever individual juvenile case representation requires these services for effective and quality representation. These services include, but are not limited to, evaluation by and testimony of mental health professionals, education specialists, forensic evidence examiners, DNA experts, ballistics analysis and accident reconstruction experts.

B. The indigent defense delivery system ensures the provision of all litigation support services necessary for the delivery of quality services, including, but not limited to, interpreters, court reporters, social workers, investigators, paralegals and other support staff.

5 The Indigent Defense Delivery System Supervises Attorneys and Staff and Monitors Work and Caseloads

A. The leadership of the indigent defense delivery system monitors defense counsel's caseload to permit the rendering of quality representation. The workload of indigent defenders, including appointed and other work, should never be so large as to interfere with the rendering of zealous advocacy or continuing client contact nor should it lead to the breach of ethical obligations.¹⁰ The concept of workload may be adjusted by factors such as case complexity and available support services.

B. Whenever it is deemed appropriate, the leadership of the indigent defense delivery system, in consultation with staff, may adjust attorney case assignments and resources to guarantee the continued delivery of quality juvenile defense services.

6 The Indigent Defense Delivery System Supervises and Systematically Reviews Juvenile Defense Team Staff for Quality According to National, State and/or Local Performance Guidelines or Standards

A. The indigent defense delivery system provides supervision and management direction for attorneys and all team members who provide defense representation services to children.¹¹

B. The leadership of the indigent defense delivery system adopts guidelines and clearly defines the organization's vision as well as expectations for the delivery of quality legal representation. These guidelines should be consistent with national, state and/or local performance standards, measures or rules.¹²

C. The indigent defense delivery system provides administrative monitoring, coaching and systematic reviews for all attorneys and staff representing juveniles, whether contract defenders, assigned counsel or employees of defender offices.

7 The Indigent Defense System Provides and Supports Comprehensive, Ongoing Training and Education for All Attorneys and Support Staff Involved in the Representation of Children

A. The indigent defense delivery system supports and encourages juvenile defense team members through internal and external comprehensive training¹³ on topics including, but not limited to, detention advocacy, litigation and trial skills, dispositional planning, post-dispositional practice, educational rights, appellate advocacy and administrative hearing representation.

B. The indigent defense delivery system recognizes juvenile delinquency defense as a specialty that requires continuous training in unique areas of the law.¹⁴ In addition to understanding the juvenile court process and systems, juvenile team members should be competent in juvenile law, the collateral consequences of adjudication and conviction, and other disciplines that uniquely impact juvenile cases, such as, but not limited to:

1. Administrative appeals
2. Child welfare and entitlements
3. Child and adolescent development
4. Communicating and building attorney-client relationships with children and adolescents
5. Community-based treatment resources and programs
6. Competency and capacity
7. Counsel's role in treatment and problem solving courts¹⁵
8. Dependency court/abuse and neglect court process
9. Diversionary programs
10. Drug addiction and substance abuse
11. Ethical issues and considerations
12. Gender-specific programming
13. Immigration
14. Mental health, physical health and treatment

15. Racial, ethnic and cultural understanding
16. Role of parents/guardians
17. Sexual orientation and gender identity awareness
18. Special education
19. Transfer to adult court and waiver hearings
20. Zero tolerance, school suspension and expulsion policies

Notes

¹ These principles were developed over a one-year period through a joint collaboration between the National Juvenile Defender Center and the American Council of Chief Defenders, a section of the National Legal Aid and Defender Association (NLADA), which officially adopted them on December 4, 2004

² 387 U.S. 1 (1967). According to the IJA/ABA Juvenile Justice Standard Relating to Counsel for Private Parties 3.1 (1996), "the lawyer's principal duty is the representation of the client's legitimate interests" as distinct and different from the best interest standard applied in neglect and abuse cases. The Commentary goes on to state that "counsel's principal responsibility lies in full and conscientious representation" and that "no lesser obligation exists when youthful clients or juvenile court proceedings are involved."

³ For purposes of these Principles, the term "delinquency proceeding" denotes all proceedings in juvenile court as well as any proceeding lodged against an alleged status offender, such as for truancy, running away, incorrigibility, etc.

⁴ Common findings among these assessments include, among other barriers to adequate representation, a lack of access to competent counsel, inadequate time and resources for defenders to prepare for hearings or trials, a juvenile court culture that encourages pleas to move cases quickly, a lack of pretrial and dispositional advocacy and an over-reliance on probation. For more information, see *Selling Justice Short: Juvenile Indigent Defense in Texas* (2000); *The Children Left Behind: An Assessment of Access to Counsel and Quality of Representation in Delinquency Proceedings in Louisiana* (2001); *Georgia: An Assessment of Access to Counsel and Quality of Representation in Delinquency Proceedings* (2001); *Virginia: An Assessment of Access to Counsel and Quality of Representation in Delinquency Proceedings* (2002); *An Assessment of Counsel and Quality of Representation in Delinquency Proceedings in Ohio* (2003); *Maine: An Assessment of Access to Counsel and Quality of Representation in Delinquency Proceedings* (2003); *Maryland: An Assessment of Access to Counsel and Quality of Representation in Delinquency Proceedings* (2003); *Montana: An Assessment of Access to Counsel and Quality of Representation in Delinquency Proceedings* (2003); *North Carolina: An Assessment of Access to Counsel and Quality of Representation in Delinquency Proceedings* (2003); *Pennsylvania: An Assessment of Access to Counsel and Quality of Representation in Delinquency Proceedings* (2003); *Washington: An Assessment of Access to Counsel and Quality of Representation in Juvenile Offender Matters* (2003)

⁵ *American Bar Association Ten Principles of a Public Defense Delivery System* (2002), Principle 3.

⁶ A conflict of interest includes both codefendants and intra-family conflicts, among other potential conflicts that may arise. See also *American Bar Association Ten Principles of a Public Defense Delivery System* (2002), Principle 2.

⁷ For purposes of this Principle, the term "transfer/waiver proceedings" refers to any proceedings related to prosecuting youth in adult court, including those known in some jurisdictions as certification, bind-over, decline, remand, direct file, or youthful offenders

⁸ *American Bar Association Ten Principles of a Public Defense Delivery System* (2002), Principle 8.

⁹ *American Bar Association Ten Principles of a Public Defense Delivery System* (2002), Principle 4.

¹⁰ See National Study Commission on Defense Services, *Guidelines for Legal Defense Systems in the United States* (1976), 5.1, 5.3; American Bar Association, *Standards for Criminal Justice, Providing Defense Services* (3rd ed., 1992), 5-5.3; American Bar Association, *Standards for Criminal Justice: Prosecution Function and Defense Function* (3rd ed., 1993), 4-1.3(e); National Advisory Commission on Criminal Justice Standards and Goals, *Report of the Task Force on Courts, Chapter 13, "The Defense"* (1973), 13.12; National Legal Aid and Defender Association and American Bar Association, *Guidelines for Negotiating and Awarding Contracts for Criminal Defense Services* (NLADA, 1984; ABA, 1985), III-6, III-12; National Legal Aid and Defender Association, *Standards for the Administration of Assigned Counsel Systems* (1989), 4.1.4.1.2; ABA Model Code of Professional Responsibility DR 6-101; *American Bar Association Ten Principles of a Public Defense Delivery System* (2002), Principle 5.

¹¹ *American Bar Association Ten Principles of a Public Defense Delivery System* (2002), Principles 6 and 10.

¹² For example, Institute of Judicial Administration-American Bar Association, *Juvenile Justice Standards* (1979); National Advisory Commission on Criminal Justice Standards and Goals, *Report of the Task Force on Courts, Chapter 13, "The Defense"* (1973); National Study Commission on Defense Services, *Guidelines for Legal Defense Systems in the United States* (1976); American Bar Association, *Standards for Criminal Justice, Providing Defense Services* (3rd ed., 1992); American Bar Association, *Standards for Criminal Justice: Prosecution Function and Defense Function* (3rd ed., 1993); *Standards and Evaluation Design for Appellate Defender Offices* (NLADA, 1980); *Performance Guidelines for Criminal Defense Representation* (NLADA, 1995).

¹³ *American Bar Association Ten Principles of a Public Defense Delivery System* (2002), Principle 9; National Legal Aid and Defender Association, *Training and Development Standards* (1997), Standards 1 to 9.

¹⁴ National Legal Aid and Defender Association, *Training and Development Standards* (1997), Standard 7.2, footnote 2.

¹⁵ American Council of Chief Defenders, *Ten Tenets of Fair and Effective Problem Solving Courts* (2002).

8 The Indigent Defense Delivery System Has an Obligation to Present Independent Treatment and Disposition Alternatives to the Court

A. Indigent defense delivery system counsel have an obligation to consult with clients and, independent from court or probation staff, to actively seek out and advocate for treatment and placement alternatives that best serve the unique needs and dispositional requests of each child.

B. The leadership and staff of the indigent defense delivery system work in partnership with other juvenile justice agencies and community leaders to minimize custodial detention and the incarceration of children and to support the creation of a continuum of community-based, culturally sensitive and gender-specific treatment alternatives.

C. The indigent defense delivery system provides independent post-conviction monitoring of each child's treatment, placement or program to ensure that rehabilitative needs are met. If clients' expressed needs are not effectively addressed, attorneys are responsible for intervention and advocacy before the appropriate authority.

9 The Indigent Defense Delivery System Advocates for the Educational Needs of Clients

A. The indigent defense delivery system recognizes that access to education and to an appropriate educational curriculum is of paramount importance to juveniles facing delinquency adjudication and disposition.

B. The indigent defense delivery system advocates, either through direct representation or through collaborations with community-based partners, for the appropriate provision of the individualized educational needs of clients.

C. The leadership and staff of the indigent defense delivery system work with community leaders and relevant agencies to advocate for and support an educational system that recognizes the behavioral manifestations and unique needs of special education students.

D. The leadership and staff of the indigent defense delivery system work with juvenile court personnel, school officials and others to find alternatives to prosecutions based on zero tolerance or school-related incidents.

10 The Indigent Defense Delivery System Must Promote Fairness and Equity For Children

A. The indigent defense delivery system should demonstrate strong support for the right to counsel and due process in delinquency courts to safeguard a juvenile justice system that is fair, non-discriminatory and rehabilitative.

B. The leadership of the indigent defense delivery system should advocate for positive change through legal advocacy, legislative improvements and systems reform on behalf of the children whom they serve.

C. The leadership and staff of the indigent defense delivery system are active participants in the community to improve school, mental health and other treatment services and opportunities available to children and families involved in the juvenile justice system.

JUVENILE DELINQUENCY GUIDELINES

**Improving
Court Practice in Juvenile
Delinquency Cases**

**NATIONAL COUNCIL OF JUVENILE
AND FAMILY COURT JUDGES
Reno, Nevada**

JUVENILE DELINQUENCY GUIDELINES

Improving Court Practice in Juvenile Delinquency Cases

Authored by the Publication Development Committee
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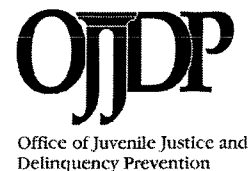
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the juvenile delinquency court system. The breadth of knowledge and wisdom that result from experience are critical to ensure that this complex court serves the best interests of the community and its youth. ***The DELINQUENCY GUIDELINES recommends six continuous years as the minimum time for a judge or judicial officer to spend on the juvenile delinquency court bench.***

5. ***All Members of the Juvenile Delinquency Court Shall Treat Youth, Families, Crime Victims, Witnesses, and Others With Respect, Dignity, Courtesy, and Cultural Understanding*** – *The juvenile delinquency court must be accessible, understandable, and respectful to persons of all ages, cultures, and abilities, in its processes, its written materials, and its verbal and non-verbal communications.*

All members of the juvenile delinquency court system, from intake, assessment, diversion, courtroom, and disposition services, must understand and appreciate the ethnic and cultural traditions and mores, the socio-economic circumstances, the gender differences, the disabilities, and the strengths of those who enter the juvenile delinquency system. All members of the juvenile delinquency court should understand how courts can positively impact disproportionate minority contact, and should design and monitor decision points to ensure fair and consistent decision-making that minimizes the possibility of bias.

Effective juvenile delinquency court systems ensure certified interpreters are available to assist families who do not speak English or are hearing impaired; legal materials are available in the language of significant ethnic groups in the jurisdiction that do not speak English; and, services are designed with appropriate cultural and cognitive understanding. Juvenile delinquency courts of excellence strive to set their hearings and appointments at times that will minimize youth missing school and parents missing work.

6. ***Juvenile Delinquency Court Judges Should Ensure Their Systems Divert Cases to Alternative Systems Whenever Possible and Appropriate*** – *Juvenile delinquency courts should limit formal processing of petitions to cases where it is apparent that law enforcement diversion, prosecutor diversion, or juvenile delinquency court diversion to community services, has failed to protect, or will be ineffective in protecting the community from significant risk of harm.*

Juvenile delinquency courts should encourage

law enforcement and prosecutors to consider diversion for every status offender, every first-time, non-violent misdemeanor offender, and other offenders as appropriate. Juvenile delinquency court judges should engage the community, law enforcement, and the prosecutor to develop diversion programs, including dispute resolution alternatives. Juvenile delinquency court judges should participate in the creation and ongoing monitoring of these programs to ensure that they are successfully diverting appropriate alleged juvenile offenders.

7. ***Youth Charged in the Formal Juvenile Delinquency Court Must Have Qualified and Adequately Compensated Legal Representation*** – *Alleged and adjudicated delinquent youth must be represented by well trained attorneys with cultural understanding and manageable caseloads. Juvenile delinquency court administrative judges are responsible to ensure that counsel is available to every youth at every hearing, including post-disposition reviews and reentry hearings.*

Juvenile delinquency court judges and judicial officers should be extremely reluctant to allow a youth to waive the right to counsel. On the rare occasion when the court accepts a waiver of the right to counsel, the court should take steps to ensure that the youth is fully informed of the consequences of the decision. A 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.

8. ***Juvenile Delinquency Court Judges Should Ensure Crime Victims Have Access to All Phases of the Juvenile Delinquency Court Process and Receive All Services to Which They Are Entitled by Law*** – *The prosecutor, probation officer, or both, should provide victim advocates to assist crime victims throughout the court process. Crime victims should be welcomed, respected, listened to, and involved in system improvement efforts.*

Juvenile delinquency court judges should ensure that crime victims are encouraged to participate in the juvenile delinquency court process by providing safe and separate waiting rooms, providing assistance in submitting victim impact statements, and making enforced orders of restitution. Judges should ensure that offending youth have opportunities to learn the impact of crime on the victim through victim impact panels or other methods, and that programs exist to assist youth to earn and pay restitution to victims.



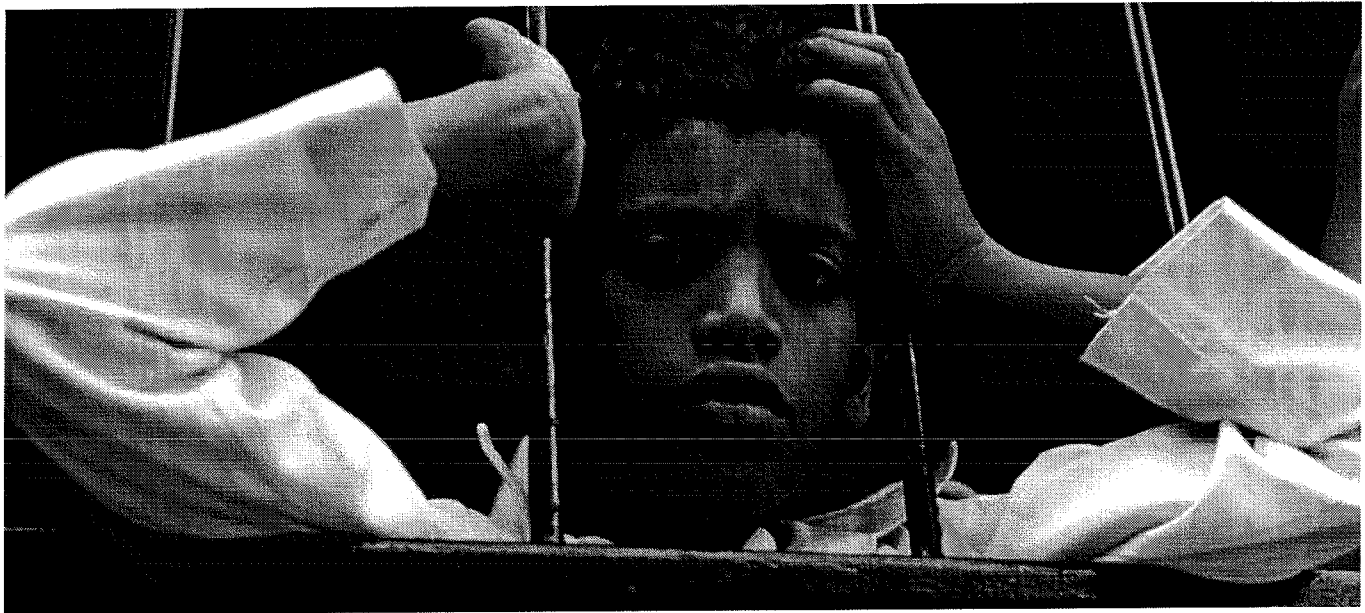
The Children's
Law Center



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

JANUARY 2006



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

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)

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

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

CONTINUED ON REVERSE

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. ■



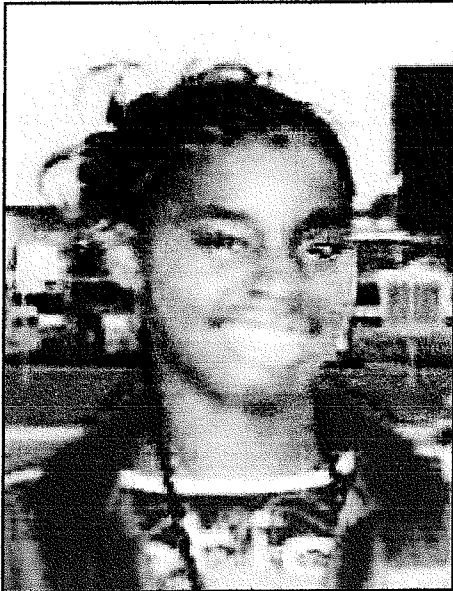
TAKE ACTION

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 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 (NCJFCJ), *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.

Ohio children affected by waiver of counsel



Kristal's story

Kristal was 13 years old when she was charged in Cuyahoga County with delinquency for breaking into her mother's bedroom and taking money. She denies taking any money or entering her mother's room for that purpose. Kristal was charged with felony burglary.

At a court appearance, Kristal waived her right to counsel. Lacking a lawyer, she admitted to the charges before the court read her rights to her, including her right to a trial. From Kristal's point of view, she did see any point in having a trial—or an attorney—after she had already admitted to the charges. The following month, Kristal appeared in court for sentencing, again waiving her right to counsel, and the court placed Kristal on probation for an indefinite period of time.

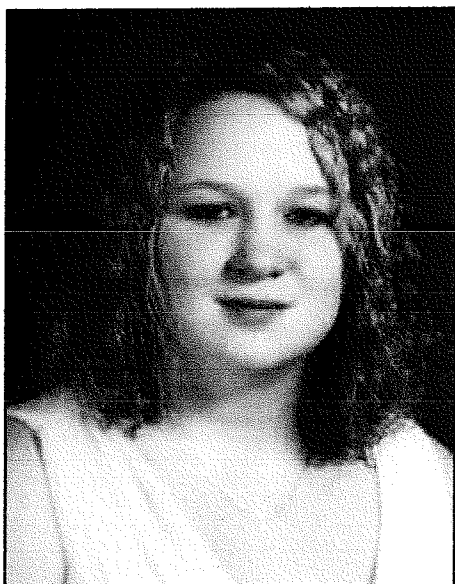
A year later, Kristal, while still on probation but living with her grandmother, left home overnight without permission. When she returned, Kristal, her grandmother, and the family therapist went to see Kristal's probation officer. During that meeting, Kristal's probation officer took Kristal into the courtroom to see the Magistrate and filed a court order violation against her for leaving home and not following the rules. Kristal did not have a court date set for this day, and she and her grandmother were unaware that Kristal would be placed before the court.

During the proceeding, the court did not ask Kristal if she wanted an attorney to assist her, and no counsel was present or appointed to represent her. Kristal admitted to the charge. Her probation officer first asked the court to commit her to 90 days in county detention, but then increased the request to six months in DYS custody. Kristal was not provided with counsel, who could have advocated for no or reduced detention. Lacking advocacy on her behalf, Kristal was committed to DYS for a minimum of six months, maximum to her 21st birthday.

Ryan's story

Ryan, a 17-year-old boy, represented himself during his delinquency trial on a burglary charge in Clark County. Ryan took his case to trial, claiming his innocence. 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 struggled in presenting testimony and evidence, and in knowing how or when to object to other improper testimony. Ryan lost his trial, was adjudicated delinquent and was sentenced to a DYS facility for a minimum of one year and a maximum to his 21st birthday.

Ryan appealed his case. After he had served ten 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. Ryan's incarceration and subsequent legal expenses cost Ohio taxpayers more than \$50,000.



Pamela's story:

Pamela was 15 years old and on probation when she was charged in Licking County with delinquency for possessing drugs after submitting to a urine test. The urine test revealed evidence of drug use, a fact that, standing alone, may be insufficient to support the charges.

Prior to appearing at her adjudication hearing on the drug charge and an unrelated probation violation, Pamela signed a series of "rights forms," one of which indicated that she wished to waive her right to counsel. Pamela, her mother, and her probation officer attended the hearing; however, no defense attorney or prosecutor was present. Pamela waived her right to counsel "on the record" during the following brief colloquy with the court, after which she admitted to the drug charge:

THE COURT: In all of these cases you have the right to be represented by an attorney at today's hearing. Do you understand that?

PAMELA: Yes, sir.

THE COURT: If you cannot afford an attorney and you qualify under state guidelines, I will appoint an attorney to represent you. Do you understand that?

PAMELA: Yes, sir.

THE COURT: On the new charge of felony five possession of drugs, do you wish to go forward in that case without an attorney?

PAMELA: Yes, sir.

THE COURT: You do.

PAMELA: Yes.

THE COURT: Then I need you to sign and your mother to sign your waiver of attorney, please.

With respect to the probation violation case, Pamela had previously requested an attorney; however, her mother had not completed the court appointed attorney application in time for the court proceeding. Subsequently, Pamela's mother prompted Pamela to admit to the probation violation without an attorney so, "That way we'll be done." At first, Pamela resisted proceeding without an attorney. However, following questioning by the court, Pamela admitted to the probation violation as well.

At the disposition proceeding, the court again failed to appoint counsel to or secure a valid waiver of the right to counsel from Pamela and committed her to DYS for a minimum period of six months and a maximum period extending to her 21st birthday. Following disposition, Pamela signed a form, waiving her right to file written objections to the Magistrate's Decision.

Pamela is currently incarcerated in a DYS facility and has filed an appeal. She has yet to receive any drug or alcohol counseling in DYS, except for the Alcoholics Anonymous meetings that she voluntarily attends.

A.C.'s story

A.C. was a 17-year-old honors student with no criminal record when he was arrested for stealing American flags from neighbors' yards shortly after the war in Iraq began. After A.C. told the officers who arrested him that he would not speak to them without an attorney, the officers transported him to the Hamilton County juvenile detention center, where he was held overnight.

The following morning, A.C. admitted to stealing the flags, without being advised of his right to counsel and without having the charges against him—or their potential consequences—explained to him in court. Without any knowledge of the juvenile court system, A.C. believed that he would be released from detention if he owned up to what he had done. However, upon confessing to the crime in court, A.C. was sentenced to two weeks in detention while a probation investigation report was generated.

A.C.'s mother promptly retained a private attorney, who successfully withdrew A.C.'s plea on the grounds that he had not been adequately advised of his right to counsel or the charges against him. A.C. was immediately released. He ultimately admitted to a single count of theft, and the remaining charges were dismissed. He did not serve any more time in detention.

R.B.'s story

R.B., age fifteen, was detained and charged with delinquency in Clark County Juvenile Court for drug-related charges. During his arraignment, which neither of his parents attended, R.B. asked the court if there was, "any way he could get out" of detention. R.B. also informed the court, "I'm scared. I know I keep messing up, man, but I'm scared to go to court because I don't want to get locked back up." The Magistrate asked R.B. if he wanted an attorney, and R.B. responded, "Yeah." R.B. again asked if there was any way he could be released from detention, to which the court responded, "Not right now."

Approximately three weeks later, R.B. had an adjudication hearing. This time, both of his parents appeared in court. R.B. was not represented by counsel and, although R.B. had indicated at his arraignment that he wanted an attorney to represent him, the court did not discuss the issue of counsel. During the adjudication hearing, R.B. entered a plea to amended charges and was found delinquent. Afterward, in response to questions from R.B.'s father, the court informed R.B.'s parents that if they could find a suitable program for R.B. to attend, the court would consider not committing him to DYS.

One month later, R.B. appeared in court with his father for disposition proceedings. Again, R.B. was not represented by counsel, did not waive counsel, and the court neither raised the issue nor appointed a lawyer to R.B. at any point during the proceedings. Subsequently, the court committed R.B. to DYS for a minimum of six months, maximum to his 21st birthday. R.B. appealed, and the Second District Court of Appeals reversed his case, finding that his right to counsel had been violated. See *In re R.B.*, 2006-Ohio-264; 2006 WL 172367 (Ohio App. 2 Dist.)

R.B. was released from DYS after winning his appeal; however, he spent 183 days in a state juvenile prison which, according to DYS figures, cost Ohio taxpayers approximately \$33,719 (excluding two months of county detention costs): a very high price to pay considering the court would have considered alternatives to incarceration for R.B. if only an advocate had presented suitable programs to the court at disposition.

Support: Ohio organizations

The following organizations have read the White Paper (“A Call to Amend the Ohio Rules of Juvenile Procedure to Protect the Right to Counsel”) prepared by the American Civil Liberties Union, the Children’s Law Center, the ACLU of Ohio, and the Office of the Ohio Public Defender; agree that Ohio juveniles’ right to counsel must be better protected; support efforts to amend the Ohio Rules of Juvenile Procedure to achieve this goal; and respectfully urge the Supreme Court of Ohio to consider such amendments:

Children’s Defense Fund Ohio (CDF)

The mission of the Children's Defense Fund is to Leave No Child Behind and to ensure every child a Healthy Start, a Head Start, a Fair Start, a Safe Start and a Moral Start in life and successful passage to adulthood with the help of caring families and communities. CDF provides a strong, effective voice for all the children of America who cannot vote, lobby or speak for themselves. We pay particular attention to the needs of poor and minority children and those with disabilities. CDF educates the nation about the needs of children and encourages preventive investment before they get sick or into trouble, drop out of school, or suffer family breakdown. CDF began in 1973 and is a private, nonprofit organization supported by foundation and corporate grants and individual donations. As an independent voice for children, CDF does not accept government funds.

Franklin County Public Defender

The mission of the Franklin County Public Defender is to provide comprehensive legal representation services in criminal, juvenile, and custody proceedings to indigent persons in Franklin County so as to fulfill the constitutional mandate of “equal justice under the law.”

The Greater Cincinnati Criminal Defense Lawyers Association (GCCDLA)

GCCDLA is an organization of over 50 criminal defense attorneys in the Greater Cincinnati region. The GCCDLA aggressively advocates for the constitutional rights of all those accused of crime, whether they be indigent or otherwise able to afford legal counsel. Its members represent the criminally accused at all levels of the criminal justice system.

Juvenile Justice Advocacy Alliance (JJAA)*

The Juvenile Justice Advocacy Alliance (formerly the Juvenile Justice Policy and Review Committee) is an independent group of predominately youth-serving professionals and concerned citizens in Cuyahoga County. The mission is to promote and advocate for the delivery of effective, humane and just services and policies for youth involved in the juvenile justice system in Cuyahoga County and beyond, as the best way to serve the safety and well-being of youth and the public.

*The JJAA is not incorporated as any legal entity – it is a citizen group, and the members who are part of the JJAA only endorse as individuals, not as representatives of their organizations.

Juvenile Justice Coalition (JJC)

The mission of the Juvenile Justice Coalition is to promote effective programs, equitable treatment of youth, and public policy that will reduce juvenile delinquency in Ohio. JJC has focused on two policy areas: encouraging community-based alternatives to institutionalization and reducing minority overrepresentation in the juvenile justice system.

The Maumee Valley Criminal Defense Lawyers Association (MVCDLA)

The MVCDLA, founded in 1996, is an organization of approximately 100 attorneys representing the criminally accused in northwest Ohio. The MVCDLA advocates for progressive laws and policies consistent with constitutional principles with special concern for the rights of those accused of criminal offenses. The MVCDLA's concern for the rights of those accused of crimes naturally extends to those accused of being delinquent or unruly and the importance of their right to counsel.

Montgomery County Public Defender

The Law Office of the Public Defender operates to defend citizens who are accused of a criminal offense and who are at risk for going to jail. This includes felonies, misdemeanors, preliminary hearings, extraditions, and juvenile delinquency. We also handle some Children's Services cases, some child support contempt cases, and we can assist with reductions in child support.

Ohio Council of Churches

The Ohio Council of Churches seeks to challenge our members to learn from our diversity, to witness to our faith, and celebrate our oneness with the Body of Christ. Among its strategies to accomplish this is to advocate for social policies, seeking justice for and with those with no voice.

Public Children Service Association of Ohio (PCSAO)

PCSAO is a proactive coalition of Public Children Services Agencies that promotes the development of sound public policy and program excellence for safe children, stable families, and supportive communities. We do this through advocacy, research, training, consultation, and technical assistance.

Voices for Children Ohio

Voices for Children of Greater Cleveland is a non-partisan group of public, not-for-profit and private sector organizations who share a mutual concern about the present and future: OUR CHILDREN. Through a collaborative effort and a collective voice, Voices for Children promotes improvements in the well being of our community's children.



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February 23, 2006

Secretary Jo Ellen Cline
Commission on the Rules of Practice and Procedure
Supreme Court of Ohio
65 S. Front Street
Columbus, Ohio 43215

RE: Ohio Rules of Juvenile Procedure 3 and 29(B)

Dear Secretary Cline:

I write in support of the petition filed by the ACLU, the Office of the Ohio State Public Defender, and the Children's Law Center to amend the Ohio Rules of Juvenile Procedure 3 and 29(B) to require that children be prohibited from waiving counsel in delinquency proceedings without first consulting with an attorney. I write not as an attorney but as an educator with a history of working with children with disabilities in the juvenile and criminal justice systems. I have served the Courts and the Civil Rights Division of the U.S. Department of Justice and other organizations as an expert, monitor, and receiver in cases involving education and special education services for incarcerated populations. As a researcher, my colleagues and I have studied service delivery for students with disabilities and the rates of identification of children with disabilities in juvenile corrections.

Children with disabling conditions such as learning disabilities, emotional disturbance, speech and language disorders, and mental retardation are disproportionately represented in the juvenile justice system. Our research indicates that while 10-12 % of the school-age population in most states is identified and receiving special education services, nationally, more than 34% of all youth receiving education services in juvenile corrections are receiving special education services. The national average was obtained through self report by juvenile corrections agencies in more than 2/3 of all states. This average includes five states that reported in excess of 49% of all students in corrections are receiving special education services as well as states that reported very low service delivery rates. Based on my experience as a monitor and expert in cases involving education services for incarcerated youth, I believe that states with very low rates of identification have poorly developed links between juvenile corrections and the public schools and in fact, have many more students eligible for special education services that are not being served.

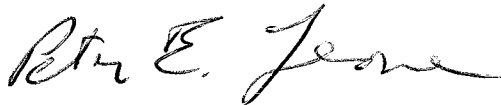
There is no evidence that children with disabilities commit more acts of delinquency than peers without disabilities, however, there is sufficient evidence that they are

overrepresented in juvenile corrections. While several theories have been developed to explain the phenomena of disproportionate representation of youth with disabilities in the system, the most plausible is "differential treatment." This explanation suggests that the ways in which youth present themselves to arresting officers, juvenile court intake workers, and juvenile court judges increases the likelihood that they will be detained prior to hearings and more likely to be committed to juvenile corrections rather receive alternative dispositions.

By definition, youth with disabilities have characteristics that may interfere with their ability to effectively communicate with law enforcement and the Courts. Some youth have difficulty processing and retaining newly presented information, others have difficulty communicating with others, and some are highly distractible. Other youth have difficulty attending to relevant aspects of instructions and have difficulty making choices or make choices without relying on all available information. When youth - out of fear, ignorance, or inability - fail to respond to questions and avoid eye contact with law enforcement and the Courts, their behavior is more likely to be suspect.

The proposed rule change prohibiting children from waiving counsel in delinquency proceedings without first consulting with an attorney, increases the likelihood that children with disabilities and other youth will receive a fair hearing in court. I encourage the Supreme Court of Ohio amend its rules of practice and procedure to ensure that all children have the opportunity to talk with counsel before waiving their right to legal representation in court.

Sincerely,

A handwritten signature in cursive script that reads "Peter E. Leone".

Peter E. Leone, Ph.D.
Professor & Director, National Center on Education,
Disability, and Juvenile Justice

THE PARTNERSHIP

Promoting Quality Practices and Programs for Youth and Families that Result in Positive Change and Restore Community

National Partnership for Juvenile Services

PARTNERS

Council for Educators of At-Risk and Delinquent Youth

Juvenile Justice Trainers Association

National Association of Juvenile Correctional Agencies

National Juvenile Detention Association

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February 25, 2006

Secretary Jo Ellen Cline
Commission on the Rules of Practice and Procedure
Supreme Court of Ohio
65 S. Front St.
Columbus, OH 43215

Dear Secretary Cline:

This letter is in support of the request by the National Office of the ACLU, the Children's Law Center, ACLU of Ohio, and the Office of the Ohio Public Defender to the Supreme Court of Ohio's Commission on the Rules of Practice and Procedure to consider changes to the Ohio Rules of Juvenile Procedure regarding waiver of the right to counsel.

I understand that according to a recent report by the Children's Law Center, and data supplied as part of this request, as many as 80% of children charged with criminal wrongdoing in some Ohio juvenile courts are not represented by counsel, and roughly 15% of children committed to Ohio Department of Youth Services facilities and 20% of those placed at community corrections facilities were unrepresented by counsel during their delinquency proceedings. These numbers seem to reflect a system of limited advocacy, in particular at the early stages of juvenile court proceedings when youth face hearings regarding detention.

I currently serve as Chief Executive Officer of the National Partnership for Juvenile Services, which includes the Council for Educators of At-Risk and Delinquent Youth, the Juvenile Justice Trainers Association, the National Association of Juvenile Corrections Agencies, and the National Juvenile Detention Association. These organizations serve as organizations for state and local agencies providing detention and correctional training, technical assistance and programming for youth in the juvenile justice system. It is unfortunate that facilities too often receive youth who have gone unrepresented in their delinquency cases, and in a number of cases, should not be confined at all. Residential service providers are too often in the position of receiving questions and concerns of youth that should be directed to an attorney because the youth has waived the right to counsel, or counsel has not yet been appointed.

Further, the lack of advocacy at detention hearings results in many youth being detained that could be diverted to far less expensive and equally as effective alternative programs or even released. It has been documented that the average cost for one (1) secure detention bed exceeds \$1.25 million over a twenty year period. Costs for a longer term secure youth corrections bed far surpasses that of detention. Recent reports suggest that the cost for a single bed in the State of Connecticut is in excess of \$325,000.00 per year.

Early appointment of counsel, even prior to detention hearings as has now been legislated in Virginia, can result in more efficient and cost-effective use of detention facilities. Such appointments also help to ensure that youth do not languish unnecessarily in juvenile detention facilities, and that their cases are resolved expeditiously. The benefits of prohibiting waiver protect not only the youth and his or her rights throughout the proceedings, but in general produce more just and effective outcomes.

I hope that the Ohio Supreme Court will consider this very important issue and protect the rights of youth in Ohio in the delinquency system by putting these measures in place. I thank you for your time and consideration, and am happy to answer any further questions you may have of me or my organization.

Sincerely,

Earl L. Dunlap
Chief Executive Officer
National Partnership for Juvenile Services

February 28, 2006

Secretary Jo Ellen Cline
Commission on the Rules of
Practice and Procedure
Supreme Court of Ohio
65 South Front Street
Columbus, Ohio 43215

Dear Secretary Cline:

On behalf of the National Juvenile Defender Center, I write to express my strong support for the proposed amendments to Ohio Rules of Juvenile Procedure 3 and 29(B) that would prevent children from waiving their right to counsel unless the child has first consulted with an attorney and the court has determined on the record that the child's waiver is knowing and intelligent. The National Juvenile Defender Center is an advocacy organization that works across the country to ensure excellence in juvenile defense and to promote justice for all children.

Nearly three years ago, the National Juvenile Defender Center and its partners issued *Justice Cut Short: An Assessment of Access to Counsel and Quality of Representation in Delinquency Proceedings in Ohio*. This comprehensive assessment of defense services was based on extensive surveys of juvenile justice personnel, interviews with hundreds of youth, and first-hand observation of courtroom proceedings by trained investigators. One of our key findings was that staggering numbers of Ohio youth waive their constitutional right to an attorney, even during the most critical stages of delinquency proceedings. We found that children's waiver of counsel is both widespread and widely tolerated in Ohio, and our investigators observed that it occurred without youth receiving proper advisements of their rights from judges and magistrates. In fact, as many as 80% of youth proceeded through Ohio's delinquency system without the "guiding hand of counsel" required by *In re Gault*, 387 U.S. 1 (1967).

The high rates of waiver in Ohio and elsewhere are particularly troubling given our knowledge of adolescent judgment and decision-making. Legal rules about the right to counsel can be difficult to grasp for individuals not trained in the law, especially children; one study by psychologists Grisso and Pomicter found that nearly 80% of youth do not understand the concepts entailed in the *Miranda* rights. Moreover, psychological studies consistently confirm what parents of teenagers have long known: adolescents evaluate risk differently than adults. In particular, youth are impulsive, easily influenced by others, and tend to focus on short-term consequences. Youth in the juvenile justice system also suffer from learning disabilities and mental illness at disproportionate rates, which can further complicate the decision process. Youth facing delinquency proceedings are in great danger of making a hasty or uncomprehending decision to waive their right to an attorney – a decision that will affect the rest of their lives.

In light of these considerations, the National Juvenile Defender Center and other professional organizations advocate policies to ensure that the procedure by which youth can waive counsel is adequate to protect their rights. The *Juvenile Justice Standards* issued by the Institute for Judicial Administration and the American Bar Association, as well as the *Ten Core Principles* for juvenile indigent defense promulgated by NJDC and the American Council of Chief Defenders, recommend that children be prevented from waiving counsel.

The National Council of Juvenile and Family Court Judges (NCJFCJ) has also recently issued *Juvenile Delinquency Guidelines* that address children's waiver of counsel. NCJFCJ notes that, contrary to the expectations of many court personnel, juvenile delinquency courts find that providing children with counsel facilitates earlier resolution of cases. To increase the efficiency and fairness of courtroom proceedings, NCJFCJ urges delinquency courts to appoint counsel early and permit waiver only rarely. The proposed amendments to Ohio's rules would conform to NCJFCJ's recommendation that judges should accept a child's waiver of counsel only after the youth has consulted with an attorney and persists in his or her desire to waive the right.

Over half of the United States now safeguard children's constitutional rights and improve delinquency court effectiveness by limiting waiver of counsel in some fashion. The proposed amendments to Ohio Rules of Juvenile Procedure 3 and 29(B) would bring Ohio into step with this trend by requiring that children's waiver of counsel is constitutionally adequate and follows consultation with an attorney. This sensible reform acknowledges the realities of adolescent development and would be an effective way to address the high rates of waiver documented in Ohio. The National Juvenile Defender Center hopes that the courts of Ohio will join other leading jurisdictions across the country in reaping the significant benefits of this simple change.

Sincerely,



Patricia Puritz
Executive Director

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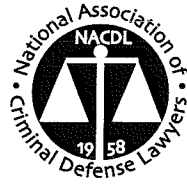
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NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

March 3, 2006

Secretary Jo Ellen Cline
Commission on the Rules of Practice and Procedure
Supreme Court of Ohio
65 South Front Street
Columbus, Ohio 43215

Dear Secretary Cline:

I write to express my strong support for the proposed amendments to Ohio Rules of Juvenile Procedure 3 and 29(B) that would prevent children from waiving their right to counsel unless the child has first consulted with an attorney and the court has determined on the record that the child's waiver is knowing and intelligent. NACDL is the preeminent organization in the United States advancing the mission of the nation's criminal defense lawyers to ensure justice and due process for persons accused of crime or other misconduct. A professional bar association founded in 1958, NACDL's more than 12,500 direct members - and 90 state, local, and international affiliate organizations with another 35,000 members - include private criminal defense lawyers, public defenders, active U.S. military defense counsel, law professors and judges committed to preserving fairness within America's criminal justice system.

NACDL has long advocated policies that vindicate the right to counsel for indigent defendants, including children, first announced in *Gideon v. Wainwright*, 372 U.S. 335 (1963). Sadly, over 40 years later, the promise of *Gideon* remains unrealized - partly due to high rates of waiver of counsel by individuals who may not understand the magnitude of the rights they renounce. The American Bar Association, in its 2005 Policy on Indigent Defense Reforms Needed to Ensure Compliance with *Gideon*, calls upon judges to "never attempt to encourage persons to waive their right to counsel, and accept no such waivers unless they are knowing, voluntary, intelligent, and on the record[.]" This judicial responsibility is, if anything, more pressing with regard to youth who do not yet possess mature decision-making capacities and who frequently struggle with learning disabilities or mental illness. Yet it is well documented that majority percentages of children in Ohio and elsewhere proceed through the delinquency system without the "guiding hand of counsel" required by *In re Gault*, 387 U.S. 1 (1967).

"LIBERTY'S LAST CHAMPION"

EXECUTIVE DIRECTOR
Ralph Grunewald

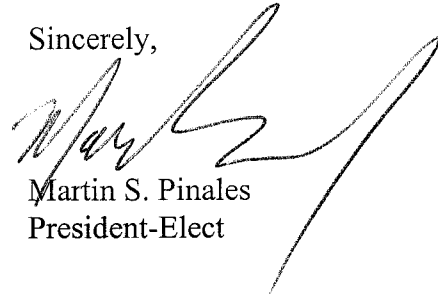
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Secretary Jo Ellen Cline
March 3, 2006
Page 2

NACDL joins the American Bar Association, the National Council on Juvenile and Family Court Judges, and other respected national organizations in disfavoring waiver of counsel by children in delinquency proceedings. The stakes for the individual and for society are too high to allow children to renounce these rights in a lonely decision, without ever consulting an attorney. An attorney's advice helps to ensure that children's waivers, when made, will be knowing, intelligent, and voluntary - and therefore less likely to be challenged on appeal. Likewise, requiring judicial findings is a sensible way to verify that a child's waiver of the right to an attorney meets constitutional standards.

I urge you to join the many other states and jurisdictions that have recognized the critical need for safeguards to ensure that children can make a meaningful decision about their right to an attorney. The proposed amendments to the Ohio Rules of Juvenile Procedure, requiring the modest reform of consultation with an attorney prior to any child's waiver, would be a great stride toward protecting children's most basic constitutional rights and the integrity of the legal system.

Sincerely,

A handwritten signature in black ink, appearing to read 'Martin S. Pinales', with a long, sweeping flourish extending to the right.

Martin S. Pinales
President-Elect