



May 15, 2017

Jess Mosser, Esq.  
Staff Liaison, Commission on Rules of Practice & Procedure  
Supreme Court of Ohio  
65 South Front Street  
Columbus, Ohio 43215-3431

Dear Ms. Mosser,

Today marks the 50<sup>th</sup> anniversary of the Supreme Court's decision in *In re Gault*, 387 U.S. 1 (1967), which sets forth the principle that children, too, have a constitutional right to counsel. The Children's Law Center, Inc., 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 strengthen the provisions in Juv. R. 3 to further restrict the circumstances in which youth proceed through court without the benefit of counsel intended by *Gault*. (See Attachment 1 for proposed language.)

In 2006, our organizations jointly sought an amendment to Juv. R. 3, noting that an estimated 2/3 of youth in some counties waived the right to counsel, or that there was no reimbursement sought through the Office of the Ohio Public Defender for these cases. In July of 2012, an amended version of Juv. R. 3 went into effect to prohibit courts from allowing waiver of counsel by children charged with felony counts until they have met privately to confer with an attorney. It further requires an advisement on the disadvantages of self-representation in any case where a youth could face loss of liberty, and establishes procedural requirements for courts before a child can waive.

Although this was a step in the right direction, Juv. R. 3 does not go far enough to ensure justice for Ohio's children. The Supreme Court of Ohio reports that for 2015, a total of 77,771 cases involving delinquency and status offender youth were heard in juvenile courts throughout Ohio. Although consistent and accurate data has never been kept through the online reporting system to document how many of these youth are appointed counsel, data obtained through the Office of the Ohio Public Defender for roughly the same time period suggests that between 28-42% of these cases were not appointed a public defender or assigned counsel, or that there was no reimbursement sought.<sup>1</sup> (See attachment 2)

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<sup>1</sup> The difficulties of obtaining accurate information are many. Cases are not always counted in the same manner by the court, or by counties submitting for reimbursement. The range varies, with the lower percentage reflecting an estimated 20% reduction where private counsel is presumed to have been retained. This number has been used by

There is no logical reason why the protections against waiver of counsel should not extend to youth in non-felony cases where placement outside the home, whether in juvenile detention, correctional treatment, mental health facilities, or other residential placement, is possible. The staff notes to the 2012 Juvenile Rule 3 amendment indicate the rule change is “intended to implement a process for the mandates of the United States Supreme Court’s decision *In re Gault* (1967), 387 U.S. 1 and the Supreme Court of Ohio’s decision *In re C.S.* (2007), 115 Ohio St.3d 267, 2007-Ohio -4919, to ensure children have meaningful access to counsel and are able to make informed decisions about their legal representation.”<sup>2</sup> Gerald Gault was, in fact, charged and found guilty of a misdemeanor.

The initial proposed changes to Juv. R. 3 were met with concerns that the provision of lawyers would be too costly for counties, and that it was unnecessary for many cases. Juvenile case filings have dropped dramatically, however, from 147,867 delinquency and status cases filed in 2004 down to 77,771 in 2015, roughly 50%.<sup>3</sup> The data suggests that many counties are already assuring that many if not most youth are represented, including a number of larger counties such as Franklin, Lucas, Montgomery and Cuyahoga.

In light of the pending anniversary of the *Gault* decision, the National Juvenile Defender Center released *Defend Children: A Blueprint for Effective Juvenile Defender Services* in November of 2016.<sup>4</sup> The Blueprint calls for those who work in the juvenile justice field to recognize the need for a more comprehensive, system wide approach to ensuring the fundamental rights of children in the delinquency system are upheld. It highlights innovative programs which can be replicated throughout the country to address the ongoing crisis in indigent defense, calling on all states to champion, uphold and fund children’s right to counsel. It addresses the pervasive racial and ethnic disparities which follow decades of delinquency prevention focused on control and enforcement in lieu of effective treatment and positive youth outcomes. But it begins and ends with ensuring that all youth receive effective representation.

Ohio can and should extend the same provisions within Juv. R. 3 to any cases in which out of home placement is possible, including misdemeanor and status cases. Such appointments should be made without consideration of the income level of parents, guardian or custodian as mandated by law, and incorporated into the proposed rule<sup>5</sup> Courts do not interpret this provision

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national experts to estimate the number of non-indigent defendants in criminal proceedings, but it is likely that the number of youth with private counsel is considerably lower in delinquency proceedings.

<sup>2</sup> See Juv.R. 3, Staff Notes on Juvenile Rule 3 at

<http://www.supremecourt.ohio.gov/LegalResources/Rules/juvenile/JuvenileProcedure.pdf>

<sup>3</sup>[http://www.supremecourt.ohio.gov/Publications/annrep/04OCS/2004\\_Court\\_Summary.pdf](http://www.supremecourt.ohio.gov/Publications/annrep/04OCS/2004_Court_Summary.pdf)

<sup>4</sup> <http://njdc.info/blueprint/>

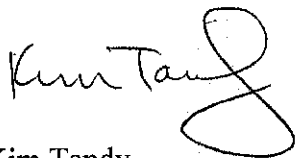
<sup>5</sup> Ohio Administrative Code 120-1-3, (B) (4). Such provision states that “[A]n applicant is presumed indigent and thus entitled to the appointment of counsel at state expense under the following circumstances:.....(4)The applicant is a child as defined in division (B)(6) of section 2151.011 or division (C) of section 2152.02 of the Revised Code. In determining the eligibility of a child for appointed counsel, the income of the child’s parent, guardian, or custodian shall not be considered.”

consistently across counties, resulting in some youth risking the denial of appointed counsel unnecessarily.

In recognition of the 50<sup>th</sup> anniversary of the landmark decision in Gault recognizing that children need “the guiding hand of counsel at every step in the proceedings,” we ask that the attached changes be made in Juv. R. 3 to ensure that all youth, regardless of offense and geography, receive the same protections regarding the appointment of counsel and the restrictions on waiver of counsel.

We stand ready to answer questions and to provide additional information if needed. Please do not hesitate to contact us as you proceed.

Sincerely,



Kim Tandy  
Executive Director, Children’s Law Center, Inc.



Jill Beeler, Deputy Director  
Office of the Ohio Public Defender



Mike Brickner, Senior Policy Director  
ACLU of Ohio

Attachments:

- 1) Proposed Changes to Juvenile Rule 3
- 2) Estimated Waiver Rates by County
- 3) Letter of Support, National Juvenile Defender Center

## PROPOSED CHANGE TO OHIO RULE OF JUVENILE PROCEDURE 3

- (A) All children in delinquency and status offense cases shall be appointed counsel at the earliest stage of the proceedings in order for the child to have a meaningful opportunity to consult with the lawyer.
- (B) The court shall not allow any waiver of counsel unless the child has met privately with appointed counsel to discuss the child's right to counsel and the disadvantages of self-representation.
- (C) A child's right to be represented by counsel may not be waived in the following circumstances:
- (1) When a child is being detained pending adjudication;
  - (2) at a hearing conducted pursuant to Juv.R. 30;
  - (3) when a serious youthful offender dispositional sentence has been requested; or
  - (4) when there is a conflict or disagreement between the child and the parent, guardian, or custodian; or if the parent, guardian, or custodian requests that the child be removed from the home.
- (D) In all other cases, Any any waiver of the right to counsel shall be made in open court, recorded, in the presence of the child's lawyer, and in writing. The court shall advise the child of the right to counsel and the dangers of self-representation. In determining whether a child has knowingly, intelligently, and voluntarily waived the right to counsel, the court shall look to the totality of the circumstances including, but not limited to: the child's age; intelligence; education; background and experience generally and in the court system specifically; the child's emotional stability; and the complexity of the proceedings. The Court shall ensure that a child consults with a parent, custodian, guardian, or guardian ad litem, before any waiver of counsel. However, no parent, guardian, custodian, or other person may waive the child's right to counsel.
- (E) Children are presumed indigent and thus entitled to the appointment of counsel at state expense without regard to the income of the child's parent, guardian, or custodian.
- (F) Other rights of a child may be waived with permission of the court.
- ~~(G) If a child is facing the potential loss of liberty, the child shall be informed on the record of the child's right to counsel and the disadvantages of self-representation.~~
- ~~(H) If a child is charged with a felony offense, the court shall not allow any waiver of counsel unless the child has met privately with an attorney to discuss the child's right to counsel and the disadvantages of self-representation.~~



## Ensuring Access to Counsel in Ohio: Estimated Waiver Rates by County

MAY 2017

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 many 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. Cases are not counted in the same manner by the court, or by the counties submitting for reimbursement to the Office of the Ohio Public Defender. Public Defenders and Appointed Counsel also have different methods of tracking each case. Finally, these numbers also do not account for private lawyers who may be retained in some cases.

The estimates here are calculated two ways. The first column calculates the total number of delinquency and unruly cases terminated in 2015 by county,<sup>i</sup> reduced by 20% to account for private counsel,<sup>ii</sup> and compares that against the total number of cases in which the child was represented by a public defender or appointed counsel who actually billed the Office of the Ohio Public Defender for reimbursement. The second column takes the total number of all delinquency and unruly cases without the 20% reduction. Accordingly, since the data gathered from OPD on appointed counsel includes data for all cases, including traffic, rather than merely delinquency and unruliness, the number may actually indicate a higher percentage of represented children than actually true.

In 2006, The ACLU of Ohio, The Children's Law Center & The Office of the Ohio State Public Defender released a Fact Sheet regarding the rate of waiver across Ohio's counties using data from 2004. Since 2004, the rate of waiver has decreased

significantly, although there is still room for improvements in order to ensure equal access to counsel for Ohio's children. In 2004, it was estimated that 67% of children in Ohio who were the subject of delinquency or unruly complaints resolved faced those proceedings without an attorney, or there was no claim for reimbursement by the attorney. Now, in 2015, it is estimated that between 28% - 42% of children faced delinquency or unruly complaints without an attorney, or there was no claim for reimbursement by the attorney. Improvements have been made, but many Ohio children go through proceedings without the benefit of counsel, with wide variance by geography. The chart which follows provide the data described above.

### Given the data below, it appears that:

- **Some counties show a negative amount of waiver, indicating a higher amount of representation, likely due to the fact that information is not provided in the same manner across the state.**
- **In 15-20 of Ohio's 88 counties, 60% of juveniles or more lacked legal representation, or there was no claim for reimbursement by the attorney, compared to 73 counties in 2004.**
- **But in only 2-3 of those counties, 90% or more went without counsel or there was no claim for reimbursement, compared to 24 counties in 2004.**
- **Statewide, 28%-42% of juveniles who were subject of delinquency or unruly complaints resolved in 2015 faced those proceedings without an attorney, or there was no claim for reimbursement by the attorney.**

County.....	Est. Waiver Rate w/ 20% Reduction .....	Est. Waiver Rate w/o 20% Reduction .....
Adams.....	-103%.....	-63%
Allen.....	46%.....	57%
Ashtabula.....	41%.....	53%
Athens.....	43%.....	54%
Auglaize.....	26%.....	41%
Belmont.....	66%.....	73%
Brown.....	66%.....	72%
Butler.....	32%.....	46%
Carrroll.....	97%.....	98%
Clark.....	72%.....	78%
Clermont.....	19%.....	36%
Clinton.....	74%.....	79%
Columbiana.....	27%.....	41%
Coshocton.....	-46%.....	-17%
Cuyahoga.....	-49%.....	-19%
Darke.....	89%.....	92%
Erie.....	79%.....	83%
Fayette.....	58%.....	67%
Franklin.....	3%.....	23%
Gallia.....	45%.....	56%
Geauga.....	10%.....	28%
Greene.....	62%.....	70%
Guernsey.....	39%.....	51%
Hamilton.....	59%.....	67%
Hancock.....	-8%.....	13%
Harrison.....	20%.....	36%
Huron.....	13%.....	31%
Jackson.....	49%.....	59%
Jefferson.....	42%.....	54%
Knox.....	79%.....	83%
Lake.....	22%.....	38%
Lucas.....	-53%.....	-22%
Medina.....	18%.....	34%
Meigs.....	77%.....	82%
Miami.....	67%.....	73%
Monroe.....	90%.....	92%
Montgomery.....	3%.....	22%
Pickaway.....	-5%.....	16%
Pike.....	-3%.....	18%
Portage.....	54%.....	63%
Ross.....	-49%.....	-19%
Shelby.....	67%.....	73%
Stark.....	11%.....	71%
Summit.....	23%.....	38%
Trumbull.....	81%.....	85%

Continued on following page

County	Est. Waiver Rate w/o 20% Reduction	Est. Waiver Rate w/ 20% Reduction
Tuscarawas.....	50%.....	60%
Union.....	-36%.....	-9%
Van Wert.....	41%.....	53%
Washington.....	1%.....	21%
Wayne.....	9%.....	27%
Williams.....	68%.....	74%
Wood.....	49%.....	59%

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<sup>i</sup> The data kept by all these sources also did include the same dates. The information from the Supreme Court was gathered for 2015. The information from the OPD Commission for Public Defenders was gathered from February 2015 through Jan. 2016 and the information for Assigned Counsel was gathered from September 2014 through August 2015.

<sup>ii</sup> 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.



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Jess Mosser, Esq.  
Staff Liaison, Commission on Rules of Practice & Procedure  
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Dear Ms. Mosser:

The National Juvenile Defender Center (NJDC) supports the proposed modification to Ohio's Juvenile Rule 3, submitted today by the Children's Law Center, Inc., the ACLU of Ohio, and the Office of the Ohio Public Defender. The proposed changes call for all youth in juvenile court to have a meaningful opportunity to consult with a lawyer about their right to counsel, regardless of whether they face a felony or misdemeanor allegation. The modifications to Ohio Juvenile Rule 3 are in line with national best practices and developmentally-appropriate juvenile court systems and will significantly improve the provision of justice for children in Ohio.

NJDC is a nonprofit, nonpartisan organization dedicated to promoting justice for all children by ensuring excellence in juvenile defense. Through community building, training, and policy reform, NJDC provides national leadership on juvenile defense issues with a particular focus on remedying the deprivation of children's rights in the justice system.

Today, exactly 50 years after the United States Supreme Court decision in *In re Gault*<sup>1</sup> affirmed the constitutional right to counsel for youth in delinquency proceedings, NJDC released a report, *Access Denied: A National Snapshot of States' Failure to Protect Children's Right to Counsel (Snapshot)*.<sup>2</sup> The *Snapshot* reveals that most states have yet to uphold the promise of *Gault* and continue to place barriers between children and their right to counsel.

Given the dual injustices imposed on children by violating their civil rights through disparate enforcement practices and their due process rights through denial of access to effective counsel, it is more critical than ever that states take action to further protect children's rights. Juvenile defenders are critical to ensuring children's constitutional rights are upheld. Yet, in many jurisdictions, children routinely waive their right to counsel without first consulting with an attorney. Countless youth across the country are encouraged to waive their right to counsel without adequate knowledge of the benefits of legal representation.<sup>3</sup> As part of our work, NJDC conducts in-depth assessments of statewide juvenile defense systems. In 62 percent of states assessed to date, we have observed excessive waiver of counsel rates due in large part to youth not having access to

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<sup>1</sup> *In Re Gault*, 387 U.S. 1 (1967)

<sup>2</sup> NAT'L JUVENILE DEFENDER CTR., *ACCESS DENIED: A NATIONAL SNAPSHOT OF STATES' FAILURE TO PROTECT CHILDREN'S RIGHT TO COUNSEL* (2017).

<sup>3</sup> NAT'L JUVENILE DEFENDER CTR., *DEFEND CHILDREN: A BLUEPRINT FOR EFFECTIVE JUVENILE DEFENDER SERVICES AT 12* (2016) (CITING U.S. DEP'T OF JUSTICE STATEMENT OF INTEREST FOR N.P. ET AL. V. GEORGIA, NO. 2014-CV-241025 AT 12-15 (GA. SUPER. CT. 2014))



lawyers prior to making the decision to waive that right.<sup>4</sup> Such rampant juvenile waiver of counsel impedes fairness and justice for children.

The current version of Ohio's Juv. Rule 3 requires youth consult with an attorney before waiving the right to counsel only in felony cases. While this likely reflects attempts to protect the rights of children who are at greater risk of incarceration, it is a false distinction.<sup>5</sup> Children of all ages who are charged with any offense must understand their right to counsel and can, at almost any point, face incarceration.

In the course of conducting research for *Access Denied*, NJDC found that in a majority of states where children are required to consult with an attorney before waiving their right to counsel, waiver of that right is the rare exception, rather than a regular occurrence.<sup>6</sup>

On the 50<sup>th</sup> Anniversary of the *In re Gault* decision, NJDC respectfully requests that the Supreme Court of Ohio's Commission on the Rules of Practice and Procedure adopt the proposed changes to Juvenile Rule 3, thereby ensuring that a child's constitutional right to counsel is upheld across the State of Ohio.

Sincerely,



Mary Ann Scali  
Executive Director

*“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. The child requires the guiding hand of counsel at every step in the proceedings against him.”*  
- *In re Gault*, 387 U.S. 1, 36 (1967)

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<sup>4</sup> *Id.* at 10; See generally *State Assessments*, NAT'L JUVENILE DEFENDER CTR., <http://njdc.info/our-work/juvenile-indigent-defense-assessments/> (last visited Apr. 11, 2017).

<sup>5</sup> NAT'L JUVENILE DEFENDER CTR., *ACCESS DENIED: A NATIONAL SNAPSHOT OF STATES' FAILURE TO PROTECT CHILDREN'S RIGHT TO COUNSEL*, 26 (2017).

<sup>6</sup> *Id.* at 27.