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SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

FILED IN OFFICE
MAR 13 2015
DEPUTY CLERK SUPERIOR COURT
FULTON COUNTY, GA

N.P., *et al.*, on Behalf of Themselves and All Others Similarly Situated,

Plaintiffs,

-against-

THE STATE OF GEORGIA, *et al.*,

Defendants.

No. 2014-CV- 241025

STATEMENT OF INTEREST OF THE UNITED STATES

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In the criminal justice system, children, like adults, are entitled to due process, and the rehabilitative focus of the juvenile courts cannot come at the expense of a child's constitutional rights. As the Supreme Court declared almost fifty years ago, "[u]nder our Constitution, the condition of being a [child] does not justify a kangaroo court." *In re Gault*, 387 U.S. 1, 28 (1967). To the contrary, due process requires that every child who faces the loss of liberty should be represented from their first appearance through, at least, the disposition of their case by an attorney with the training, resources, and time to effectively advocate the child's interests. If a child decides to waive the right to an attorney, courts should ensure that the waiver is knowing, intelligent, and voluntary by requiring consultation with counsel before the court accepts the waiver.

In this case, Plaintiffs allege, *inter alia*, that children in juvenile delinquency proceedings in the Cordele Judicial Circuit are denied their right to meaningful representation and are, at best, provided with "assembly-line justice." Amended Complaint ("Compl.") at 7, *N.P. v. State*, No. 2014-CV-24-1025 (Fulton Cnty. Super. Ct. Oct. 3, 2014). Several defendants have moved to

dismiss the complaint. Without taking a position on the merits of the case, the United States files this Statement of Interest to provide the Court with a framework for evaluating Plaintiffs' juvenile justice claims and to assist the Court in determining the types of safeguards that must be in place to ensure that children receive the due process the Constitution demands.[1]

INTEREST OF THE UNITED STATES

The United States has authority to file this Statement of Interest pursuant to 28 U.S.C. § 517, which permits the Attorney General to attend to the interests of the United States in any case pending in a federal or state court. The United States has specific authority to enforce the right to counsel in juvenile delinquency proceedings pursuant to the Violent Crime Control and Law Enforcement Act of 1994, 42 U.S.C. § 14141.[2] Pursuant to that statutory authority, the United States is currently enforcing a comprehensive settlement with Shelby County, Tennessee, following findings of serious and systemic failures in the juvenile court that violated the due process and equal protection rights of juvenile respondents.[3] An essential component of the

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[1] The United States' silence on other issues presented in this litigation is not intended to express any view or assessment of other aspects of this case. Plaintiffs here allege that adult defendants in the same jurisdiction regularly enter guilty pleas without any substantive attorney-client interaction. Compl. at 7. The Department takes these allegations seriously and is troubled by any suggestion that citizens are being denied their right to counsel, but we confine our Statement in this instance to the allegations regarding juveniles in the Cordele Judicial Circuit. We have previously filed Statements of Interest in cases concerning the right to counsel in adult proceedings. *See* Statement of Interest of the United States, *Wilbur v. City of Mount Vernon*, No. C11-1100RSL (W.D. Wash., Aug. 8, 2013), *available at* http://www.justice.gov/crt/about/spl/documents/wilbursoi8-14-13.pdf; Statement of Interest of the United States, *Hurrell-Harring v. State of New York*, No. 8866-07 (N.Y. Sup. Ct., Sept. 25, 2014), *available at* http://www.justice.gov/crt/about/spl/documents/hurrell_soi_9-25-14.pdf. There, as here, we took no position on the truth of the factual allegations or the merits of the case. In *Wilbur*, the United States provided its expertise by recommending that if the court found for the plaintiffs, it should ensure that public defense counsel have realistic workloads and sufficient resources to carry out the hallmarks of minimally effective representation. In *Hurrell-Harring*, the United States provided an informed analysis of existing case law to synthesize the legal standard for constructive denial of counsel.

[2] The statute provides, *inter alia*: "It shall be unlawful for any governmental authority, or any agent thereof, or any person acting on behalf of a governmental authority, to engage in a pattern or practice of conduct by law enforcement officers or by officials or employees of any governmental agency with responsibility for *the administration of juvenile justice or the incarceration of juveniles* that deprives persons of rights, privileges, or immunities secured or protected by the Constitution or laws of the United States." 42 U.S.C. § 14141(a) (1994). (emphasis added).

Agreement, which is subject to independent monitoring, is the establishment of a juvenile public defender system with "reasonable workloads" and "sufficient resources to provide independent, ethical, and zealous representation to Children in delinquency matters."[4]

The Department of Justice's commitment to the due process rights of juveniles is manifested in additional ways as well. For example, the Department's Office of Juvenile Justice and Delinquency Prevention ("OJJDP") works "to develop and implement effective and coordinated prevention and intervention programs and to improve the juvenile justice system so that it protects public safety, holds offenders accountable, and provides treatment and rehabilitative services tailored to the needs of juveniles and their families."[5] Through grants and other programs, OJJDP supports efforts to reform state and local juvenile justice systems. Those activities include programs aimed at providing juvenile defense counsel with "customized technical assistance, training, and resources for policy development and reform," reducing "the overrepresentation of minority youth in the juvenile justice system" and improving "access to counsel and quality of representation for youth with unique needs."[6]

In addition, in March 2010, Attorney General Eric Holder launched the Access to Justice Initiative ("ATJ"), tasked with carrying out the Department's commitment to improving indigent

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[3] Mem. of Agreement Regarding the Juv. Ct. of Memphis & Shelby Cntys., Tenn. Dec. 17, 2012, *available at* http://www.justice.gov/crt/about/spl/findsettle.php.

[4] *Id.* at 15.

[5] Vision and Mission, OJJDP, *available at* http://www.ojjdp.gov/about/missionstatement.html.

[6] *See* Press Release, U.S. Dep't of Justice Office of Pub. Affairs, *Attorney Gen. Holder Announces $6.7 Million to Improve Legal Defense Services for the Poor* (Oct. 30, 2013), *available at* http://www.justice.gov/opa/pr/attorney-general-holder-announces-67-million-improve-legal-defense-services-poor. Similarly, the Department's National Institute of Justice ("NIJ") has funded research on indigent defense, and waiver of counsel in juvenile court is one area of research that is ongoing. Investigators from Georgetown University and the University of Massachusetts are presently studying "age-based differences in defendant knowledge regarding the role of counsel, presumptions about counsel, and maturity of judgment when making decisions about whether to waive the right to counsel in juvenile court. *See* National Institute of Justice, *Indigent Defense Research*, *available at* http://nij.gov/topics/courts/indigent-defense/Pages/research.aspx. NIJ expects to release the results of this study in 2016.

defense.[7] Within of a few months of its creation, Laurence H. Tribe, the first head of ATJ, emphasized the vital importance of early appointment of counsel, particularly in juvenile cases. In his remarks at the 2010 Annual Conference of Chief Justices, he stressed that "[e]very child in delinquency proceedings should have access to justice via a right to counsel at every important step of the way: before a judicial determination regarding detention, and during probation interviews, pre-trial motions and hearings, adjudications and dispositions, determination of placement, and appeals." He urged state courts to "adopt a rule that at the very least requires consultation with an attorney prior to waiver of counsel" for juveniles.[8]

Finally, the United States has taken an active role in providing guidance to courts and parties on the due process and equal protection problems that result from the nation's ongoing indigent defense crisis. For example, the United States filed Statements of Interest in *Wilbur v. City of Mount Vernon* in 2013 and *Hurrell-Harring v. State of New York* in 2014. Both cases involved the fundamental right to counsel for indigent adult criminal defendants and the role counsel plays in ensuring the fairness of our justice system.[9] Although these prior filings focused on adult criminal justice systems, the allegations at issue here are even more problematic because they apply to children.

In light of the United States' compelling interest in protecting the right to counsel generally and the right to counsel for juveniles in particular, the United States files this Statement

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[7] *See* Access to Justice Initiative, U.S. Dep't of Justice, *available at* http://www.justice.gov/atj/.

[8] Laurence H. Tribe, Senior Counselor for Access to Justice, Keynote Remarks at the Annual Conference of Chief Justices (July 26, 2010), *available at* http://www.justice.gov/opa/speech/laurence-h-tribe-senior-counselor-access-justice-keynote-remarks-annual-conference-chief.

[9] The United States also recently filed a Statement of Interest in *Varden v. City of Clanton*, asserting that any bail or bond scheme that mandates payment of pre-fixed amounts for different offenses in order to gain pre-trial release, without any regard for indigence, not only violates the Fourteenth Amendment's Equal Protection Clause, but also constitutes poor public policy. *See* Statement of Interest of the United States, *Varden v. City of Clanton*, No. 2:15-cv34-MHT-WC (M.D. Ala., Feb. 13, 2015), *available at* http://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/02/13/varden_statement_of_interest.pdf.

of Interest to assist the Court with its analysis of the alleged failures of the juvenile defense system in the Cordele Judicial Circuit.

BACKGROUND

This country has seen significant development in the last century with respect to how courts and justice professionals treat children charged with delinquency. As explained in the Shelby County Findings Report,[10] prior to 1899 the law treated children over seven years of age and adults the same way. "States prosecuted children in the same manner as adults and sentenced them to lengthy periods of incarceration in adult prisons."[11]

This harsh approach began to change in the late nineteenth century as states established separate courts for juveniles that explicitly endorsed judicial flexibility and informality rather than rigid procedural safeguards.[12] The goal of these reforms was to enable juvenile judges to respond to the unique needs of accused and adjudicated youth. At the time, "bedrock due process protections afforded adults were considered restrictive for juvenile court judges, who sought to work informally to treat, guide, and rehabilitate young people." Findings Report at 8. Soon, however, many became concerned that in juvenile courts "the child receives the worst of both worlds: that he gets neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children." *Kent v. United States*, 383 U.S. 541, 556 (1966).

As a result, in the 1950's and 1960's juvenile justice evolved again, culminating in the Supreme Court's landmark ruling in *Gault*, 387 U.S. 1. In *Gault,* the Court recognized that the unintended consequence of the juvenile courts' more flexible approach was the failure to

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[10] Findings Report Regarding the Juv. Ct. of Shelby Cnty, Tenn. Apr. 26, 2012, *available at* http://www.justice.gov/crt/about/spl/documents/shelbycountyjuv_findingsrpt_4-26-12.pdf.

[11] *Id.* at 8.

[12] *Id.*

prioritize due process. Rather than enshrine that disparity further, *Gault* eradicated it. *Gault* stands for the proposition that children involved in the juvenile justice system are fully entitled to due process in their dealings with the court. As the Department has previously observed:

> *Gault* focused not on creating a system of rigid formality, but on ensuring that juveniles were afforded the protections of due process. In essence, the Court outlined important constitutional protections afforded to juveniles in the delinquency process — the right to counsel, the right to notice of the charges, the right to confront witnesses, and the right to be free from compulsory self-incrimination.[13]

Despite *Gault's* unequivocal command and the increasing recognition that children require counsel with specialized, training, supervision and skills, practitioners and scholars have recognized that the promise of *Gault* is threatened.[14] And, if Plaintiffs' allegations are correct, in the Cordele Judicial Circuit, juvenile defenders are absent altogether.

DISCUSSION

Plaintiffs seek declaratory and injunctive relief, alleging that juvenile defendants within the Cordele Judicial Circuit are routinely denied their right to counsel outright or that the right is reduced to a "hollow formality" lacking any semblance of a representational relationship between defense attorney and client. Compl. at 8. While taking no stance on the merits of these

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[13] *Id.* at 8-9.

[14] *See* Wallace J. Mlyniec, *In re Gault at 40: The Right to Counsel in Juvenile Court – A Promise Unfulfilled*, 33 CRIM. L. BULL. 371 (May-June 2008) (reviewing and analyzing the findings of the 1995 national juvenile assessment by the American Bar Association's Juvenile Justice Center, *A Call for Justice: An Assessment of Access to Counsel and Quality of Representation in Delinquency Proceedings* and 16 statewide juvenile defense system assessments subsequently undertaken by the National Juvenile Defender Center *available at* http://njdc.info/our-work/juvenile-indigent-defense-assessments/); Katayoon Majd & Patricia Puritz, *The Cost of Justice: How Low-Income Youth Continue to Pay the Price of Failing Indigent Defense Systems,* 16 GEO. J. ON POVERTY L. & POL'Y 543, 549-51, 561 (2009) (describing obstacles to effective representation due to inadequately funded juvenile defense systems and noting that "high caseloads also negatively impact indigent juvenile clients more than indigent adult clients" because defenders who handle both "often make 'triage' decisions, and it is not unusual for defenders to focus most of their attention on adult felony cases, at the expense of the delinquency clients."). Barbara Fedders, *Losing Hold of the Guiding Hand: Ineffective Assistance of Counsel in Juvenile Delinquency Representation*, 14 LEWIS & CLARK L. REV. 771, 791-92 (2010) (noting that Gault's promise is "threatened by routine and widespread substandard representation" as "many attorneys for juveniles do not interview witnesses or visit the crime scene. They do not file pre-trial motions. They do not prepare for dispositional hearings" and they are unprepared for bench trials.).

factual allegations, the United States maintains that children, like adults, are denied their right to counsel not only when an attorney is entirely absent, but also when an attorney is made available in name only. A state further deprives children of their right to counsel if its courts allow them to waive that right without first consulting with competent counsel.[15]

I. DUE PROCESS DEMANDS THAT CHILDREN BE PROVIDED WITH THE IMMEDIATE AND ONGOING ASSISTANCE OF SKILLED COUNSEL IN JUVENILE DELINQUENCY PROCEEDINGS.

A. The right to counsel is a central requirement of due process in delinquency proceedings.

The Constitution guarantees that every criminal defendant and child accused of delinquency, regardless of economic status, has the right to counsel when their liberty is at stake. *Gideon v. Wainwright,* 372 U.S. 335, 340-341, 344 (1963); *Gault*, 387 U.S. at 36. The right to counsel is so fundamental to the operation of the criminal and juvenile justice systems that diminishment of that right erodes the principles of liberty and justice that underpin these proceedings. Although it was *Gault* that first codified this procedural right for juveniles in state proceedings, the Supreme Court had long emphasized the critical role of counsel in ensuring fairness to the accused: "The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. . . . [A defendant] requires the guiding hand of counsel at every step in the proceedings against him." *Powell v. Alabama,* 287 U.S. 45, 68-69

[15] If the Plaintiffs prevail, the Court may consider as one possible remedy the appointment of a monitor as part of its authority to grant injunctive relief. Monitors, or their equivalent, have been utilized in similar cases. In *Wilbur*, pursuant to an order for injunctive relief, the court required the hiring of a "Public Defense Supervisor" to supervise the work of the public defenders. The supervision and monitoring includes extensive file review, caseload assessments, data collection, and reports to the court to ensure there is "actual" and appropriate representation for indigent criminal defendants in the cities of Mount Vernon and Burlington. *See* Statement of Interest of the United States, *Wilbur*, *supra* note 1, at 19.

(1932). *See also Johnson v. Zerbst*, 304 U.S. 458 (1938) (establishing right to counsel in federal criminal prosecutions).[16]

In the half-century since *Gideon* and *Gault*, the Court has continually reaffirmed that zealous representation by qualified counsel is essential to a constitutional criminal justice system. The Sixth Amendment right to counsel now applies even where the actual likelihood of imprisonment is more remote,[17] and it attaches at the accused's initial presentment before a judicial officer.[18] Specifically addressing the right to counsel for juveniles, the Court has noted that it "is not a formality. It is not a grudging gesture to a ritualistic requirement. It is of the essence of justice." *Kent*, 383 U.S. at 561.

The *Gault* Court emphasized this point repeatedly, and criticized the reasoning that led some to argue that adults should be afforded greater procedural protections than children. *See Gault,* 387 U.S. at 27-28 ("[A detained juvenile's] world is peopled by guards, custodians, state employees, and 'delinquents' confined with him for anything from waywardness to rape and homicide. In view of this, it would be extraordinary if our Constitution did not require the procedural regularity and the exercise of care implied in the phrase 'due process.'"); *id.* at 29 ("The essential difference between Gerald's case and a normal criminal case is that the safeguards available to adults were discarded in Gerald's case."); *id.* at 47 ("It would indeed be

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[16] The President's Comm'n on Law Enforcement & Admin. of Justice, Exec. Office of the President, *The Challenge of Crime in a Free Society* 86 (1967) ("The Commission believes that no single action holds more potential for achieving procedural justice for the child in the juvenile court than provision of counsel."), *quoted in Gault*, 387 U.S. at 38 n.65.

[17] *Alabama v. Shelton*, 535 U.S. 654, 658 (2002) (counsel must be appointed even in cases in which a prison sentence will be suspended, but could someday be imposed).

[18] *Rothgery v. Gillespie*, 544 U.S. 191 (2008) ("This Court has held that the right to counsel guaranteed by the Sixth Amendment applies at the first appearance before a judicial officer at which a defendant is told of the formal accusation against him and restrictions are imposed on his liberty.") (citations omitted).

surprising if the privilege against self-incrimination were available to hardened criminals, but not to children.").

Although the law has long recognized a distinction between children and adults, our understanding of these differences—and the law's recognition of them—has increased over the last ten years.[19] In that time, the Supreme Court has repeatedly underscored that age is "far 'more than a chronological fact,'" and that the law must adapt accordingly. *J.D.B. v. North Carolina*, 131 S. Ct. 2394, 2403 (2011) (citation omitted).

Buttressed by scientific research, the Court has increased protections for juveniles out of recognition that "the features that distinguish juveniles from adults also put them at a significant disadvantage in criminal proceedings." *Graham v. Florida*, 560 U.S. 48, 78 (2010). In shielding juveniles from capital punishment, the Court found that "general differences between juveniles under 18 and adults demonstrate that juvenile offenders cannot with reliability be classified among the worst offenders." *Roper v. Simmons*, 543 U.S. 551, 569 (2005). In *Graham*, the Court extended its own prior holdings to the sentence of juvenile life without parole for non-homicide offenses based on the recognition that scientific research "continue[s] to show fundamental differences between juvenile and adult minds."[20] *Graham,* 560 U.S. at 68. Children must now be afforded special consideration in the context of *Miranda* waivers[21] because they "'often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental

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[19] *See* Donna M. Bishop & Hillary B. Farber, *Joining the Legal Significance of Adolescent Development Capacities with the Legal Rights Provided by In Re Gault*, 60 RUTGERS L. REV. 125, 149-60 (2007) (reviewing recent research from psychology, neuroscience and psychosociolgy on adolescent decision making).

[20] According to the U.S. Departmentt of Health and Human Services' National Institute of Mental Health, brain maturation does not occur until the early twenties. *See* Nat'l Inst. of Mental Health, *The Teen Brain: Still Under Construction*, NIH Publication No. 11–4929 (2011), *available at* http://www.nimh.nih.gov/health/publications/the-teen-brain-still-under-construction/index.shtml.

[21] *J.D.B.*, 131 S. Ct. at 2403.

to them.'"[22] Most recently, the Court emphasized that its increased protections for juveniles in the sentencing context are compelled by the "hallmark features" of youth: "immaturity, impetuosity, and failure to appreciate risks and consequences." *Miller v. Alabama*, 132 S.Ct. 2455, 2468 (2012). These same features make children more vulnerable than adults and more dependent on qualified counsel to navigate the justice system.

> [Roper and Graham] relied on three significant gaps between juveniles and adults. First, children have a "lack of maturity and an underdeveloped sense of responsibility," leading to recklessness, impulsivity, and heedless risk-taking. Second, children "are more vulnerable . . . to negative influences and outside pressures," including from their family and peers; they have limited "contro[l] over their environment" and lack the ability to extricate themselves from horrific, crime-producing settings. And third, a child's character is not as "well formed" as an adults'; his traits are "less fixed" and his actions less likely to be "evidence of irretrievabl[e] deprav[ity]".

Id. at 2464 (internal citations omitted). This reasoning applies not merely to the sentencing phase, but to the entirety of a juvenile's contact with the justice system.[23]

Case law, practical experience, and scientific research compel the conclusion that children are entitled to procedural safeguards that acknowledge their vulnerability. Indeed, many states and localities have endeavored to do this by providing an array of enhanced safeguards for juveniles at all stages of the process, including a requirement that all custodial interrogations of juveniles be recorded, *e.g.*, Wis. Rev. Stat. § 938.195 *et seq.* (2008); a presumption that juveniles are indigent for purposes of attorney appointment, *e.g.*, Pa. R. Juvenile Ct. P. 151 (2014); statutory safeguards prohibiting the public disclosure of juvenile court records, *e.g.*, 33 V.S.A. § 5117 (2009); strict sealing and expungement requirements beyond those typically afforded to adults, *e.g.*, Mont. Code Ann. § 41-5-216 (2014); rules rendering any communications between

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[22] *Id.* (quoting *Bellotti* v. *Baird*, 443 U.S. 622, 635 (1979)).

[23] *Miller,* 132 S.Ct.. at 2468 (noting that "incompetencies associated with youth" can include a juvenile's "inability to deal with police officers or prosecutors (including on a plea agreement) or his incapacity to assist his own attorneys.").

juveniles and court staff inadmissible, *e.g.*, Ark. Code Ann. § 9-27-321 (2010); and prohibitions on juvenile shackling in court proceedings, *e.g.*, Fla. R. Juv. P. § 8.100(b) (2014). Each of these measures is a concrete recognition of the reality that children are different, and each is a positive step in the provision of enhanced safeguards for our youth.

B. Children who face the loss of liberty must be represented zealously by skilled counsel at every stage of delinquency proceedings.

The right to counsel means more than just a lawyer in name only. Justice systems must ensure that the right to counsel comprehends traditional markers of client advocacy and adequate structural support to ensure these traditional markers of representation are met. The Department has previously discussed the requirements for effective counsel in its filing in *Hurrell-Harring*,[24] and the standards set forth there are as applicable to juveniles as they are to adults. Indeed, the unique qualities of youth demand special training, experience and skill for their advocates. For example, although the need to develop an attorney-client relationship is the same whether an attorney is representing an adult or a child, the juvenile defense advocate's approach to developing the necessary trust-based relationship differs when the client is a child.

> Because the client in juvenile court is a minor, counsel's representation is more expansive than that of a criminal defense lawyer for an adult. Lawyers for children must be aware of their clients' individual and family histories, their schooling, developmental disabilities, mental and physical health, and the client's status in their communities in order to assess their capacities to proceed and to assist in their representation. Once those capacities are understood, the lawyer must vigorously defend the juvenile against the charges with that capacity in mind, and then prepare arguments to obtain rehabilitative treatment should the child be found guilty.[25]

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[24] Statement of Interest of the United States, *Hurrell-Harring*, *supra* note 1.

[25] Mlyniec, *supra* note 14, at 378-79.

Attorneys representing children must receive the training necessary to communicate effectively with their young clients and build a trust-based attorney-client relationship.[26] Without that relationship, they cannot satisfy their responsibilities as counsel. These well-established duties include advocating for the client at intake and in detention hearings, investigating the prosecution's allegations and any possible defenses, seeking discovery, researching legal issues, developing and executing a negotiation strategy, preparing pre-trial motions and readying for trial, exploring alternative dispositional resources available to the client, uncovering possible client competence concerns, and providing representation following disposition and on appeal.[27] At all of these stages, the vulnerable juvenile client faces processes overwhelming to most adults, and accordingly, must have an advocate who can guide them in terms they can understand through a relationship built on trust.[28] Every child who faces the loss of liberty must be

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[26] Nat'l Juvenile Defender Ctr., NATIONAL JUVENILE DEFENSE STANDARDS, Standard 3.6 (2012) ("Counsel must recognize barriers to effective communication. Counsel must take all necessary steps to ensure that differences, immaturity, or disabilities do not inhibit the attorney-client communication or counsel's ability to ascertain the client's expressed interest. Counsel must work to overcome barriers to effective communication by being sensitive to difference, communicating in a developmentally appropriate manner, enlisting the help of outside experts or other third parties when necessary, and taking time to ensure the client has fully understood the communication.").The standards were developed during a five-year process by multi-disciplinary teams consisting of juvenile defenders, prosecutors, judges, legislators, academics, and other juvenile justice stakeholders. *See also* Nat'l Research Council of the Nat'l Acads., *Reforming Juvenile Justice: A Developmental Approach* 203 (Richard J. Bonnie et al. eds. 2013) ("The youth's decision-making capacity and voice may be enhanced by the lawyer's ability to create an appropriate environment for counseling, build rapport with the youth over time, engage the youth in one-on-one age-appropriate dialogue, and repeat information as many times as the youth needs to hear."); Robin Walker Sterling, *Role of Juvenile Defense Counsel in Delinquency Court* 8 (2009) ("Juvenile defense counsel do not assume they know what is best for the client, but instead employ a client-centered model of advocacy that actively seeks the client's input, conveys genuine respect for the client's perspective, and works to understand the client in his/her own socioeconomic, familial, and ethnic context.").

[27] *See generally* Nat'l Juvenile Defender Ctr., *supra* note 26; R. Hertz, M. Guggenheim, A.G. Amsterdam, TRIAL MANUAL FOR DEFENSE ATTORNEYS IN JUVENILE DELINQUENCY CASES (2012).

[28] These challenges are complicated by the number of children in the juvenile justice system struggling with learning or developmental disabilities. *See* Joseph B. Tulman, *Special Education Advocacy for Youth in the Delinquency System*, *in* SPECIAL EDUCATION ADVOCACY 401, 405-06 (Ruth Colker, Julie K. Waterstone eds., 2010) (citing to studies on system involved children and noting their overrepresentation in the delinquency system); *see also* Mary M. Quinn, *et al.*, *Youth with Disabilities in Juvenile Corrections: A National Survey*, 71 Exceptional Children 339-45 (2005) (Among other findings, number of youth needing special education services was almost four times that of children in public schools); Joseph P. Tulman & Douglas M. Weck, *Shutting Off the School-to-Prison Pipeline for Status Offenders with Education-Related Disabilities*, 54 N.Y.L. SCH. L. REV. 875, 876 n.2 and accompanying text;

represented from the time of arrest through the disposition of their case by an attorney with the skills necessary to zealously advocate their interests.

Georgia law recognizes the specialization of juvenile defense by requiring the creation of juvenile defense units with attorneys trained and dedicated to representing children accused of delinquency offenses.[29] Ga. Code Ann. § 17-12-23(c) (2014). Specialization requires training and oversight to ensure that attorneys have the resources and support necessary for competent representation, including initial and on-going training on adolescent brain development and its implications for building an attorney-client relationship,[30] protecting juvenile clients' constitutional rights,[31] the child's relative culpability,[32] the law of pretrial juvenile detention,[33]

Nat'l Juvenile Defender Ctr. & Juvenile Law Ctr., TOWARD DEVELOPMENTALLY APPROPRIATE PRACTICE: A JUVENILE COURT TRAINING CURRICULUM, Module 3, *Special Education and Disability Rights* 1 (2009) ("A large number of youth who come into contact with the juvenile justice system in the United States have experienced school failure, fall significantly below peers on reading and math achievement tests, and have characteristics that entitle them to special education services. In particular, youth in the juvenile justice system are more likely than youth not involved in the juvenile justice system to meet the diagnostic criteria for specific learning disabilities, emotional disturbance, mental retardation, speech or language impairments, and other health impairments, including attention deficit disorder.").

[29] *See also* Nat'l Juvenile Defender Ctr. & Nat'l Legal Aid & Defender Ass'n, *Ten Core Principles for Providing Quality Delinquency Representation through Public Defense Delivery Systems*, Principle 2A. (2d ed. 2008) ("The public defense delivery system recognizes that representing children in delinquency proceedings is a complex specialty in the law that is different from, but equally as important as, the representation of adults in criminal proceedings.").

[30] *Graham*, 560 U.S. at 78 ("Juveniles mistrust adults and have limited understandings of the criminal justice system and the roles of institutional actors within it. They are less likely than adults to work effectively with their lawyers to aid in the defense. . . . Difficulty in weighing long-term consequences; a corresponding impulsiveness; and reluctance to trust defense counsel seen as part of the adult world a rebellious youth rejects, all lead to poor decisions by one charged with a juvenile offense . . .These factors are likely to impair the quality of a juvenile defendant's representation."). *See also* Kristin Henning, *Loyalty, Paternalism, and Rights: Client Counseling Theory and the Role of Child's Counsel in Delinquency Cases*, 81 NOTRE DAME L. REV. 245, 270-74 (2005); Nat'l Juvenile Defender Ctr., *supra* note 26.

[31] *J.D.B.*, 131 S. Ct. 2394 (juvenile suspect's age is relevant factor when determining whether he or she is in police custody and entitled to be warned prior to interrogation pursuant to *Miranda v. Arizona*, 384 U.S. 436 (1966)).

[32] *Miller*, 132 S. Ct. at 2465 (distinctive attributes of youth caused by on-going development of parts of the brain involved in controlling behavior, including transient rashness, proclivity for risk, and inability to assess consequences, lessen child's moral culpability).

[33] Nat'l Juvenile Defender Ctr., *supra* note 26, at Standard 3.8(a) ("Counsel must be versed in state statutes, case law, detention risk assessment tools, and court practice regarding the use of detention and bail for young people.").

dispositional resources,[34] special education law,[35] the collateral consequences of delinquency findings,[36] and the ethical issues that arise in delinquency representation.[37]

A juvenile division should have the resources to monitor workloads so that attorneys are available to advocate for clients at intake[38] and during detention and probable cause hearings.[39] Outside of court, they need adequate time to meet with clients, investigate the prosecution's factual allegations, engage in a robust motions practice, devote time to preparing for trial and the disposition process, and to monitor and advocate for the needs of post-disposition clients who are still within the court's jurisdiction.[40]

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[34] American Bar Ass'n, Juvenile Justice Ctr., *A Call for Justice: An Assessment of Access to Counsel and Quality of Representation in Delinquency Proceedings* 36-38 (1995) ("The purpose of the dispositional process is to develop plans for juveniles that meet their educational, emotional and physical needs, while protecting the public from future offenses. . . . More than at any other stage of the juvenile justice system, counsel should explore every possible resource during the dispositional process.").

[35] Nat'l Juvenile Defender Ctr. & Nat'l Legal Aid & Defender Ass'n, *supra* note 29, at Principle 7C (juvenile defense team members "must receive training to recognize issues that arise in juvenile cases . . . [including] . . . Special Education"); *id.* at Principle 9A ("The public 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"); *See also* Tulman, *supra* note 28 (special education rights provide opportunities to develop delinquency advocacy evidence and arguments otherwise unavailable to juvenile defender).

[36] *Gault*, 387 U.S. at 32 ("[M]any [juvenile] courts routinely furnish information to the FBI and the military, and on request to government agencies and even to private employers."); The President's Comm'n on Law Enforcement & Admin. of Justice, *supra* note 16, at 87 ("Employers, schools, social agencies have an understandable interest in knowing about the record of a juvenile with whom they have contact. On the other hand, experience has shown that in too many instances such knowledge results in rejection or other damaging treatment of the juvenile, increasing the chances of future delinquent acts."). *See, e.g., Padilla v. Kentucky,* 559 U.S. 356 (2010) (defense counsel's failure to correctly advise client regarding immigration consequences of accepting guilty plea is outside the scope of constitutionally reasonable professional assistance and therefore may be basis for finding of ineffective assistance of counsel).

[37] American Bar Ass'n, *supra* note 34, at 26 (commentators have suggested that many of those who represent children "do not understand their ethical obligations, and as a result, fail to zealously represent their young clients."); *see, e.g.,* Nat'l Juvenile Defender Ctr., *supra* note 26, at Standard 1.1 (Ethical Obligations of Juvenile Defense Counsel), Standard 1.2 (Elicit and Represent Client's Stated Interests), Standard 1.6 (Avoid Conflicts of Interest).

[38] Nat'l Juvenile Defender Ctr., *supra*, note 26, at Standards 3.1, 3.2, 3.5.

[39] *Id.* at Standards 3.7, 3.8.

When faced with severe structural limitations, even good, well-intentioned, lawyers can be forced into a position where they are, in effect, counsel in name only. For example, if they do not have the time or resources to engage in effective advocacy or if they do not receive adequate training or supervision because their office is understaffed and under-resourced, then they will inevitably fail to meet the minimum requirements of their clients' right to counsel. These conditions lead to *de facto* nonrepresentation. *Hurrell-Harring,* 930 N.E. at 224; *see also State v. Peart,* 621 So.2d 780, 789 (La. 1993) ("We know from experience that no attorney can prepare for one felony trial per day, especially if he has little or no investigative, paralegal, or clerical assistance. As the trial judge put it, '[n]ot even a lawyer with an S on his chest could effectively handle this docket.'").

In justice systems where lawyers regularly fail to advocate for clients in a manner traditionally expected of effective counsel and/or where lawyers lack the structural support necessary to do their jobs, it is tantamount to the system's failure to appoint counsel.[41] If the allegations in this case are ultimately proven true, then Plaintiffs are being systematically deprived of their constitutional right to counsel in the Cordele Judicial Circuit.

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[40] In formulating remedies that address the Constitutional violations that the Department found during its Shelby County, Tennessee investigation, the Department required the establishment of a juvenile defender unit with "sufficient resources to provide independent, ethical, and zealous representation to Children in delinquency matters." Mem. of Agreement, *supra* n.3, at 15. The Department also required "training on trial advocacy skills and knowledge of adolescent development." *Id.*

[41] A breakdown of the adversarial system where children routinely appeared without counsel had disastrous effects in Luzerne County, Pennsylvania where a juvenile court judge routinely incarcerated youth for minor transgressions, sending them to a private detention facility in which he had a financial stake. *See* John Schwartz, *Clean Slates for Youths Sentenced Fraudulently*, N.Y. Times, Mar. 27, 2009 at A13 (New York edition), *available at* http://www.nytimes.com/2009/03/27/us/27judges.html?_r=0. And as one legal commentator recounted: "In Pennsylvania and other states, juvenile proceedings are sealed to the public for the protection of a juvenile's privacy. However, the former director of the Office of Juvenile Justice in Pennsylvania, Clay Yeager, said that 'they are kept open to probation officers, district attorneys, and public defenders, all of whom are sworn to protect the interests of children.' He added, 'It's pretty clear those people didn't do their jobs.' Pennsylvania Supreme Court Justice J. Michael Eakin stated, 'The DA fell down.' He added, 'The public defender fell down. To fall down that often is just wrong.'" Sarah L. Primrose, *When Canaries Won't Sing: The Failure of the Attorney Self-Reporting System in the "Cash-For-Kids" Scheme*, 36 J. LEGAL PROF. 139, 152 (2011) (citations omitted).

II. GIVEN THE UNIQUE STATUS OF JUVENILE OFFENDERS, THEIR RIGHT TO COUNSEL MAY BE DENIED WHEN THEY WAIVE THAT RIGHT WITHOUT FIRST CONSULTING WITH AN ATTORNEY.

Plaintiffs allege that children accused of delinquency in the Cordele Judicial Circuit routinely waive their right to counsel without ever having seen or being advised by a lawyer. According to Plaintiffs, juveniles are regularly presented with a Hobson's choice: waive counsel without ever speaking with an attorney and have your case resolved immediately *or* schedule another hearing, remain in detention and hope counsel can be present at the next proceeding. This alleged systemic deprivation of access to counsel is particularly troubling.

Because the right to counsel is "necessary to insure fundamental human rights of life and liberty[42], . . . 'courts indulge every reasonable presumption against [its] waiver'[43] and 'do not presume acquiescence in the loss of [this] fundamental right[].'"[44] Indeed, effective counsel is so central to the constitutional guarantee of due process in criminal proceedings that the decision to waive counsel must be knowing, intelligent, and voluntary. *See Brady* v. *United States,* 397 U.S. 742, 748 (1970) (waiver must be a "knowing, intelligent ac[t] done with sufficient awareness of the relevant circumstances"). Determining whether a waiver of the right to counsel is made knowingly, intelligently, and voluntarily depends on the facts and circumstances surrounding the case, "including the background, experience, and conduct of the accused." *Johnson,* 304 U.S. at 464. A juvenile's waiver of counsel cannot be knowing, intelligent, and voluntary without first consulting counsel.

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[42] *Johnson*, 304 U.S. at 462.

[43] *Id.* at 464 (quoting *Aetna Insurance Co. v. Kennedy*, 301 U.S. 389, 393 (1937).

[44] *Id.* (quoting *Ohio Bell Tel. Co. v. Public Utilities Commission of Ohio*, 301 U.S. 292, 307 (1937).

The same characteristics of children that require skilled and specially trained counsel to represent them also demand that courts ensure that a child's decision to waive counsel is knowing, intelligent, and voluntary. Many states have taken steps to limit and safeguard waivers of counsel by juveniles. Maryland, for example, prohibits a court from accepting a waiver unless "the child is in the presence of counsel and has consulted with counsel," and "[t]he court determines that the waiver is knowing and voluntary."[45] Other states, such as Iowa, Kentucky, Louisiana, Texas, and Wisconsin, prohibit waiver of the right to counsel by children under a certain age or at many juvenile proceedings.[46]

Those states recognize that the same principles that underlie juvenile right to counsel apply specifically with regard to juvenile waiver of rights. *E.g.*, *J.D.B.*, 131 S.Ct. at 2403 (citation omitted) (holding that juveniles are more likely to feel pressure to waive *Miranda* rights during interrogation and courts must take juveniles' age and suggestibility into account in assessing validity of waivers); *Miller*, 132 S.Ct. at 2468 (identifying "incompetencies associated with youth—for example, [a juvenile's] inability to deal with police officers or prosecutors (including on a plea agreement) or his incapacity to assist his own attorneys.") (*citing Graham* and *J.D.B.*). The decision to waive one's right to counsel, like the decision to waive one's *Miranda* rights, or to confer with prosecutors about a plea, must be well thought-out, with an understanding of present and future ramifications. This poses a particular challenge for young

[45] Md. Code Ann. § 3-8A-20(b) (2008).

[46] Iowa Code § 232.11(2) (2010) (child cannot waive right to counsel at detention, waiver, adjudicatory, and dispositional hearings); KY. Rev. Stat. Ann. § 610.060(2)(a) (Baldwin 2010) (court shall not accept plea or conduct adjudicatory hearing in any case where court intends to impose detention or commitment unless child is represented by counsel); Tex. Fam. Code § 51.10(b) (Vernon 2010) (child's right to counsel shall not be waived at transfer, adjudicatory, dispositional, commitment, and mental health proceedings); Wis. Stat. § 938.23(1m)(a) (2010) (juvenile younger than fifteen may not waive right to counsel).

people, who "tend to underestimate the risks involved in a given course of conduct [and] focus heavily on the present while failing to recognize and consider the future."[47]

There is something unique, too, about the role courts play in assessing waiver of counsel, because the right to counsel "invokes, of itself, the protection of a trial court, in which the accused—whose life or liberty is at stake—is without counsel. The protecting duty imposes the serious and weighty responsibility upon the trial judge of determining whether there is an intelligent and competent waiver by the accused." *Johnson*, 304 U.S. at 465*; see also Westbrook v. Arizona*, 384 U.S. 150, 150 (1966) (per curiam*)*. And the Fourteenth Amendment's Due Process Clause imposes its own serious and weighty duty on courts to determine whether rejecting offered assistance of counsel is intelligent. "Anything less is not waiver." *Carnley v. Cochran*, 369 U.S. 506, 514-16 (1962). In order to properly fulfill this "serious and weighty responsibility" without abandoning its own judicial role in juvenile delinquency proceedings where a child faces a loss of liberty, a court should appoint an attorney who will explain the importance of counsel before the court accepts a waiver.[48]

Recognizing that juvenile waivers must be afforded particular scrutiny in view of the child's age and immaturity and that waiver of counsel is an area of special concern even in adult courts, national standards require that children be prohibited from waiving counsel without first consulting with counsel:

> The problem with juvenile waiver of counsel is clear: children require the advice and assistance of counsel to make decisions with lifelong consequences in the highly charged venue of a juvenile court proceeding. As a result of immaturity, anxiety, and overt pressure from judges, parents, or prosecutors, unrepresented

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[47] Kristin Henning, *Juvenile Justice After Graham v. Florida: Keeping Due Process, Autonomy, and Paternalism in Balance*, 38 WASH. U. J.L. & POL'Y 17, 24 (2012).

[48] Jennifer K. Pokempner, *et al.*, *The Legal Significance of Adolescent Development on the Right to Counsel: Establishing the Constitutional Right to Counsel for Teens in Child Welfare Matters and Assuring a Meaningful Right to Counsel in Delinquency Matters*, 47 HARV. C.R.-C.L. L. REV. 529, 567-68 (Summer 2012).

> children feel pressure to resolve their cases quickly and may precipitously enter admissions without obtaining advice from counsel about possible defenses or mitigation. In order to ensure the client's due process rights are protected, the client must have meaningful consultation with counsel prior to waiving the right to counsel.[49]

When juveniles are not provided counsel, courts cannot ensure that their waivers are knowing, intelligent, and voluntary. Because this is what the Plaintiffs allege is happening in Cordele Judicial Circuit, should the Court determine that children are indeed regularly waiving counsel without first consulting with an attorney, the Court can and should find that the resulting waivers amount to a system-wide denial of the right to counsel.

CONCLUSION

If the Court determines that the juvenile justice system within the Cordele Judicial Circuit fails to provide the requisite due process protections afforded to juveniles, or the Court finds that juveniles are regularly waiving their right to counsel without the opportunity to consult with an attorney, then the Court should hold that *Gault* is not being fulfilled and juveniles' constitutional rights are being violated.

[49] Nat'l Juvenile Defender Ctr., *supra* note 26, at Standard 10.4 (commentary); *see also* Nat'l Juvenile Defender Ctr. & Nat'l Legal Aid & Defender Ass'n, *supra* note 29, at Principle 1(B) ("The public defense delivery system ensures that children do not waive appointment of counsel and that defense counsel are assigned at the earliest possible stage of the delinquency proceedings.").

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This is to certify that I have this day served the following with a copy of the within and foregoing STATEMENT OF INTEREST by placing a copy of the same in the United States mail in an envelope with adequate postage to assure delivery.

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