IN THE SUPREME COURT OF OHIO

IN RE:	COREY SPEARS, A MINOR CHILD	: : : : : :	CASE NO. 06-1074 On appeal from the Licking County Court of Appeals, Fifth Appellate District C.A. Case No. 2005-CA-93

MERIT BRIEF OF APPELLANT COREY SPEARS

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STATEMENT OF THE CASE AND FACTS

On August 9, 2005, Corey Spears, aged 13, appeared in the Licking County Juvenile Court for his arraignment hearing in case numbers A2004-0329 and A2005-0616. (T.pp. 1-13). The hearing began with arraignment, proceeded to adjudication, and ended with disposition. (T.pp. 1-13). Before the hearing, Corey and his mother signed the court's Order to Appear and Explanation of Rights form (hereinafter "Rights Form") in two places—once on page two and again, at the end of the form, on page seven.

The court began the hearing with the following colloquy:

THE COURT:	Today is August 9th, 2005. We're here in the matter of Corey Spears, Case No. A2005-0616 and A2004-0329. And you are Corey, correct?
COREY SPEARS:	Yes, sir.
THE COURT:	Corey, I have here two sets of rights papers, both of which appear to bear your signatures in several places. Are those your signatures?
COREY SPEARS:	Yes, sir.
THE COURT:	Did you read that form or have it read to you before you signed it?
COREY SPEARS:	Yes, sir.
THE COURT:	Do you understand the rights and explanations contained in that form?
COREY SPEARS:	Yes sir.
THE COURT:	Do you understand that you have the right to be represented by an attorney at today's hearing?
COREY SPEARS:	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?
COREY SPEARS:	Yes, sir.
THE COURT:	Do you wish to go forward with today's hearing without an attorney?
COREY SPEARS:	Yes, sir.
THE COURT:	Ms. Spears, do you agree with Corey's decision today to go forward without an attorney?
MS. SPEARS:	Yes, sir.

(T.pp. 2-3). The court did not "ascertain whether notice requirements [had] been complied with and, if not, whether the affected parties waive[d] compliance."[1] (T.pp. 2-3). The court did not "inform the parties of the *** purpose of the hearing, and possible consequences of the hearing...."[2] (T.pp. 2-3). The court did not conduct a colloquy concerning Corey's waiver of his right to counsel; instead, it asked, "Do you wish to go forward with today's hearing without an attorney?" (T.p. 3). Further, at the beginning of the hearing, the court did not inform Corey, who was not represented by counsel, "of the right: to obtain counsel at any stage of the proceedings, to remain silent, to offer evidence, to cross-examine witnesses, and, upon request, to have a record of all proceedings made, at public expense if indigent."[3] (T.pp. 2-3). After the court dispensed with Corey's right to counsel, without any further explanation, the court continued:[4]

THE COURT:	Corey, in A2004-0329 it alleges that on or about August 2nd of 2005 in the county of Licking, state of Ohio, you violated the terms and conditions of a valid court order, specifically that on that date you absconded from your residence without parental permission and as of the filing of the motion on August 5th your whereabouts were unknown. Do you understand that allegation?
COREY SPEARS:	Yes, sir.
THE COURT:	Do you admit or deny that allegation?
COREY SPEARS:	Admit, sir.
THE COURT:	In A2005-0616 in Count One it alleges that between August 3rd and August 7th of 2005 in the county of Licking, state of Ohio, you did with purpose to deprive the owner of property or services knowingly obtain or exert control over such property or services without the consent of

[1] As is required by Juv.R. 29(B)(1).
[2] As is required by Juv.R. 29(B)(2).
[3] As is required by Juv.R. 29(B)(5).
[4] It appears that the court proceeded to the requirement in Juv.R. 29(C), which provides, "The court shall request each party against whom allegations are being made in the complaint to admit or deny the allegations...."

	the owner or person authorized to give consent, the property involved being a motor vehicle, that conduct being a violation of Section 2913.02(A)(1) of the Ohio Revised Code, a fourth degree felony commonly known as grand theft. Do you understand that charge?
COREY SPEARS:	Yes, sir.
THE COURT:	Do you admit or deny that charge?
COREY SPEARS:	Admit, sir.
THE COURT:	Count Two alleges that on or about the same date, time, and place you did with purpose to deprive the owner of property or services knowingly obtain or exert control over such property or services without the consent of the owner or person authorized to give consent, that property being a motor vehicle, in violation of Section 2913.02(A)(1) of the Ohio Revised Code, a fourth degree misdemeanor common---common---I'm sorry, a fourth degree felony commonly known as grand theft. Do you understand that charge?
COREY SPEARS:	Yes sir.
THE COURT:	Do you admit or deny that charge?
COREY SPEARS:	Admit, sir.

(T.pp. 3-5). The court then explained the effect of Corey's admissions and the possible commitment to the Department of Youth Services:

THE COURT:	If you admit these charges today, Corey, that's basically the same as pleading guilty. Do you understand that?
COREY SPEARS:	Yes, sir.
THE COURT:	As a result then we would not have an adjudicatory hearing or trial in either of these cases. Do you understand that?
COREY SPEARS:	Yes, sir.
THE COURT:	Instead, we would proceed directly to disposition, that is, for me to decide what punishment or conditions if any that should be imposed upon you. Do you understand that?
COREY SPEARS:	Yes, sir.
THE COURT:	By entering that plea you will be—well, first of all, that disposition in your case A2005-0616 could include a commitment to the custody of the Department of Youth Services for a minimum period of six months or twelve months and a

maximum period not to exceed age twenty-one. Do you understand that?

COREY SPEARS: Yes, sir.

(T.p. 5). The court was aware that Corey had indicated a desire to be sent to DYS, where his brother was. (Newark Police Division Statement of Facts, dated Aug. 8, 2005, p.1). The court did not inform Corey of the additional orders of disposition the court could, and in fact later did, impose; the court did not inform Corey that it intended to ensure that Corey and his brother were not held in the same facility (T.p. 11); and, the court did not inform Corey that he would later be ordered to pay court costs and restitution, and have his right to apply for his driver's license suspended until August 13, 2012.[5]

Then, the court told Corey about the rights he would be waiving by admitting to the charges:

THE COURT: *** By entering that plea of admit you will be waiving or giving up certain Constitutionally guaranteed rights that you would otherwise enjoy. Among the rights that you will be giving up is the right to remain silent. Do you understand that?

COREY SPEARS: Yes, sir.

THE COURT: You will also be giving up the right to call witnesses and to present evidence in your defense. Do you understand that?

COREY SPEARS: Yes, sir.

THE COURT: And you'll be giving up the right to question and to cross-examine prosecution witnesses. Do you understand that?

COREY SPEARS: Yes, sir.

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[5] The court imposed these additional sanctions in its Journal Entry, dated August 9, 2005. However, these sanctions are no longer at issue: Although the Court of Appeals held that Corey entered a fully informed, valid admission to the charges (In re Spears, 5th Dist. No. 2005-CA-93, 2006-Ohio-1920, at ¶59), the court affirmed Corey's third assigned error and vacated the court's order suspending Corey's right to apply for driving privileges (Id. at ¶77). Additionally, the court remanded the matter to the juvenile court for a new determination of Corey's ability to pay the financial sanctions it imposed (Id. at ¶93). See Licking County Judgment Entry, filed in juvenile court case number A2005-0616 on April 24, 2006.

THE COURT:	Ordinarily, Corey, the State of Ohio[6] would be required to prove these cases beyond a reasonable doubt. If you enter a plea of admit, however, the State of Ohio will not have to prove anything at all. Do you understand that?
COREY SPEARS:	Yes, sir.

(T.pp. 5-6). The court asked Corey whether there had been any threats or promises to cause him to enter his pleas, and he responded, "No, sir." (T.pp. 6-7). The court continued the hearing and accepted Corey's admission, saying:

THE COURT:	Ms. Spears, do you agree with Corey's decision today to enter pleas of admission to these charges?
MS. SPEARS:	Yes, sir.
THE COURT:	Then, Corey, I'll accept the pleas of admission. Is there any statement about this situation that you wish to make?
COREY SPEARS:	No, sir.
THE COURT:	Have you talked to your mother since you got arrested?
COREY SPEARS:	No, sir.
THE COURT:	Ms. Spears, did you have an opportunity to read the police report?
MS. SPEARS:	No, sir.

(T.p. 7). During the first five pages of the transcript, the court asked Corey "do you understand?" a total of fifteen times. (T.pp. 2-6). Each time, Corey gave the same response: "Yes, sir." (T.pp. 2-6).

During the hearing—from the beginning of the arraignment to the end of the disposition—Ms. Spears did not offer Corey any advice or assistance. (T.pp. 2-13). The court did not ask Ms. Spears whether she was there to "represent" her son. (T.pp. 2-13).

[6] There is no indication in the record that counsel for the Sate of Ohio was present during Corey's hearing, and the court did not explain to Corey that the "State of Ohio" is represented by the prosecutor's office.

After the court accepted Corey's admissions, it proceeded to disposition. (T.pp. 11-13). Corey was not represented by counsel for disposition, and the issue of counsel was not discussed. (T.pp. 11-13). Corey did not waive his right to counsel during the disposition portion of his hearing. (T.pp. 11-13). After some discussion with Corey about the court's assumption that there were more charges forthcoming in Perry County[7], the court committed him to the Department of Youth Services for a minimum period of six months on each charge, maximum of his twenty-first birthday, and ordered the commitments to be served consecutively. (T.pp. 9-10). The court did not readvise Corey of his right to counsel during the adjudication portion of his hearing or during the disposition portion of his hearing. (T.pp. 3-13). Further, at the end of Corey's hearing, after the court instructed the probation department to ensure that Corey and his brother would not be held at the same DYS facility, the court said to Corey: "Your plan was that they be in---you were---you were anxious to be arrested on these felonies so that you could go to D-Y-S and be with your brother again. You're going to D-Y-S but I'll ensure you're not in the same facility." (T.p. 12). After the court pronounced its disposition, Ms. Spears asked the court if there was any possibility that her two sons (now both in the custody of DYS) could be housed in the same facility because her visits to them in separate facilities would present a hardship to her because she doesn't drive (T.p. 12). The court brushed aside Ms. Spears' objection:

> If I was you, I'd let [Corey and his brother] stew for a year. You know, if I was you, I'd enjoy twelve months of peace and quiet. I'd let them sit in prison where they belong, away from their mother, away from their family, away from each other so they have a chance to understand what it is they're missing. And if I was you, I'd go on with my life and enjoy the next twelve months of peace and quiet. But that's just my thought. And if they want to sit in an institution in

[7] To date, Corey has not received notice of any additional charges stemming from the events in this case.

> Cleveland or Cincinnati or southeast Ohio, and wonder what must be going on, I say leave them there.

(T.pp. 12-13).

On October 7, 2005, Corey filed an appeal of his adjudication and disposition in accordance with In re Anderson, 92 Ohio St.3d 63, 67, 2001-Ohio-131.[8] On April 17, 2006, the Fifth District Court of Appeals issued its opinion in this case. In its opinion, the court addressed Corey's first two assignments of error—concerning waiver of his right to counsel and entry of his admission to the charge—together and found:

> The record illustrates that Appellant's admission was voluntary and that the trial court explained his rights, the charges, and the consequences of being found delinquent. Based on the foregoing, this Court finds that the trial court substantially complied with Juv.R. 29 and did not violate Appellant's constitutional rights. The record reflects that appellant's admission to the charges was given knowingly, intelligently, and voluntarily and that the trial court obtained a valid waiver of Appellant's right to counsel. Accordingly, appellant's First and Second Assignments of Error are overruled.

In re Spears, 5th Dist. No. 2005-CA-93, at ¶59.[9]

Corey filed a timely appeal in this Court. In his memorandum, he challenged the constitutionality of R.C. 2151.352 and the court's analysis of what it found to be a valid waiver of Corey's right to counsel. This Court accepted Corey's appeal on the first and second

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[8] On October 3, 2005, this Fifth District dismissed Corey's appeal as being untimely filed. On October 7, 2005, Corey filed a Motion to Reconsider. In that motion, Corey cited Anderson, and asked the court of appeals to find that his Notice of Appeal was timely filed. On October 28, 2005, the court of appeals granted Corey's motion and stated, "Appellant has provided this Court with documentation indicating that such an error [as in Anderson] was likely to have occurred in this case." (at ¶3). Despite this, in Spears, the court stated: "Counsel did not attach an affidavit from appellant wherein he swore he never received notice, nor did counsel provide this court with a copy of the court's docket, which indicates appellant was in fact properly served in compliance with the Civil Rules." Spears at ¶20. This statement is both contrary to its entry and to the holding in Anderson.

[9] The court also vacated part of Corey's disposition and reversed and remanded the matter according to its rulings on Corey's Third and Fourth Assignments of Error, which are not at issue here. Spears at ¶¶77, 92-93.

propositions of law. In re Spears, 110 Ohio St. 3d 1409, 2006-Ohio-5083. The first proposition argues that the fifth sentence in R.C. 2151.352 impinges upon a juvenile defendant's right to counsel in juvenile court; the second proposition asks this Court to proclaim a standard for the waiver of counsel in juvenile court that strictly complies with constitutional safeguards that can ensure such waiver is knowing, intelligent, and voluntary.

ARGUMENTS IN SUPPORT OF PROPOSITIONS OF LAW

FIRST PROPOSITION OF LAW

Ohio Revised Code 2151.352 impinges upon a juvenile's constitutional right to counsel because the provision, "Counsel must be provided for a child not represented by the child's parent, guardian, or custodian" has led to inconsistent interpretations of the right to counsel in violation of Article I, Section 10 of the Ohio Constitution and the Sixth and Fourteenth Amendments to the United States Constitution.

I. Introduction

Regardless of the forum, the right to counsel in any proceeding in which personal liberty is at stake is a basic requirement of the Sixth Amendment and the Due Process Clause of the Fourteenth Amendment to the United States Constitution. In re Gault (1967), 387 U.S. 1, 30-31, 87 S. Ct. 1428. "In all criminal prosecutions, the accused shall *** have the assistance of Counsel for his defence." Sixth Amendment to the United States Constitution. In Ohio, "In any trial, in any court, the party accused shall be allowed to appear and defend in person and with counsel." Section 10, Article I of the Ohio Constitution; State v. Martin, 103 Ohio St. 3d 385, 2004-Ohio-5471, at ¶22. Although juvenile delinquency proceedings are civil proceedings, "[w]hatever their label, juvenile delinquency laws feature inherently criminal aspects that we cannot ignore." State v. Walls, 96 Ohio St. 3d 437, 446, 2002-Ohio-5059; at ¶26. Therefore, "numerous constitutional safeguards normally reserved for criminal prosecutions are equally applicable to juvenile delinquency proceedings." Id.; Gault at 31-57. See also In re Agler (1969), 19 Ohio St. 2d 70, 78, 249 N.E.2d 808. Specifically, a child in a juvenile delinquency proceeding "requires the guiding hand of counsel at every step in the proceedings against him." Gault at 36, citing Powell v. Alabama (1932), 287 U.S. 45, 69, 53 S. Ct. 55.

This Court has said that R.C. 2151.352 "provides a statutory right to appointed counsel that goes beyond constitutional requirements." State ex rel. Asberry v. Payne, 82 Ohio St. 3d

44, 46, 1998-Ohio-596. But the language from the fifth sentence of R.C. 2151.352—"Counsel must be provided for a child not represented by the child's parent, guardian, or custodian"—subjects juvenile delinquency defendants to the worst of both worlds of criminal and civil proceedings because it suggests either that a child's parent can adequately represent her child's legal interests in juvenile court, as an attorney could, or that a juvenile defendant does not need an attorney's assistance if his parent is present.

There are three problems currently at issue with the statutory language cited above: first, the constitutional right to counsel as provided by the Sixth Amendment to the United States Constitution and Section Ten, Article One of the Ohio Constitution is fundamental to our system of justice, and "representation" by a child's parent has no bearing on that basic right; second, it is not clear whether the fifth sentence of the statute is intended to be construed as making the right nonwaivable where a child is not "represented" by his parent, guardian, or custodian; and third, the phrase "represented by the child's parent, guardian, or custodian" has not been clearly defined.

II. The constitutional right to counsel as provided by the Sixth Amendment to the United States Constitution and Section Ten, Article One of the Ohio Constitution is fundamental to our system of justice, and "representation" by a child's parent has no bearing on that basic right.

In re Gault, the case from which all due process rights in juvenile court flow, provides an explanation of a juvenile defendant's right to counsel in juvenile court: a child in a juvenile delinquency proceeding "requires the guiding hand of counsel at every step in the proceedings against him." Gault at 36. A child's constitutional right to representation by counsel in juvenile court is neither dependant upon nor muddled by any reference whatsoever to whether a child is "represented" by his parents. In Spears, the court considered Corey's mother's presence in court when it found that Corey had validly waived his right to counsel. Spears at ¶58. It found:

> Appellant's mother was present in court during the explanation of rights[,] [s]he concurred in her son's decision to waive his right to counsel[,] [s]he and the appellant were both informed of their right to object to the magistrate's decision pursuant to Juv.R. 40 [...,] [t]he appellant and his mother acknowledged receipt of the magistrate's decision and both waived their right to file written objections to that decision; [further] Appellant and his mother signed a written waiver of rights form prior to the plea.

Id.

Conspicuously absent from the court's assessment of Corey's mother's "representation" of her son were the following: the juvenile court never asked Ms. Spears if she was prepared to represent Corey; Ms. Spears told the court that she had not spoken to her son since he had been arrested; Ms. Spears told the court that she had not had the opportunity to read the police report; and, Ms. Spears had, in effect, raised an objection to the court's pronouncement of disposition when she asked the court if there was any possibility that her two sons (now both in the custody of DYS) could be housed in the same facility because her visits to them in separate facilities would present a hardship to her because she doesn't drive (T,p. 12), and the court brushed aside Ms. Spears' objection when it responded:

> If I was you, I'd let [Corey and his brother] stew for a year. You know, if I was you, I'd enjoy twelve months of peace and quiet. I'd let them sit in prison where they belong, away from their mother, away from their family, away from each other so they have a chance to understand what it is they're missing. And if I was you, I'd go on with my life and enjoy the next twelve months of peace and quiet. But that's just my thought. And if they want to sit in an institution in Cleveland or Cincinnati or southeast Ohio, and wonder what must be going on, I say leave them there.

(T.p. 13).

The court of appeals highlighted Ms. Spears' agreement with Corey's arguably uninformed decision to waive counsel. Spears at ¶58. In so doing, the court interjected a facet of waiver of the right to counsel that is not supported by the law. Worse, the court relied on Ms.

Spears' "participation" at Corey's hearing and found that Corey had validly waived his right to counsel (Id.) while it blatantly ignored Ms. Spears' obvious inability to represent her son under the circumstances—especially when the court had encouraged her to wash her hands of both of her boys. (T.pp. 12-13).

III. R.C. 2151.352 cannot be construed as creating a nonwaivable right to counsel for a child not represented by his parent, guardian, or custodian under Ohio law.

Other states have recognized the problems created by language similar to the fifth sentence of Ohio's statute and have resolved the matter by finding that it creates a nonwaivable right to counsel. Like R.C. 2151.352 in Ohio, the relevant code sections in Georgia and North Dakota provide: "Counsel must be provided for a child not represented by his parent, guardian, or custodian." Ga. Code Ann. § 15-11-6(b) (2006); N.D. Cent. Code § 27-20-26 (2006). In both states, the sentence has been interpreted to mean that the right to counsel is nonwaivable when a child is not represented by the child's parent, guardian, or custodian. K.E.S. v. State of Ga. (1975), 134 Ga. App. 843, 847, 216 S.E.2d 670, citing A.C.G. v. State of Ga. (1974), 131 Ga. App. 156, 156, 205 S.E.2d 435 (The right to counsel can "be waived unless the child is not represented by his parent, guardian or custodian."); In Interest of S. (1978), 263 N.W.2d 114, 120 (Sup. Ct. of N.D.) ("In view of the rights provided by the first three sentences of this section, the fourth sentence will have meaning and effect only if it is interpreted as mandating a nonwaivable right to counsel for such a child."). In North Dakota, In Interest of S. was the first of seven cases addressing this point. In the Interest of K.H., 2006 ND 156, 718 N.W.2d 575 (Sup. Ct. of N.D.); In the Interest of Z.C.B., 2003 ND 151, 669 N.W.2d 478 (Sup. Ct. of N.D.); In the Interest of R.D.B., 1998 ND 15, 575 N.W.2d 420 (Sup. Ct. of N.D.); In Interest of B.S. (1993), 496 N.W.2d 31 (Sup. Ct. of N.D.); State v. Ellvanger (1990), 453 N.W.2d 810 (Sup. Ct. of N.D.); In Interest of J.D.Z. (1988), 431 N.W.2d 272 (Sup. Ct. of N.D.); Huff v. P. (1981),

302 N.W.2d 779 (Sup. Ct. of N.D.); In Interest of G. (1980), 295 N.W.2d 323 (Sup. Ct. of N.D.).

In Ohio, such a construction of the sentence would conflict with Juv.R. 3, which provides, "rights of a child [except the right to counsel in Juv.R. 30 hearings] may be waived with permission of the court." Further, Juv.R. 1 provides that statutory procedure in juvenile court actions "shall be in accordance with these rules." Therefore, as was held in Spears, the statute cannot be construed as creating a nonwaivable right to counsel for a child not represented by his parent, guardian, or custodian. Spears, at ¶30 ("pursuant to R.C. 2151.352, Juv.R. 4(A) and Juv.R. 29(B), appellant was entitled to appointed counsel *provided [he] did not knowingly waive this right.*"). (Emphasis in original.)

Although the court in Spears dispensed with the possibility of construing the statute as creating a nonwaivable right, the problem created by the fifth sentence of the statute remains: the courts of appeals in Ohio have interpreted the sentence and reached varying results. In an earlier decision, the Fifth District Court of Appeals noted, "The state does not deny that R.C. 2151.352 requires that a juvenile not represented by parents, guardian or custodian must have legal counsel appointed." Douglas v. State (December 6, 1996), 5th Dist. No. 96 CA 44, at *2. Accordingly, because the court concluded that the juvenile court properly, although erroneously, believed Douglas was represented by his custodial parent—his grandmother—the lower court's inquiry indicated valid waiver of Douglas' right to counsel.

Citing Douglas, the Fourth District Court of Appeals interpreted R.C. 2151.352 as creating a nonwaivable right to counsel when the child is not represented by his parents in juvenile court. In re Estes, 4th Dist. No. 04CA11, 2004-Ohio-5163. The court reasoned:

> Our society generally recognizes that children do not have the life experience that would assist them in making the best decisions to safeguard their personal

> and constitutional rights. *** Therefore, they are in need of special protection and assistance. To that end, R.C. 2151.352 provides that "counsel must be appointed for a child not represented by his parent, guardian or custodian."

Id. at ¶8. (Internal citations omitted.) Accordingly, because the court found that Estes' parents were present with Estes "to counsel and advise him, and to protect him from the overpowering presence of the law" the court concluded "that the presence of Estes' parents satisfied the requirements of R.C. 2151.352, and, therefore, the trial court was not required to appoint counsel...." Id. at ¶¶9,11. Similarly, the Eighth District has found that "the presence of a social worker, serving in the capacity of a juvenile's custodian, nullifies the automatic-appointment-of-counsel provision of the statute." In re Smith, 8th Dist. No. 77905, 142 Ohio App. 3d 16, 20, 753 N.E.2d 930.

In contrast to Douglas, Estes, and Smith, the Second District has interpreted the sentence to mean, "[o]nly if the child has some adult to advise him may the child knowingly and voluntarily waive his right to counsel." In re R.B., 166 Ohio App. 3d 626, 2006-Ohio-264, ¶25. These inconsistent interpretations by the district courts reveal that the fifth sentence of R.C. 2151.352 creates uncertainty about a child's right to representation in juvenile court.

IV. Defining the phrase, "represented by the child's parent, guardian, or custodian" under R.C. 2151.352 would not resolve the problems it creates.

Additional problems are created by the fifth sentence of the statute because the phrase "represented by the child's parent..." has not been clearly defined. The word "represent" is not defined in the statute, and the language of the statute does not offer any guidance. For example, when the word "representation" is used in the first sentence of R.C. 2151.352, it plainly refers to "representation by legal counsel." Likewise, the word "represented" as used in Juv.R. 3 and Juv.R. 4 are referring to representation "by counsel." However, in the fifth sentence of R.C. 2151.352, the word "represent" refers to a parent's, guardian's, or custodian's "representation"

of the child. Further, while Juv.R. 29(B) makes repeated references to "unrepresented parties," it does not clarify by whom the child would be represented—counsel or parent, guardian, or custodian. Juv. R. 29(B)(3)-(5). The question remains: is a child's right to counsel equivalent to his right to be represented by his parent, guardian, or custodian? The answer must be no.

Notwithstanding their good intentions, parents cannot represent their child's legal interests in a court proceeding unless they are licensed to practice law. Further, as in Corey's hearing, parents are often unprepared for the hearings in juvenile court. (T.p. 7.) And, as in Corey's hearing, although the child's parents may have been given a written form concerning their child's rights, they remain unfamiliar with their specific responsibilities to advocate for their child, to object during the proceedings should the court fail to comply with due process as dictated by the rules, and to comply with the technical requirements of Juv.R.40.[10]

In juvenile delinquency proceedings, parents' interests and their child's best interests are often in conflict with the child's legal interests. For example, in In re William B., the Sixth District found that the trial court erred by not appointing counsel for William "to protect his constitutional rights," and said, "appellant's mother was present in court with him at the show cause hearing [* * * however * * *] 'the parents or guardian do not always represent the child's best interests and are sometimes adverse thereto.'" 163 Ohio App. 3d 201, 2005-Ohio-4428, at ¶15, quoting Agler, at 78.

IV. As written and as applied, the fifth sentence of R.C. 2151.352 impinges upon a juvenile defendant's right to counsel in juvenile court. Therefore, the sentence must be severed from the statute.

[10] Under Juv.R. 40(D)(2)(b), a party may seek to have the magistrate's order set aside, and pursuant to the strictures set forth in Juv.R. 40(D)(3)(a)-(b)(i)-(iii), a party must file objections to the magistrate's decision, or shall be held to have waived all but plain error on appeal. Juv.R. 40(D)(3)(b)(iv).

At its inception, R.C. 2151.352 was intended to ensure juvenile defendants their rights to due process. Due process requires "the just determination of every juvenile court proceeding by ensuring the parties a fair hearing and the recognition and enforcement of their constitutional and other legal rights." Juv.R. 1(B), cited in In re Williams, 101 Ohio St. 3d 398, 2004-Ohio-1500, at ¶28. The varied interpretations of the fifth sentence of R.C. 2151.352 have created uncertainty about the right to counsel and the effect of a child's parent's presence in court on the child's waiver of his right to counsel. It seems that this Court can resolve this uncertainty, as it did in Williams, in favor of the "plain language of the first sentence of R.C. 2151.352, as clarified by the Juvenile Rules." Williams, at ¶¶27-28.

The first sentence of R.C. 2151.352 outlines the statutory right to counsel in juvenile court. It provides, "A child, the child's parents or custodian, or any other person in loco parentis of the child is entitled to representation by legal counsel at all stages of the proceedings [in juvenile court.]" This plain language, like the constitutional right to counsel in juvenile court, is unencumbered by any conditions or limitations. In 1969, the 108th General Assembly enacted R.C. 2151.532. The language cited above, including the sentence, "Counsel must be provided for a child not represented by [the child's] parent, guardian, or custodian" has existed, save some stylistic changes, in the code ever since.

In Agler, this Court discussed the evolution of juvenile law in Ohio: "Such refinements are the contribution of the law partner to the sociological enterprise of the Juvenile Court system, intended to secure due process to children and their parents." Agler, at 74. This intent is also reflected in the Summary of 1969 Enactments, which states: "Right to counsel; other rights. Gives a child taken into custody the same rights as an adult *** provides that the child and his parents are entitled to representation by legal counsel at all stages of the proceedings,

and, if indigent, are entitled to have counsel provided." Ohio Legis. Serv. Comm'n, Summary of 1969 Enactments, 108th General Assemb., Jan.-Sept., 1969, p. 20 (explaining the changes enacted by Am. Sub. H.B. 320). (Emphasis omitted)

While the origin of the sentence, "Counsel must be provided for a child not represented by the child's parent..." is not clear, the General Assembly's intent in enacting it was to protect the parties' due process rights in juvenile court in accordance with the then-recently issued decision, In re Gault, 387 U.S. 1. In light of Gault, the intent of the new statute could not have been to deprive a child of his constitutional right to counsel in juvenile court. Indeed, even if the General Assembly had intended to create a right to representation in place of counsel, it could not, because the Fourteenth Amendment to the United States Constitution provides, "[No] State [shall] deprive any person of life, liberty, or property, without due process of law."

The meaning of the fifth sentence of R.C. 2151.352 in the context of the statute is not plain. It suggests either the existence of a nonwaivable right to counsel for a child not represented by the child's parent, guardian, or custodian, or that a child is entitled to have his legal rights represented by a parent instead of an attorney. In light of due process and the procedures respecting the same in the Juvenile Rules, neither suggestion is acceptable. Further, as demonstrated in Spears and as was highlighted above, the fifth sentence of R.C. 2151.352 has led to inconsistent interpretations of a child's right to representation by counsel in juvenile court. Because of this, R.C. 2151.352, as written and as applied, is invalid because it impinges upon a juvenile defendant's right to counsel in juvenile court. Therefore, this Court should sever the sentence from the statue and return the right to counsel as required by Section 10, Article I of the Ohio Constitution and the Sixth and Fourteenth Amendments to the United States Constitution to juvenile defendants in juvenile court.

SECOND PROPOSITION OF LAW

A child's waiver of counsel should be permitted only upon strict compliance with constitutional safeguards that can ensure such waiver is knowing, intelligent, and voluntary and thus comports with due process requirements of Article I, Section 16 of the Ohio Constitution and the Fifth and Fourteenth Amendments to the United States Constitution.

I. Introduction

Juvenile defendants are entitled to counsel "at all stages of the proceedings" against them. R.C. 2151.352. See also Juv.R. 4, Juv.R. 29; In re Gault (1967), 387 U.S. 1, 87 S.Ct. 148; In re Agler (1969), 19 Ohio St. 2d 70, 249 N.E.2d 808. The only circumstance under which a juvenile defendant may appear without counsel is after the juvenile court has obtained a valid waiver of the juvenile's right to counsel. R.C. 2151.352, Juv.R. 3. But what constitutes a valid waiver of the right to counsel is far from clear. In 1995, the Eighth District Court of Appeals stated, "We have found no controlling Ohio case law regarding what constitutes a valid waiver of a juvenile's constitutional right to counsel." In re East (1995), 8th Dist. No. 67955, 105 Ohio App. 3d 221, 223, 663 N.E.2d 983. Because there exists no controlling case law, courts have applied widely varying standards that have produced inconsistent results to this day. In Corey's hearing, although the juvenile court's two-part inquiry, followed by Corey's two-word responses, did not reflect any adherence to even the basic requirements of due process, the court found that "the trial court obtained a valid waiver of Appellant's right to counsel." Spears at ¶59.

II. Under current law, Ohio provides more protections for an adult criminal defendant's right to counsel in criminal court than it provides for a juvenile defendant's right to counsel in juvenile court.

For adult defendants in criminal court, a valid waiver of the right to counsel "must be made with an apprehension of the nature of the charges, the statutory offenses included within

them, the range of allowable punishments thereunder, possible defenses to the charges and circumstances in mitigation thereof, and all other facts essential to a broad understanding of the whole matter." State v. Martin, 103 Ohio St. 3d 385, 2004-Ohio-5471, at ¶40, quoting State v. Gibson (1976), 45 Ohio St. 2d 366,377, 345 N.E. 2d 399, quoting Von Moltke v. Gilles (1948), 332 U.S. 708, 723, 68 S.Ct. 316.

There are three types of waiver-of-the-right-to-counsel cases relevant to this case: those that involve adult criminal defendants who seek to waive counsel so that they may represent themselves (see, e.g., Gibson, Martin); those that involve adults with mental illnesses who would have benefited from representation by counsel, but who were not provided the opportunity to obtain counsel (see, e.g., In re Fisher (1974), 39 Ohio St. 2d 71, 313 N.E.2d 851; McDuffie v. Berzzarins (1975), 43 Ohio St. 2d 23, 25, 330 N.E.2d 667 (there is a "strong presumption against the waiver of the constitutional right to counsel...."); and those that involve juvenile defendants who allege that their juvenile court failed to obtain a valid waiver of their right to counsel (see, e.g., Spears; In re Royal (1999), 132 Ohio App. 3d 496, 725 N.E.2d 685; In re Johnson (1995), 106 Ohio App. 3d 38, 665 N.E.2d 247. The standard for valid waiver of the right to counsel should be at least as strict for a juvenile in juvenile court as for an adult in criminal or civil court because the same safeguards of due process afforded to adults apply to juveniles in delinquency proceedings. See Gault at 30. Further, "[i]n light of the criminal aspects of delinquency proceedings, including a juvenile's loss of liberty, due process and fair treatment are required in a juvenile adjudicatory hearing." In re Cross, 96 Ohio St. 3d 328, 2002-Ohio-4183, at ¶¶21-24.

In fact, the standard for waiver of counsel for children should ensure more protections than the standard for adults, because "our society generally recognizes that children do not have

the life experience that would assist them in making the best decisions to safeguard their personal and constitutional rights *** [t]herefore, they are in need of special protection and assistance." In re Estes, 4th Dist. No. 04CA11, 2004-Ohio-5163, at ¶8; In re Rogers (1997), 124 Ohio App. 3d 392, 395, 706 N.E.2d 390, citing Gault at 36 and In re East (1995), 105 Ohio App.3d 221, 223, 663 N.E.2d 983. But the standard for adults and children is not even the same. Compare the instant case involving thirteen-year-old Corey in juvenile court and another case from Licking County, which involved an adult defendant in criminal court. State v. Bettah, 5th Dist. No. 05 CA 50, 2006-Ohio-1916.

Just three days before it issued its decision in Spears, the Fifth District issued its decision in Bettah. Mr. Bettah was an adult defendant who faced three misdemeanor-level offenses in the Licking County Municipal Court.[11] Mr. Bettah originally asked for additional time to obtain an attorney, but then decided he wanted to "end the case" because he did not have the money to afford an attorney. Id. at ¶¶ 3, 11. The court asked, "So, are you ready to go to trial on your drunk driving charge?" to which Mr. Bettah responded, "Yes, Your Honor." Id. at ¶¶12-13. Mr. Bettah told the court that hoped he could get a lawyer, and the court reminded him that it had already granted him a continuance to hire an attorney and had warned him that no further continuances would be granted. Id. at ¶¶17, 21-25. The court noted that Mr. Bettah had not applied for a court-appointed attorney. Id. at ¶25. The trial went forward, Mr. Bettah testified on his own behalf, and he was acquitted of one of the charges. Id. at ¶27. On appeal, Mr. Bettah raised four assignments of error, two of which concerned his right to counsel and the court's failure to obtain a valid waiver of his right to counsel. Id. at ¶¶29-33. The court of

[11] Mr. Bettah was charged with "operating a motor vehicle under the influence of alcohol and failure to operate within the marked lanes" Bettah, at ¶1, and with driving under a suspended license, Id. at ¶27.

appeals reversed the case and remanded the matter to the lower court. Id. at ¶46. In Bettah, the court proclaimed, "The constitutionally protected right to the assistance of counsel is absolute." Id. at ¶35, quoting State v. Tymcio (1975), 42 Ohio St.2d 39, 43, 325 N.E.2d 556, citing Argersinger v. Hamlin (1972), 407 U.S. 25, 37, 92 S.Ct. 2006. The court also declared, "there is a presumption against the waiver of a constitutional right such as the right to counsel." Bettah at ¶35.

Addressing the standard for valid waiver of the right to counsel, the court said, "A criminal defendant may waive this right to counsel either expressly or impliedly from the circumstances of the case." State v. Weiss (1993), 92 Ohio App. 3d 681, 684, 637 N.E.2d 47. The court then applied the following standard to Mr. Bettah's supposed waiver of his right to counsel:

> An effective waiver requires the trial court to "...make sufficient inquiry to determine whether [the] defendant fully understands and intelligently relinquishes that right." [*** T]the Ohio Supreme Court [has] explained what constitutes a "sufficient inquiry" into a criminal defendant's waiver of his right to counsel: "To discharge this duty properly in light of the strong presumption against waiver of the constitutional right to counsel, a judge must investigate as long and as thoroughly as the circumstances of the case before him demand. The fact that an accused may tell him that he is informed of his right to counsel and desires to waive this right does not automatically end the judge's responsibility. To be valid such waiver must be made with an apprehension of the nature of the charges, the statutory offense included within them, the range of allowable punishments thereunder, possible defenses to the charges and circumstances in mitigation thereof, and all other facts essential to a broad understanding of the whole matter."

Bettah at ¶40, quoting Gibson at syllabus ¶2; 377. (Internal citations omitted.)

Applying this standard, the court found:

> There is no indication in the record that appellant was advised by the trial court of the dangers of self-representation or that appellant was aware of the nature of the charges against him, the range of allowable punishments and all possible defenses to the charges. Thus, we hold the trial court failed to establish that appellant made a valid waiver of his right to counsel....

Bettah at ¶ 41.

In Spears, the court addressed Corey's first two assignments of error—concerning waiver of his right to counsel and entry of his admission to the charge—together and found:

> The record illustrates that Appellant's admission was voluntary and that the trial court explained his rights, the charges, and the consequences of being found delinquent. Based on the foregoing, this Court finds that the trial court substantially complied with Juv.R. 29 and did not violate Appellant's constitutional rights. The record reflects that appellant's admission to the charges was given knowingly, intelligently, and voluntarily and that the trial court obtained a valid waiver of Appellant's right to counsel. Accordingly, appellant's First and Second Assignments of Error are overruled.

Spears at 59.

In Spears, the court did not explain the factors that led it to conclude that Corey's waiver of counsel was knowing, intelligent, and voluntary. Id. at ¶¶26-60. It is not clear whether the court relied upon the juvenile court's colloquy, Corey's mother's agreement that the waiver of counsel was valid, or the rights forms that Corey and his mother signed. Id. It is clear that the use of a child's written waiver of counsel is not mandated or even suggested by the juvenile rules, and therefore should never stand in the place of a valid in-court colloquy. Further, close examination of the waiver-of-counsel form signed by Corey and his mother reveals several problems therein: First, the section entitled, "Your Right to an Attorney" states, "If you cannot afford an attorney and you qualify under state guidelines, the Clerk will appoint an attorney to represent you at no cost to you." (Rights Form, filed August 9, 2005, at p. 1). It does not explain that a thirteen-year-old child is generally presumed indigent, and has an absolute right to counsel notwithstanding whether his parents "qualify under state guidelines." O.A.C. 120-1-03(D) ("In determining eligibility of a child for court-appointed counsel in juvenile court, only the child's income shall initially be considered[; and i]n no case shall a child be denied appointed counsel because a parent refuses to disclose their financial information...."). Second,

the form directs the reader to "contact the Clerk's office seven (7) days in advance of your scheduled hearing and the Clerk will advise you how to apply for a Court-appointed attorney." (Rights Form at p.1). This advisement was problematic here, when Corey's offense was alleged to have occurred "between August 3rd and August 7th of 2005" (T.p. 3), and his only hearing occurred on August 9, 2005. In general, the form's language creates more of a presumption against a child's asserting his right to counsel than it creates a presumption against the waiver of his right to counsel. (Rights Form, pp.1-2). And, there is no way to ensure a child is able to read the form or understand the information explained in it. The form does not explain that the child and the parent each have a right to an attorney in the matter. (Rights Form, pp.1-2). If a parent and juvenile want to waive their "right to be represented by an attorney" they must sign the form on page two. (Rights Form, pp.1-2). On pages five and six the form explains Juv.R. 40's requirements, but the form fails to mention or explain the following before it asks the reader to sign the waiver of counsel: a significant consequence of appearing in court without an attorney before a magistrate is that if the juvenile defendant objects to the magistrate's decision, he must adhere to the strictures of Juv.R. 40(D)(2)(iii)(N)(b) or Juv.R. 40(D)(3)(b)(i)-(iii), or will be deemed to have waived all but plain error on appeal under Juv.R. 40(D)(3)(b)(iv).[12] Given the Rights Form's problems, the fact that Corey and his mother both signed it should have no bearing on this case.

At the beginning of Corey's hearing, the court told Corey that he had "the right to be represented by an attorney at today's hearing" and that "if you cannot afford an attorney and you qualify under state guidelines, I will appoint an attorney to represent you." (T.p. 2). Although the court had not addressed the notice requirements and had not informed Corey of

[12] The Rights Form refers to Juv.R. 40(E), which contained the earlier version of that rule.

the substance of the complaint, the purpose of the hearing, and the possible consequences of the hearing, as is required by Juv.R. 29(B)(1)-(2), the court then asked Corey: "Do you wish to go forward with today's hearing without an attorney?" Corey responded, "Yes, sir."

After the court dispensed with Corey's right to counsel, the court read each allegation and asked Corey to admit or deny each charge. (T.pp. 3-5). Corey admitted to each charge. (T.pp. 3-5). The court explained that if Corey admitted, there would not be an adjudicatory hearing and the case would proceed directly to disposition. (T.p. 5). The court informed Corey that he faced six or twelve months to the age of twenty-one in the Department of Youth Services for the charges. (T.p. 5). The court explained that by admitting, Corey was giving up his rights to trial, including his rights to remain silent, to call witnesses, to present evidence, to cross examine witnesses, and to have the charges proven beyond a reasonable doubt. (T.pp. 5-6). The court asked Corey whether there had been any threats or promises to cause him to enter his pleas, and asked Corey's mother whether she agreed with his decision to admit to the charges. (T.pp. 6-7).

After the court accepted Corey's admissions, it proceeded to disposition. (T.pp. 7-13). The record reveals that the only time the court mentioned Corey's right to counsel was at page two of the transcript. (T.pp. 2-13). The court did not readvise Corey of his right to counsel during the adjudication portion of his hearing or during the disposition portion of his hearing. (T.pp. 3-13). Further, at the end of Corey's hearing, after the court instructed the probation department to ensure that Corey and his brother would not be held at the same DYS facility, the court said to Corey: "Your plan was that they be in---you were---you were anxious to be arrested on these felonies so that you could go to D-Y-S and be with your brother again. You're going to D-Y-S but I'll ensure you're not in the same facility." (T.p. 12). When it made this

statement, the court indicated that it knew that Corey expected the consequence of his plea would be that he would get to see his brother at DYS. This indicates that Corey's waiver of counsel and plea were truly not "knowing, intelligent, and voluntary." It further illustrates how an attorney could have helped Corey participate fully and honestly in the proceedings instead of being motivated by an ill-conceived plan.

During his hearing, Corey did not express a desire to proceed pro se. (T.pp. 2-13). In its decision, however, the court relied on Iowa v. Tovar (2004), 541 U.S.77, 124 S.Ct. 1379, and its analysis of waiver of counsel under federal law. Spears at ¶¶49-52. The court in Spears, citing Tovar, stated, "The Court emphasized that it has never 'prescribed any formula or script to be read' when a defendant seeks to proceed pro se." Spears at ¶51. There is a difference, however, between a defendant who seeks to proceed pro se and a child who lacks the education and life experience necessary to assert and protect his own rights under the law. See Estes at ¶8.

Although the court in Spears often cited to precedent, it failed to apply that precedent to the facts of this case. For example, the court said, "a juvenile may waive his or her right to counsel, but the trial court must make sufficient inquiry to determine whether the juvenile does so knowingly, intelligently, and voluntarily...." Spears at ¶45, citing In re Kindred, 5th Dist. No. 04 CA 7, 2004-Ohio-3647, at ¶20, and In re Christner, 5th Dist. No. 2004AP020014, 2004-Ohio-4252, at ¶20 [sic] (the cited text can be found at ¶14). The court stated, "before permitting a waiver of counsel, the court has a duty to make an inquiry to determine that the relinquishment is of 'a fully known right' and is voluntary [sic], knowingly, and intelligently made." Spears at ¶45, citing Gault, 387 U.S. at 42. The court also stated, "A voluntary, knowing and intelligent waiver of the right to counsel must affirmatively appear on the record." Spears at ¶45. Despite this, the court found that Corey validly waived his right to counsel when

the juvenile court did nothing more than inform Corey of his right to counsel and ask him if he "wish[ed] to go forward with today's hearing without an attorney." (T.pp. 2-3).

The court also stated, "Some of the factors the court must review are the juvenile's age, emotional stability, mental capacity, and prior criminal experience." Spears at 45. But the record does not reflect that the juvenile court considered any of these factors—there is no indication the court considered Corey's age before it accepted his waiver of counsel, and the transcript reveals that the court elicited only one-word responses from Corey that do not show that the juvenile court had considered, or could have considered, Corey's emotional stability or mental capacity before it accepted his waiver of counsel. (T.pp. 2-3). And, the record does not show that the juvenile court considered Corey's prior "criminal" experience before it accepted his waiver of his right to counsel. (T.pp. 2-3).

To emphasize, the juvenile court did not ask Corey, in the affirmative, whether he wanted to have an attorney represent him during his three-part hearing; rather, the court phrased the question in the negative: "Do you wish to go forward with today's hearing without an attorney?" (T.p. 3). The court's phrasing indicates that there is a presumption against Corey's assertion of his right to counsel, rather than a presumption against the waiver of that right, as the law requires. See East, at 224 (Courts indulge every reasonable presumption against the waiver of a fundamental constitutional right including the right to be represented by counsel.).

In sum, when the court found that Corey knowingly, intelligently, and voluntarily waived his right to counsel, it issued a decision that conflicted not only with its precedent (as in Kindred at ¶20; Christner at ¶14; and In re Poland, 5th Dist. No. 04CA18, 2004-Ohio-5693, at ¶¶19, 24) but also with the legal framework it provided in this case. Spears at ¶¶53, 31-60.

There were differences between Corey's and Mr. Bettah's cases—most significantly,

unlike Mr. Bettah, Corey did not express a desire to be represented by counsel. In Bettah, the court asked the defendant "whether he was going to represent himself or be represented by counsel." Id. at ¶3. At Corey's hearing, the juvenile court asked Corey, "Do you wish to go forward with today's hearing without an attorney?" (T.p.3). The court in Bettah presumed that the defendant would be represented by someone (either himself or counsel), while at Corey's hearing, the court presumed Corey would choose to be represented by no one. (T.pp. 2-3). Although the facts and the stages of the proceedings were different in the two cases, it seems that Mr. Bettah enjoyed far greater protection than did thirteen-year-old Corey Spears.

Without acknowledging Bettah, the court in Spears addressed the differences in the strength of the protection of the right to counsel when it cited Tovar:

> [Valid waiver] "will depend on a range of case-specific factors, including the defendant's education or sophistication, the complex or easily grasped nature of the charge, and the stage of the proceeding." *** [Tovar reasoned] that at earlier stages of the criminal process, a less searching or formal colloquy may suffice. *** "[W]e require less rigorous warnings pretrial *** not because pretrial proceedings are 'less important' than trial, but because, at that stage, 'the full dangers and disadvantages of self-representation ... are less substantial and more obvious to an accused than they are at trial.[']" The Court concluded "'The law ordinarily considers a waiver knowing, intelligent, and sufficiently aware if the defendant fully understands the nature of the right and how it would likely apply *in general* in the circumstances—even though the defendant may not know the *specific detailed* consequences of invoking it.'...."

Spears at ¶¶51-52, quoting Tovar at 88-90 (internal citations omitted). (Emphasis in original.) At the time of Mr. Tovar's appearances in court, he was a 21-year-old college student who was arrested for drunken driving. Tovar, at 81-82. Mr. Tovar appeared in court on two separate occasions—for arraignment and entry of plea, and for sentencing. Id. at 82-84. Noting that Mr. Tovar was without counsel, the court asked him, "Do you want to represent yourself at today's hearing?" and Mr. Tovar responded, "Yes, sir." Id. at 82. After a complete plea colloquy, "the

court asked Mr. Tovar if he still wished to plead guilty, and Tovar affirmed that he did." Id. at 84.

Unlike Mr. Tovar, Corey did not seek to represent himself, and the court did not allow him any opportunity to change his mind. (T.pp. 2-13). Unlike Mr. Tovar and Mr. Bettah, Corey's case was heard by a magistrate. (T.pp. 2-13). This is significant, because when a magistrate has presided over a matter in juvenile court, the juvenile defendant must adhere to the strictures of Juv.R. 40(D)(2)(iii)(N)(b) or Juv.R. 40(D)(3)(b)(i)-(iii), or will be deemed to have waived all but plain error on appeal under Juv.R. 40(D)(3)(b)(iv). While "a less searching or formal inquiry" at an earlier stage of the proceedings may suffice for an adult defendant in a criminal case, a lower standard cannot suffice for juvenile defendants in juvenile court. First, juvenile defendants, who lack maturity and life experience, are not always equipped to comprehend the gravity of their proceedings. See Estes at ¶8; Rogers at 395; 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), pp. 333-363, 356 ("Juveniles aged 15 and younger are significantly more likely than older adolescents and young adults to be impaired in ways that compromise their ability to serve as competent defendants in a criminal proceeding."); See also Matter of Lawrence S. (1971), 29 N.Y.2d 206, 208, 275 N.E.2d 577 ("[W]ith respect to a juvenile charged as a delinquent, the courts have imposed particularly strict requirements before permitting a waiver of his right to counsel."); and People v. Gina M.M. (1976), 40 N.Y.2d 595, 596, 357 N.E.2d 370 ("When a defendant waives his right to counsel and pleads guilty, there should be a painstaking effort by the trial court to make sure that the accused understands the consequences of the waiver and

plea and that defendant committed an act which constituted a crime and which would furnish a basis for the plea....").

Further, when appearing before a magistrate, even young juvenile defendants like Corey, who have not opted to represent themselves, will be held to the standard of self representation: at the outset of its analysis, the court in Spears found "in the instant case, appellant failed to object on the record to the trial court's manner of conducting the adjudicatory hearing," thus, he should be held to the plain error standard of review. Spears at ¶¶34-36. Further, the court in Spears said, "Ordinarily we would find that appellant waived the issue of imposing community control sanctions in lieu of financial sanctions by failing to either move the court at the time of sentencing or objecting to the magistrate's decision."[13] Id. at ¶91.

The court in Spears also noted that in Tovar, "the Court emphasized that it has never 'prescribed any formula or script to be read' when a defendant seeks to proceed pro se. *** The central component for a valid waiver is simply that the defendant 'knows what he is doing and his choice is made with his eyes open'" Spears at ¶51. (Internal citations omitted.) Instead of examining the facts surrounding Corey's supposed waiver of his right to counsel—which occurred in the first minute or two of his hearing—and applying the passage from Tovar to ensure Corey knew what he was doing and that he made his choice with his eyes open, the court used Tovar to excuse the juvenile court's failure to comply even minimally with the due process

[13] Fortunately for Corey, the court did not dismiss his argument. The court found, "under the facts of this case we are unwilling to conclude that the appellant waived his objection to payment of costs and restitution [because] the magistrate did not inform the appellant that he could be ordered to pay court costs and restitution. While we have found that Juv. R. 29 was not violated and that Appellant's constitutional rights were not violated we cannot say that appellant had an opportunity to move the court to impose community control sanctions in lieu of costs and restitution. Further the record before us does not reflect that either the magistrate or the judge considered community service in lieu of sanctions as mandated by R.C. 2152.20(D)." Spears at ¶91.

requirements of Juv.R. 29(B). Ohio's lack of a clear standard for the waiver of the right to counsel in juvenile court is resulting in children like Corey being allowed to waive counsel according to a lower standard than that which applies to adults who have chosen to represent themselves pro se, but then being held to a higher standard on appeal that is generally reserved for adult pro se defendants.

III. The standard for valid waiver of a juvenile defendant's right to counsel must ensure courts' strict compliance with Juv.R. 29(B) and due process and thus ensure such waiver is knowingly, intelligently, and voluntarily made.

Although the U.S. Supreme Court has never advised any formula or script for a would-be pro se defendant, "Juv.R. 29(B) provides a checklist to aid the juvenile court in ensuring that the parties before the court are afforded due-process protection under the Ohio and United States Constitutions." In re Shepherd, 4th Dist. No. 00CA12, 2001-Ohio-2499, p. 8. It follows that a clear standard for waiver of counsel by a juvenile defendant in juvenile court must begin with compliance with the express mandatory components of Juvenile Rule 29(B). The rule provides an outline for an adjudicatory hearing in juvenile court with mandatory steps given in a logical order:

> (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;

(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 offer evidence, to cross-examine witnesses, and, upon request, to have a record of all proceedings made, at public expense if indigent.

Juv.R. 29(B).

Notwithstanding this mandatory language, some courts of appeals have determined that only substantial compliance with Juv.R. 29(B) is required. E.g., In re Flanagan (April 22, 1998), 3rd Dist No. 13-97-42, at *12-*13 ("[While a] court's total disregard of the requirements of Juv.R. 29(B) has been held to be prejudicial error *** a court's substantial compliance with the rule is sufficient."); In re Daniel K., 6th Dist. Nos. OT-02-025, OT-02-023, 2003-Ohio-1409, at ¶33 ("The threshold standard to determine if an alleged delinquent child received his or her due process rights before the ultimate stage of the final adjudicatory hearing occurs is whether the presiding official substantially complied with the advisement of rights required under Juv.R. 29(B)."). See also In re Bennette H. (October 31, 1997), 6th Dist. No. L-97-1013, at *3 ("While a court's total disregard of the requirements of Juv.R. 29(B) has been held to be prejudicial error, * * * substantial compliance is sufficient to satisfy the rule."), citing In re William H. (1995), 6th Dist. No. L-94-263, 105 Ohio App. 3d 761, 766, 664 N.E.2d 1361; In the Matter of Matthew A. (Oct. 8, 1999), 6th Dist. No. OT-99-034, at *5.

But, application of the "substantial compliance" standard to Juv.R. 29(B) is illogical because the plain language of the rule is mandatory. "This court has consistently held that when a statute or rule uses the word 'shall,' the prescription is not advisory; rather, it is mandatory." Martin at ¶48 (Moyer, C.J., concurring in judgment only) citing State v. Burnside, 100 Ohio St.

3d 152, 2003-Ohio-5372, at ¶36; State v. Campbell, 90 Ohio St.3d 320, 324-25, 2000-Ohio-183; State v. Golphin, 81 Ohio St.3d 543, 545-546, 1998-Ohio-336.

A comparison of the juvenile rules and the criminal rules reveals that the criminal rules offer more protections of the right to counsel than do the juvenile rules. Like Juv.R. 29(B), the criminal rules provide a detailed framework for hearings in adult criminal proceedings. Unlike Juv.R. 29(B), the criminal rules specifically address each stage of the proceedings[14] and provide that a valid waiver of the right to counsel must be given "knowingly, intelligently, and voluntarily." Crim.R. 44. The juvenile rules do not offer a standard for waiver of counsel such as is set forth in Crim.R. 44. And there are only two juvenile rules that require the juvenile court to advise the juvenile of his right to counsel—Juv.R. 7(F), which governs detention hearings, and Juv.R.29(B), which governs adjudicatory hearings. In contrast, the criminal rules require the advisement of the right to counsel under rules 5, 10, 11, 15, 32.3, and 44. Unlike Crim.R. 11(C)(1), Juv.R. 29 does not require the juvenile court to readvise the juvenile defendant of his right to counsel before he enters his admission. But, Juv.R. 29(B)(5) requires the juvenile court to "Inform any unrepresented party who waives the right to counsel of the right: to obtain counsel at any stage of the proceedings...." In other words, Juv.R. 29(B) does not require the juvenile court to readvise a juvenile defendant of his right to counsel at any other stage of the proceedings nor does it provide a mechanism for the unrepresented child to assert his right at a later time.

Adolescents have been found to be "more likely than young adults to make choices that reflect a propensity to comply with authority figures," Grisso, et al., Juveniles' Competence to

[14] See, e.g., Crim.R. 5, "Initial appearance"; Crim.R. 10, "Arraignment"; and Crim.R. 11, "Pleas, rights upon pleas."

Stand Trial: A Comparison of Adolescents' and Adults' Capacities as Trial Defendants, LAW AND HUMAN BEHAVIOR, Vol. 27, No. 4 (Aug. 2003), at p. 357. Juv.R. 34(A) states, in part, "Where the dispositional hearing is to be held immediately following the adjudicatory hearing, the court, upon the request of any party, shall continue the hearing for a reasonable time to enable the party to obtain or consult counsel." This means that although an adolescent is unlikely to interrupt the judge and assert his right to counsel, a juvenile court judge need not readvise a juvenile of his right to counsel; rather, the juvenile or another party must request counsel and ask for a continuance to obtain counsel.[15] The risk presented by these discrepancies between the criminal and juvenile rules is exemplified in Spears, where the court held that the juvenile court need not advise an unrepresented juvenile defendant of the right to "obtain counsel at any stage of the proceedings" pursuant to Juv.R. 29(B)(5); rather, that the juvenile court's substantial compliance with Juv.R. 29 sufficed to show that Corey's "admission to the charges was given knowingly, intelligently, and voluntarily and that the trial court obtained a valid waiver of [Corey's] right to counsel."

Courts of appeals have promoted particular confusion when an opinion is based upon a mix of the analyses for a juvenile's waiver of his right to counsel and his entry of admission, as in the instant case. During Corey's one and only hearing, which began as an arraignment, became adjudication, and ended as disposition, the juvenile court did not adhere to Juv.R. 29(B)(1), Juv.R. 29(B)(2), or Juv.R. 29(B)(5) before it accepted Corey's waiver of counsel. (T.pp. 2-7). Despite this, because the Fifth District found that the trial court "substantially

[15] See also Juv.R. 35(B), which governs probation revocation hearings. It provides, "The parties shall have the right to counsel and the right to appointed counsel pursuant to Juv.R. 4(A) [if indigent.]" But, neither 35(B) nor 4(A) explicitly requires the juvenile court to explain to the juvenile defendant that he has a right to counsel; rather each simply states that the right to counsel exists.

complied with Juv. R. 29(D)"[16] much later in Corey's hearing, the court found that his waiver of counsel and entry of admission were valid. Spears at ¶59. But see Poland at ¶¶19, 24 (waiver of counsel and the entry of admission were invalid where trial court engaged in a "minimal discussion with child regarding his right to counsel" and an incomplete "Crim.R. 11 colloquy"); and Christner at ¶17 (waiver of counsel and entry of admission were invalid where the trial court did not conduct "the kind of dialogue anticipated by the rules, before finding appellant had waived his rights knowingly, voluntarily, or intelligently.").

The juvenile court's substantial compliance with Juv.R. 29(D), long after it had dispensed with Corey's right to counsel, is irrelevant to the analysis of whether Corey validly waived his right to counsel. Further, "substantial compliance" with Juv.R. 29(B), which mandates "advisement and findings at the commencement of the hearing" is inappropriate because 29(B) is mandatory. See Martin at ¶47, (Moyer, C.J., concurring in judgment only) (Substantial compliance with a criminal rule cannot be found when "there was a clear lack of compliance with an express mandatory component of the rule.").

Therefore, pursuant to Juv.R. 29(B), unless the juvenile court strictly complies with Juv.R. 29(B)(1)-(3), the reviewing court need not look any further to determine whether a valid waiver of the right to counsel was obtained. See, e.g., Royal at 502-03 ("The rights dialogue of Juv.R. 29(B) is mandatory and a trial court commits reversible error in failing to advise a juvenile of these constitutional protections."). Further, unless the juvenile court strictly complies with Juv.R. 29(B)(5) and informs any unrepresented party "who waives the right to counsel of the right: to obtain counsel at any stage of the proceedings" at the commencement of

[16] Juv.R. 29(D) governs entry of admission, not advisement of the right to counsel or waiver of the right to counsel.

the adjudicatory hearing, the child cannot be said to have validly his right to counsel at a later stage of the proceedings—whether it be during his entry of admission under Juv.R. 29(D), or during his disposition under Juv.R. 29(F)(2)(a) and Juv.R. 34.

Despite the sound reasoning of a few cases, courts remain uncertain about what constitutes a valid waiver of the right to counsel in juvenile court. Specifically, some courts of appeals have found that only substantial compliance with the language of Juv.R. 29(B) is required before a child may waive his right to counsel in a juvenile delinquency proceeding. E.g., Daniel K. at ¶33; Bennette H. at *3; William H. at 766; Matthew A. at *5.

Other courts have found the language in Juv. R. 29(B)—"[a]t the beginning of the hearing, the court shall do all of the following * * *"—to be mandatory. E.g., Royal at 502-03; In re Kimble (1996), 3rd Dist. No. 3-96-06, 114 Ohio App. 3d 136, 682 N.E.2d 1066; In re Smith (Aug. 30, 1991), 6th Dist. No. 90-OT-038, 77 Ohio App. 3d 1, 601 N.E.2d 45. Other courts, including the Fifth District in the instant case, have employed an ad hoc application of Juv.R. 29(B) and Juv.R. 29(D) together, to determine whether a child's waiver of counsel and his admission both are valid. Spears at ¶¶53-59.

All of Ohio's courts of appeals have considered juveniles' waivers of the right to counsel. Despite this, no clear standard that respects the constitutional requirements for valid waiver of the right to counsel has emerged.[17] Therefore, this Court's pronouncement of a clear standard is urgently needed to ensure due process and fair treatment for Ohio's youth.

[17] In her law review article, The Fiction of Juvenile Right to Counsel: Waiver in the Juvenile Courts, Mary Berkheiser examined the long-standing practice of permitting juveniles to waive their right to counsel. Her survey revealed, "that the vast majority of nearly one hundred post-Gault waiver of counsel cases were overturned on appeal, and those that were upheld are largely indistinguishable from those that were overturned." Of the ninety-nine surveyed cases, Ohio represented over twenty percent of the cases that overturned waivers in the juvenile courts. 54 FL. L. Rev. 577, 581-82 (Sept. 2002).

As mentioned earlier, an excellent example of a clear standard for valid waiver of the right to counsel in juvenile court is found in Royal at 502-03. In Royal, the Seventh District Court of Appeals considered the case of a boy who was thirteen and, like Corey, was "days short of his fourteenth birthday." Spears at ¶58; Royal at 500. In Royal, the court applied a comprehensive standard for the waiver of the juvenile defendant's right to counsel that respected both the constitutional requirements for due process and the mandatory provisions in Juv.R. 29(B):

> In the watershed case of *In re Gault,* the United States Supreme Court granted juveniles at the adjudicatory stage facing possible commitment many of the constitutional rights enjoyed by their adult counterparts, including the right to counsel and appointed counsel if indigent. *** Both R.C. 2151.352 and Juv.R. 4(A) provide that a child is entitled to legal counsel in juvenile proceedings. Juv.R. 29(B) mandates that a court advise the juvenile of the following upon commencement of the adjudicatory hearing:
> "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 fifteen 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;
> (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 offer evidence, to cross-examine witnesses, and, upon request, to have a record of all proceedings made, at public expense if indigent."
>
> The rights dialogue of Juv.R. 29(B) is mandatory and a trial court commits reversible error in failing to advise a juvenile of these constitutional protections. ***
> A juvenile may waive the right to counsel in most proceedings with permission of the court [pursuant to Juv.R. 3.] However, before permitting a waiver of counsel, the court has a duty to make an inquiry to determine that the relinquishment is of "a fully known right" and is voluntarily, knowingly and

> intelligently made. [The court must make an inquiry] in light of the presumption against waiver of a constitutional right to counsel:
> "' * * * a judge must investigate as long and as thoroughly as the circumstances of the case before him demand. The fact that an accused may tell him that he is informed of his right to counsel and desires to waive this right does not automatically end the judge's responsibility. To be valid such waiver must be made with an apprehension of the nature of the charges, the statutory offenses included within them, the range of allowable punishments thereunder, possible defenses to the charges and circumstances in mitigation thereof, and all other facts essential to a broad understanding of the whole matter. * * *'"
>
> *** It has also been held that before satisfying itself that a juvenile has made a voluntary, knowing and intelligent waiver of counsel, a court must make an inquiry that encompasses the totality of the circumstances, including the age of the juvenile, his emotional stability, mental capacity and prior criminal experience.

Royal at 502-03. (Internal citations omitted.)

The First District Court of Appeals' gloss on the "totality of the circumstances" is relevant for a thirteen-year-old like Corey: "Within the totality-of-the-circumstances test, the court was required to take special care given [the juvenile's] age (thirteen)." Johnson at 41.

Because there is no universal standard for the waiver of the right to counsel in juvenile court, a juvenile defendant's constitutional right to counsel in juvenile court cannot be fully realized. The standard outlined above ensures juvenile courts' strict adherence to Juv.R. 29(B), which provides the foundation for due process during a juvenile delinquency proceeding. It also requires a court to conduct a sufficient inquiry[18] to ensure a child's waiver of counsel is knowingly, intelligently, and voluntarily made, in light of the strong presumption against the waiver of the right to counsel. This ensures that juvenile defendants would receive at least the same protections offered to adult defendants in criminal court. Further, under this standard, a

[18] See State v. Johnson, __ Ohio St. 3d __, 2006-Ohio-6404, at ¶89.

juvenile court would have to create a record to show that it inquired about the factors involved in the "totality of the circumstances," including the child's age, emotional stability, mental capacity and prior criminal experience, before it permitted waiver of the child's right to counsel. In this, the fortieth anniversary of Gault, Ohio's children deserve nothing less.

CONCLUSION

Corey Spears, like all of Ohio's children who appear before a juvenile court, is entitled to an absolute right to counsel that is not dependant upon or muddled by any reference whatsoever to whether he is "represented" by his parents. Like all juvenile defendants in juvenile court, Corey cannot be found to have validly waived his right to counsel where the juvenile court did not strictly comply with constitutional safeguards to ensure such waiver is knowing, intelligent, and voluntary and thus comports with the due process requirements of Section 10, Article I of the Ohio Constitution and the Fifth and Fourteenth Amendments to the United States Constitution. Therefore, this Court should adopt the two propositions of law and remand the matter to the Fifth District Court of Appeals for a determination consistent with its holding.

Respectfully submitted,

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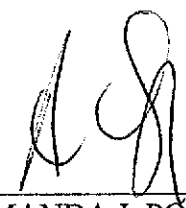
CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing **Merit Brief of Appellant Corey Spears** was forwarded by regular U.S. Mail this 26th day of December, 2006 to the office of Melinda Seeds and Erin Welch, Licking County Assistant Prosecutors, 20 South Second Street, Newark, Ohio 43055.



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IN THE SUPREME COURT OF OHIO

IN RE:	COREY SPEARS, A MINOR CHILD	: : : : : :	CASE NO. 06-1074 On appeal from the Licking County Court of Appeals, Fifth Appellate District C.A. Case No. 2005-CA-93

APPENDIX TO

MERIT BRIEF OF APPELLANT COREY SPEARS

IN THE SUPREME COURT OF OHIO

IN RE: COREY SPEARS, A MINOR CHILD	:	Case No. 06-1074
	:	On Appeal from the Licking County Court of Appeals Fifth Appellate District
	:	C.A. Case No. 2005-CA-93

NOTICE OF APPEAL
OF APPELLANT COREY SPEARS

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NOTICE OF APPEAL OF APPELLANT COREY SPEARS

Appellant Corey Spears hereby gives notice of appeal to the Supreme Court of Ohio from the judgment of the Licking County Court of Appeals, Fifth Appellate District, entered in Court of Appeals Case No. 2005-CA-93, on April 17, 2006.

This case raises substantial constitutional questions, involves a felony, and is of public or great general interest.

Respectfully submitted,

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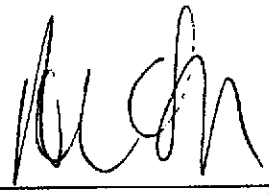
CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing **Notice of Appeal of Appellant Corey Spears** was forwarded by regular U.S. Mail this 1st day of June, 2006 to the office of Melinda Seeds and Erin Welch, Licking County Assistant Prosecutors, 20 South Second Street, Newark, Ohio 43055.



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COURT OF APPEALS
LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT

IN RE: COREY SPEARS, A MINOR CHILD

JUDGES:
Hon: John W. Wise, P.J.
Hon: W. Scott Gwin, J.
Hon: William B. Hoffman, J.

Case No. 2005-CA-93

OPINION

CHARACTER OF PROCEEDING: Civil appeal from the Licking County Court of Common Pleas, Case Nos. 2005-0616 & 2004-0329

JUDGMENT: Affirmed in part; Reversed in part and Remanded

DATE OF JUDGMENT ENTRY:

APPEARANCES:

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Gwin, J.,

{¶1} Appellant, Corey Spears, appeals pursuant to *In Re: Anderson* (2001), 92 Ohio St.3d 63, 748 N.E.2d 67, from the August 9, 2005 judgment entry of the Licking County Court of Common Pleas, Juvenile Division. Appellee is the State of Ohio.

{¶2} Appellant appeals on the basis that the Licking County Court of Common Pleas, Juvenile Division, erred when it accepted his plea of admission without substantially complying with the requirements of Juv. R. 29(D). The following facts give rise to this appeal.

{¶3} On August 9, 2005, Appellant, a juvenile, was brought before the court on two case numbers, case number A2005-0616 concerning two counts of Grand Theft, felonies of the 4th degree, and case number A2004-0329 involving a probation violation.

{¶4} At the hearing on August 9th, the Court inquired concerning two sets of rights papers which appellant and his mother had signed. Theses documents were made part of the trial court file. Appellant acknowledged receipt, reading and understanding of the rights contained in the papers. (T. at 2).

{¶5} The magistrate then inquired:

{¶6} "THE COURT: Do you understand that you have the right to be represented by an attorney at today's hearing?

{¶7} "COREY SPEARS: Yes, sir.

{¶8} "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?

{¶9} "COREY SPEARS: Yes, sir.

{¶10} "THE COURT: Do you wish to go forward with today's hearing without an attorney?

{¶11} "COREY SPEARS: Yes, sir.

{¶12} "THE COURT: Ms. Spears, do you agree with Corey's decision today to go forward without an attorney?

{¶13} "MS. SPEARS: Yes, sir."

{¶14} T. at 2-3.

{¶15} The magistrate then explained the charges against appellant, including the facts and degree of offenses. (Id. at 3-4). After each charge was explained, the trial court asked Appellant if he understood the charge, and Appellant consistently answered in the affirmative.

{¶16} Pursuant to Juv.R. 29(B)(2) and (D), the trial court informed Appellant of the possible consequences of being found delinquent or admitting to the delinquency charge, which Appellant said he understood.

{¶17} The magistrate informed Appellant he had the right to remain silent and a right to go to trial to present evidence in his defense. Appellant stated he understood his right to go to trial and present a defense. The trial court explained to Appellant that he had the right to cross-examine witnesses and that the prosecution had the burden to show he committed the crimes by proof beyond a reasonable doubt. Appellant stated that he understood those rights. Appellant stated that there had been no promises or threats made to coerce him into pleading to the charges. The court informed appellant that by entering an admission to the charges the court would proceed directly to disposition to determine what punishment or conditions should be imposed upon

appellant. Appellant stated that he understood. Appellant stated that he understood what the Department of Youth Services is and that by entering an admission to the charges he could be committed to the custody of the Department of Youth Services "for a minimum period of six months or twelve months and a maximum period not to exceed age twenty-one". (T. at 5). Appellant stated that he understood he could be sentenced to the Department of Youth Services. (Id.)

{¶18} Appellant entered admissions to all charges and was adjudicated delinquent. (T. at 3-5, 7). The court committed appellant to the Department of Youth Services for a minimum of six months on each charge, maximum of his twenty-first birthday, and ordered the commitments to be imposed consecutively. (T. at. 9–10). The court imposed court costs and restitution, and suspended appellant's right to apply for a driver's license until his twenty-first birthday. (T. at 11).

{¶19} Appellant and his mother were both informed of their right to object to the magistrate's decision pursuant to Juv. R. 40. (See, Right to File Written Objections, Acknowledgement of Receipt, Waiver of Objections, filed August 9, 2005). The appellant and his mother acknowledged receipt of the magistrate's decision and both waived their right to file written objections and consented to the decision of the magistrate. (Id.). The trial judge then accepted the magistrate's decision.

{¶20} On September 9, 2005, appellant filed a Notice of Appeal of case numbers A2004-0329 and A2005-0616. Appellant's counsel did not allege at that time that the failure to timely file the Notice of Appeal was because appellant was never served with the final judgment in the trial court. On October 3, 2005, this Court ordered that the appeal be dismissed as untimely filed. On October 7, appellant's counsel filed a motion

to reconsider claiming that appellant was not served with a copy of the judgment entry in compliance with the Civil Rules. Counsel did not attach an affidavit from appellant wherein he swore he never received notice, nor did counsel provide this court with a copy of the court's docket, which indicates appellant was in fact properly served in compliance with the Civil Rules. On October 28, 2005, this Court vacated the order of dismissal and reinstated this appeal.

{¶21} Appellant sets forth the following four assignments of error for our consideration:

{¶22} "I. The trial court violated Corey Spears' Rights to Counsel and to Due Process under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, Article I, Section 16 of the Ohio Constitution, Ohio Revised Code Section 2151.352 and Juvenile Rules 4 and 29. (T. at. 2-13)".

{¶23} "II. Corey Spears' admission to his probation violation was not knowing, voluntary, and intelligent, in violation of the Fifth and Fourteenth Amendments to the United States Constitution, Article I, Sections 10 and 16 of the Ohio Constitution, and Juvenile Rules 29, and 35(B). (T. at 7)".

{¶24} "III. The trial court erred in depriving Corey Spears of his right to apply for driving privileges because the statute does not provide for that sanction as a dispositional option for Corey's offenses. (A-1—2)".

{¶25} "IV. The trial court erred when it failed to hold a hearing to determine whether Corey Spears, a juvenile, was able to pay the sanction imposed by the juvenile court and when it failed to consider community service in lieu of the financial sanctions in violation of R.C. 2152.20. (A-1—2); (July 20, 2005 T.p. 10)".

I. & II.

{¶26} Appellant contends in his first two assignments of error that he had a statutory right to appointed counsel and that he did not validly waive his right to counsel prior to entering his admissions in the trial court. Because these issues are interrelated we shall address them together.

{¶27} Appellant first contends that he has a statutory right to counsel pursuant to R.C. 2151.352. We disagree.

{¶28} The statute provides, in pertinent part:

{¶29} "A child * * * is entitled to representation by legal counsel at all stages of the proceedings under this chapter or Chapter 2152. of the Revised Code and if, as an indigent person, any such person is unable to employ counsel, to have counsel provided for the person pursuant to Chapter 120. of the Revised Code. * * * Counsel must be *provided* for a child not represented by the child's parent, guardian, or custodian. * * * "(Emphasis added).

{¶30} Appellant's counsel blatantly misquotes R.C. 2151.352 to bolster her position that the right to counsel is mandatory. Nowhere does the statue read "Counsel *must be appointed* for a child not represented by his parent, guardian or custodian." (Appellant's Brief at 4). In fact, this court has held "pursuant to R.C. 2151.352, Juv.R. 4(A) and Juv.R. 29(B), appellant was entitled to appointed counsel *provided she did not knowingly waive this right*". *In re Kindred*, 5th Dist. No. 04CA7, 2004-Ohio-3647 at ¶19; *In re Christner*, 5th Dist. No. 2004APO20014, 2004-Ohio-4252 at ¶13-14. [Emphasis added]. See, also *In re Gault*, (1967), 387 U.S. 1, 42, 87 S.Ct. 1428, 1451.("They[the juvenile and his mother] had a right expressly to be advised that they might retain

counsel and to be confronted with the need for specific consideration of whether they did or did not choose to waive the right. If they were unable to afford to employ counsel, they were entitled in view of the seriousness of the charge and the potential commitment, to appointed counsel, *unless they chose waiver*"). (Emphasis added).

{¶31} Appellant next maintains that he did not waive his right to counsel.

{¶32} Recently, the United States Supreme Court has suggested that "[t]he omission of a single Rule 11 warning without more is not colorable structural [error] ..." *United State v. Dominguez-Benitez* (June 14, 2004), --- U.S. ----, 124 S.Ct. 2333, 2339 at n. 6, 159 L.Ed.2d 157. Accordingly, reversal is not automatically required. Id. at 2338. Rather, the standard of review for compliance with Fed. Rules Cr. Proc. Rule 11 in informing a defendant of his rights prior to a plea of guilty is plain error. "[A] defendant who seeks reversal of his conviction after a guilty plea, on the ground that the district court committed plain error under Rule 11 must show a reasonable probability that, but for the error, he would not have entered the plea." *United States v. Dominguez-Benitez, supra,* --- U.S. at ----, 124 S.Ct. at 2340.

{¶33} Fed. Rules Cr. Proc. Rule 11 is analogous to Ohio Crim. R. 11 and Juv. R. 29. *In re: Homan,* 5th Dist. No.2002AP080067, 2003-Ohio-352. The United States Supreme Court further stated that where a defendant does not enter a Rule 11 objection on the record, the defendant has the burden to demonstrate plain error, and an appellate court may look to the entire record when determining whether the appellant's substantial rights have been affected. *United States v. Vonn* (2002), 535 U.S. 55, 122 S.Ct. 1043, 1046, 152 L.Ed.2d 90.

{¶34} In the instant case, appellant failed to object on the record to the trial court's manner of conducting the adjudicatory hearing.

{¶35} At the outset we note that the so-called substantial compliance test is defined as: "under the totality of the circumstances the defendant subjectively understands the implications of his plea and the rights he is waiving." *State v. Nero* (1990), 56 Ohio St.3d 106, 108, 564 N.E.2d 474, 476-477. The substantial-compliance test can be applicable to Crim.R. 11(C) or Juv. R. 29 when the trial court failed to comply strictly with the requirements of the rule, but the defendant is not shown to be prejudiced by the omission. See *State v. Stewart* (1977), 51 Ohio St.2d 86, 92-93, 364 N.E.2d 1163, 1166- 1167; *State v. Nero* (1990), 56 Ohio St.3d 106, 108, 564 N.E.2d 474, 476-477; *In re Bowman* (Jan. 8, 2001), 5th Dist. No.2000CA00037.

{¶36} Under the "plain error" standard the court can look to the totality of the circumstances to determine whether the appellant's substantial rights have been affected. *United States v. Vonn* (2002), 535 U.S. 55, 122 S.Ct. 1043, 1046, 152 L.Ed.2d 90. It is axiomatic that if an appellant has been "prejudiced by the omission" his "substantial rights have been affected." Accordingly, a variance from the requirements of Crim. R. 11 or Juv. R. 29 is harmless error if it does not affect substantial rights. *United States v. Dominguez-Benitez, supra, In re: Smith*, 5th Dist. No. 2004-CA-64, 2005-Ohio-1434.

{¶37} Juv.R. 29(B) requires that, at the beginning of an adjudicatory hearing, the juvenile court:

{¶38} (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 fifteen years of age or over is delinquent by conduct that would constitute a felony if committed by an adult;

{¶39} (3) Inform unrepresented parties of their right to counsel and determine if those parties are waiving their right to counsel;

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

{¶41} (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 offer evidence, to cross-examine witnesses, and, upon request, to have a record of all proceedings made, at public expense if indigent.

{¶42} If a juvenile enters an admission, the juvenile court must further comply with Juv.R. 29(D), which allows the court to refuse to accept an admission and requires the court to determine each of the following:

{¶43} (1) The party is making the admission voluntarily with understanding of the nature of the allegations and the consequences of the admission;

{¶44} (2) The party understands that by entering an admission the party is waiving the right to challenge the witnesses and evidence against the party, to remain silent, and to introduce evidence at the adjudicatory hearing.

{¶45} "*In re Gault*, (1967), 387 U.S. 1, 87 S.Ct. 1428, 18 L.Ed.2d 527, served as a turning point in the juvenile justice system. In *Gault*, the United States Supreme Court granted juveniles facing possible commitment many of the constitutional rights at the adjudicatory stage enjoyed by their adult counterparts, including ratification of the right

to counsel and appointed counsel if indigent. Id. at 41. Under R.C. 2151.352 and Juv.R. 4(A), a juvenile is entitled to representation by counsel at all stages of a delinquency proceeding. In most proceedings, with the permission of the court, a juvenile may waive the right to counsel. Juv.R. 3. However, before permitting a waiver of counsel, the court has a duty to make an inquiry to determine that the relinquishment is of "a fully known right" and is voluntary, knowingly, and intelligently made. *Gault,* 387 U.S. at 42. A voluntary, knowing, and intelligent waiver of the right to counsel must affirmatively appear on the record. *In re: Kuchta* (Mar. 10, 1999), Medina App. No. 2768-M, unreported, at 5, citing *In re: Montgomery* (1997), 117 Ohio App.3d 696, 700, 691 N.E.2d 349, appeal not allowed (1997), 78 Ohio St.3d 1490, 678 N.E.2d 1228". *In re Woolridge*, 9th Dist. No. 20680, 2002-Ohio-828. This Court has held a juvenile may waive his or her right to counsel, but the trial court must make sufficient inquiry to determine whether the juvenile does so knowingly, intelligently, and voluntarily, *Kindred*, supra at ¶20; *Christner*, supra at ¶20, citations deleted. Some of the factors the court must review are the juvenile's age, emotional stability, mental capacity, and prior criminal experience. Id.

{¶46} While the trial court need not strictly adhere to the procedures set forth in Juv.R. 29(D), it must substantially comply with the provisions. *In re J.J.*, 9th Dist. No. 21386, 2004-Ohio-1429, at ¶ 9; *In re Stone* (April 13, 2005), 5th Dist. No. 04CA013 at ¶16.

{¶47} "[T]he applicable standard for the trial court's acceptance of an admission is substantial compliance with the provisions of Juv.R. 29(D)...." *In re Christopher R.* (1995), 101 Ohio App.3d 245, 248, 655 N.E.2d 280 (quoting *In re Meyer* (Jan. 15,

1992), Hamilton App. No. C-910292. Substantial compliance means that under the totality of the circumstances the defendant subjectively understands the implications of his plea. *In re Palmer* (Nov. 21, 1996), Franklin App. No. 96APF03-281 (quoting *State v. Nero* (1990), 56 Ohio St.3d 106, 564 N.E.2d 474). If there is substantial compliance, a court may conclude the plea was voluntary absent a showing of prejudice. *In re West* (1998), 128 Ohio App.3d 356, 714 N.E.2d 988. The test for prejudice is whether the plea would have otherwise been made. *In re Dillard*, Stark App. No.2001CA00121, 2001-Ohio-1897 (citing *State v. Stewart* (1977), 51 Ohio St.2d 86, 364 N.E.2d 1163.

{¶48} Failure of the trial court to substantially comply with the provisions of Juv.R. 29(D) requires reversal, allowing the juvenile to "plead anew." *In re Christopher R.*, supra.

{¶49} In *Iowa v.* Tovar(2004), 541 U.S. 77, 124 S.Ct. 1379, the United States Supreme Court reviewed warnings which the Iowa Supreme Court had held essential to a "knowing and intelligent" waiver of the Sixth Amendment right to counsel. The specific warnings that the state required were as follows:

{¶50} (1) advise the defendant that "waiving the assistance of counsel in deciding whether to plead guilty [entails] the risk that a viable defense will be overlooked"; and (2) "admonis[h]" the defendant "that by waiving his right to an attorney he will lose the opportunity to obtain an independent opinion on whether, under the facts and applicable law, it is wise to plead guilty" *Tovar,* 541 U.S. at 81, 124 S.Ct. 1379. In rejecting the argument that such warnings were required by the Sixth Amendment, the Supreme Court held that a valid waiver of the Sixth Amendment right to counsel did not require the particular language used by the Iowa courts. Instead, the Supreme Court held that

"[t]he constitutional requirement is satisfied when the trial court informs the accused of the nature of the charges against him, of his right to be counseled regarding his plea, and of the range of allowable punishments attendant upon the entry of a guilty plea." *Id.*

{¶51} The Court emphasized that it has never "prescribed any formula or script to be read" when a defendant seeks to proceed pro se. *See id.* at 88, 124 S.Ct. 1379. The central component for a valid waiver is simply that the defendant "'knows what he is doing and his choice is made with his eyes open.' "Id. at 89, 124 S.Ct. 1379 (quoting *Adams v. United States ex rel. McCann,* 317 U.S. 269, 279, 63 S.Ct. 236, 87 L.Ed. 268 (1942)). Such information "will depend on a range of case-specific factors, including the defendant's education or sophistication, the complex or easily grasped nature of the charge, and the stage of the proceeding." *Id.* at 88, 124 S.Ct. 1379 (citing *Johnson v. Zerbst,* 304 U.S. 458, 464, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938)).

{¶52} The Court in *Tovar,* cited *Patterson v. Illinois*(1988), 487 U.S. 285, 108 S.Ct. 2389, as holding that at earlier stages of the criminal process, a less searching or formal colloquy may suffice. *Id.,* at 299, 108 S.Ct. 2389. The Court noted "[w]e require less rigorous warnings pretrial, *Patterson* explained, not because pretrial proceedings are 'less important' than trial, but because, at that stage, 'the full dangers and disadvantages of self-representation ... are less substantial and more obvious to an accused than they are at trial. *Id.,* at 299, 108 S.Ct. 2389 (citation and internal quotation marks omitted)". *Tovar,* supra, 541 U.S. at 90, 124 S.Ct. at 1388. The Court concluded "'[T]he law ordinarily considers a waiver knowing, intelligent, and sufficiently aware if the defendant fully understands the nature of the right and how it would likely apply *in general* in the circumstances–even though the defendant may not know the

specific detailed consequences of invoking it.' *United States v. Ruiz*, 536 U.S. 622, 629, 122 S.Ct. 2450, 153 L.Ed.2d 586 (2002) (emphasis in original). We similarly observed in *Patterson*: 'If [the defendant] ... lacked a full and complete appreciation of all of the consequences flowing from his waiver, it does not defeat the State's showing that the information it provided to him satisfied the constitutional minimum.' 487 U.S., at 294, 108 S.Ct. 2389 (internal quotation marks omitted)." *Tovar*, supra, 541 U.S. at 92, 124 S.Ct. at 1389.

{¶53} In the case at bar, this Court finds that the record shows that both appellant's admission to the complaint and his waiver of counsel were made voluntarily, knowingly, and intelligently. The record illustrates that Juv.R. 29 was not violated and that Appellant's constitutional rights were not violated.

{¶54} The transcripts from the hearings reveal that the trial court followed Juv.R. 29. Under Juv.R. 29(B), the trial court informed Appellant of the complaint filed against him and went through each charge, individually, explaining the charge, the elements involved, and the category of the charge. After each charge was explained, the trial court asked Appellant if he understood the charge, and Appellant consistently answered in the affirmative.

{¶55} Pursuant to Juv.R. 29(B)(2) and (D), the trial court informed Appellant of the possible consequences of being found delinquent or admitting to the delinquency charge, which Appellant said he understood. The trial court also informed Appellant that he had the right to a lawyer and that if he could not afford a lawyer, one would be appointed for him if he qualified under the State guidelines. Appellant stated that he understood his right to counsel, and he did not want a lawyer.

{¶56} The trial court's statement "and you qualify under state guidelines..." was not a misstatement of the law. Ohio Adm. Code 120-1-03 states: "(D) Juvenile court. In determining eligibility of a child for court-appointed counsel in juvenile court, only the child's income shall initially be considered..." In other words the law requires the appointment of counsel if the minor does not independently have the means to hire counsel.

{¶57} The trial court informed Appellant he had the right to remain silent and a right to go to trial to present evidence in his defense. Appellant stated he understood his right to go to trial and present a defense. The trial court explained to Appellant that he had the right to cross-examine witnesses and that the prosecution had the burden to show he committed the crimes by proof beyond a reasonable doubt. Appellant stated that he understood those rights. Appellant stated that there had been no promises or threats made to coerce him into pleading to the charges. The court informed appellant that by entering an admission to the charges the court would proceed directly to disposition to determine what punishment or conditions should be imposed upon appellant. Appellant stated that he understood. Appellant stated that he understood what the Department of Youth Services is and that by entering an admission to the charges he could be committed to the custody of the Department of Youth Services "for a minimum period of six months or twelve months and a maximum period not to exceed age twenty-one". (T. at 5). Appellant stated that he understood he could be sentenced to the Department of Youth Services. (Id.)

{¶58} Appellant was days short of his fourteenth birthday at the time he entered his admissions. Appellant has a previous record in the juvenile court. Appellant's

mother was present in court during the explanation of rights. She concurred in her son's decision to waive his right to counsel. (T. at 3). She and the appellant were both informed of their right to object to the magistrate's decision pursuant to Juv. R. 40. (See, Right to File Written Objections, Acknowledgement of Receipt, Waiver of Objections, filed August 9, 2005). The appellant and his mother acknowledged receipt of the magistrate's decision and both waived their right to file written objections to that decision. (Id.). Appellant and his mother signed a written waiver of rights form prior to the plea. (T. at 2). A copy of this document is contained within the trial court's file. Appellant fails to explain how he was prejudiced by the court's disposition of the violation of prior court order charge. The court terminated appellant unsuccessfully from probation. Appellant's disposition committing him to DYS was based upon his pleas to the two counts of theft. Appellant has not alleged that he would not have plead "but for" the magistrate's disposition concerning costs, restitution and termination of probation. *In re Dillard*, Stark App. No.2001CA00121, 2001-Ohio-1897 (citing *State v. Stewart* (1977), 51 Ohio St.2d 86, 364 N.E.2d 1163).

{¶59} The record illustrates that Appellant's admission was voluntary and that the trial court explained his rights, the charges, and the consequences of being found delinquent. Based on the foregoing, this Court finds that the trial court substantially complied with Juv.R. 29 and did not violate Appellant's constitutional rights. The record reflects that appellant's admission to the charges was given knowingly, intelligently, and voluntarily and that the trial court obtained a valid waiver of Appellant's right to counsel.

{¶60} Accordingly, appellant's First and Second Assignments of Error are overruled.

III.

{¶61} In his Third Assignment of Error appellant maintains that the trial court erred in suspending appellant's right to obtain a driver license. We agree.

{¶62} R.C. 2152.19, additional dispositional orders for delinquent children, provides, in relevant part:

{¶63} "(A) If a child is adjudicated a delinquent child, the court may make any of the following orders of disposition, in addition to any other disposition authorized or required by this chapter:

{¶64} " * * *

{¶65} "(4) Place the child on community control under any sanctions, services, and conditions that the court prescribes. As a condition of community control in every case and in addition to any other condition that it imposes upon the child, the court shall require the child to abide by the law during the period of community control. As referred to in this division, community control includes, but is not limited to, the following sanctions and conditions:

{¶66} " * * *

{¶67} "(l) A suspension of the driver's license, probationary driver's license, or temporary instruction permit issued to the child for a period of time prescribed by the court, or a suspension of the registration of all motor vehicles registered in the name of the child for a period of time prescribed by the court. A child whose license or permit is so suspended is ineligible for issuance of a license or permit during the period of suspension. At the end of the period of suspension, the child shall not be reissued a

license or permit until the child has paid any applicable reinstatement fee and complied with all requirements governing license reinstatement".

{¶68} In the case at bar, appellant was not sentenced to community control sanctions. Accordingly, the trial court could not suspend appellant's right to obtain a driver license under R.C. 2152.19(A) (4) (I).

{¶69} R.C. 2152.19 further provides:

{¶70} "(B) If a child is adjudicated a delinquent child, in addition to any order of disposition made under division (A) of this section, the court, in the following situations and for the specified periods of time, shall suspend the child's temporary instruction permit, restricted license, probationary driver's license, or nonresident operating privilege, or suspend the child's ability to obtain such a permit:

{¶71} "(1) If the child is adjudicated a delinquent child for violating section 2923.122 of the Revised Code[illegal conveyance or possession of deadly weapon or dangerous ordinance or illegal possession of object indistinguishable from firearm in a school safety zone], impose a class four suspension of the child's license, permit, or privilege from the range specified in division (A)(4) of section 4510.02 of the Revised Code or deny the child the issuance of a license or permit in accordance with division (F)(1) of section 2923.122 of the Revised Code.

{¶72} "(2) If the child is adjudicated a delinquent child for committing an act that if committed by an adult would be a drug abuse offense or for violating division (B) of section 2917.11[disorderly conduct when intoxicated] of the Revised Code, suspend the child's license, permit, or privilege for a period of time prescribed by the court. The court, in its discretion, may terminate the suspension if the child attends and

satisfactorily completes a drug abuse or alcohol abuse education, intervention, or treatment program specified by the court. During the time the child is attending a program described in this division, the court shall retain the child's temporary instruction permit, probationary driver's license, or driver's license, and the court shall return the permit or license if it terminates the suspension as described in this division".

{¶73} Appellant was not convicted of any of the offenses enumerated in R.C. 2151.19(B) (2).

{¶74} The language of R.C. 2152.19(B) is specific: "in addition to any order of disposition made under division (A) of this section, the court, in the following situations and for the specified periods of time, shall suspend the child's temporary instruction permit, restricted license, probationary driver's license, or nonresident operating privilege, or suspend the child's ability to obtain such a permit..." This is not, as appellee argues a general "catch-all" provision.

{¶75} The primary purpose of the judiciary in the interpretation or construction of a statue is to give effect to the intention of the legislature, as gathered from the provisions enacted by application of well settled rules of construction or interpretation. *Henry v. Central National Bank* (1968), 16 Ohio St.2d 16, 20. (Quoting *State ex rel. Shaker Heights Public Library v. Main* (1948), 83 Ohio App. 415). It is a cardinal rule that a court must first look to the language itself to determine the legislative intent. *Provident Bank v. Wood* (1973), 36 Ohio St.2d 101, 105. If that inquiry reveals that the statute conveys a meaning which is clear, unequivocal and definite, at that point the interpretive effort is at an end, and the statute must be applied accordingly. Id. at 105-106. In determining legislative intent it is the duty of the court to give effect to the words

used, not to delete words used or to insert words not used. *Columbus-Suburban Coach Lines v. Public Utility Comm.* (1969), 20 Ohio St.2d 125, 127. R.C. 1.42 states: "1.42 Common and technical usage. Words and phrases shall be read in context and construed according to the rules of grammar and common usage. Words and phrases that have acquired a technical or particular meaning, whether by legislative definition or otherwise, shall be construed accordingly."

{¶76} As noted above, the legislature granted the juvenile courts the right to suspend a driver license or ability to obtain a driver license in specific situations and for the specified periods of time. Appellant was not granted community control sanctions nor was he convicted of an enumerated offense. Accordingly, the trial court was without authority to prospectively suspend appellant's ability to obtain a driver license.

{¶77} Appellant's Third Assignment of Error is sustained. This court vacates the trial court's restriction on appellant's future right to obtain a driver license.

IV.

{¶78} In his Fourth Assignment of Error appellant maintains the trial court erred in not considering community service in lieu of financial sanctions.

{¶79} R.C. 2152.20 governs fines and costs in juvenile court. In parts relevant to this appeal the statute provides: "(A) If a child is adjudicated a delinquent child or a juvenile traffic offender, the court may order any of the following dispositions, in addition to any other disposition authorized or required by this chapter:

{¶80} "(2) Require the child to pay costs ...

{¶81} "(3) Unless the child's delinquent act or juvenile traffic offense would be a minor misdemeanor if committed by an adult or could be disposed of by the juvenile

traffic violations bureau serving the court under Traffic Rule 13.1 if the court has established a juvenile traffic violations bureau, require the child to make restitution to the victim of the child's delinquent act or juvenile traffic offense or, if the victim is deceased, to a survivor of the victim in an amount based upon the victim's economic loss caused by or related to the delinquent act or juvenile traffic offense. The court may not require a child to make restitution pursuant to this division if the child's delinquent act or juvenile traffic offense would be a minor misdemeanor if committed by an adult or could be disposed of by the juvenile traffic violations bureau serving the court under Traffic Rule 13.1 if the court has established a juvenile traffic violations bureau. If the court requires restitution under this division, the restitution shall be made directly to the victim in open court or to the probation department that serves the jurisdiction or the clerk of courts on behalf of the victim.

{¶82} "(C) The court may hold a hearing if necessary to determine whether a child is able to pay a sanction under this section.

{¶83} "(D) If a child who is adjudicated a delinquent child is indigent, the court shall consider imposing a term of community service under division (A) of section 2152.19 of the Revised Code in lieu of imposing a financial sanction under this section. If a child who is adjudicated a delinquent child is not indigent, the court may impose a term of community service under that division in lieu of, or in addition to, imposing a financial sanction under this section. The court may order community service for an act that if committed by an adult would be a minor misdemeanor."

{¶84} In *In re: McClanahan*, 5th Dist. No. 2004AP010004, 2004-Ohio-4113 this court held "R.C. 2152.20 does not expressly forbid the trial court from imposing a

financial sanction in a case involving an indigent juvenile. The use of the word "may" in R.C. 2152.20(C) clearly give the trial court discretion to hold a hearing". Id. at ¶18.

{¶85} Accordingly, the trial court is not mandated to hold a hearing before it may impose financial sanctions against an indigent juvenile. Nor does the statute mandate that the court impose community control sanctions upon an indigent juvenile; rather the statutes direct the court to *"consider"* imposing a community control sanction. In contrast to R.C. 2152.20(C), the language of R.C. 2152.20(D) does impose a requirement upon the trial court, obliging it to consider community service in lieu of sanctions when the child being sentenced is indigent. *In re: C.P.*, 9th Dist. No. 04CA008535, 2005-Ohio-1819 at ¶15.

{¶86} As previously indicated, appellant and his mother both signed a written waiver of their right to object to the decision of the magistrate. Appellant does not challenge that waiver in the instant appeal.

{¶87} Under Juv. R. 40(E) (3) (a), a party must file written objections to a magistrate's decision within fourteen days. Furthermore, Juv. R. 40(E) (3) (b) provides that "[a] party shall not assign as error on appeal the court's adoption of any finding of fact or conclusion of law unless the party has objected to that finding or conclusion under this rule."

{¶88} Absent objections to a magistrate's decision, a juvenile waives his or her ability to raise assignments of error related to that decision. "The waiver under Juv. R. 40(E) (3) (b) embodies the long-recognized principle that the failure to draw the trial court's attention to possible error, by objection or otherwise, when the error could have

been corrected, results in a waiver of the issue for purposes of appeal." *In re: Etter* (1998), 134 Ohio App.3d 484, 492, 731 N.E.2d 694.

{¶89} While Juv. R. 40(E)(4)(a) also provides that the trial court must undertake an independent examination of the magistrate's decision, even if no objections are filed, such analysis is limited to errors of law or other defects on the face of the magistrate's decision. *In re: Bradford*, 10th Dist. No. 01AP-1151, 2002-Ohio-4013 at ¶47.

{¶90} Recently the Ohio Supreme Court addressed the issue of assessing court cost against an indigent defendant in a criminal case. In *State v. Threatt*, 108 Ohio St.3d 277, 2006-Ohio-905, the Court held "[c]osts are assessed at sentencing and must be included in the sentencing entry. R.C. 2947.23. Therefore, an indigent defendant must move a trial court to waive payment of costs at the time of sentencing. If the defendant makes such a motion, then the issue is preserved for appeal and will be reviewed under an abuse-of-discretion standard. Otherwise, the issue is waived and costs are res judicata". Id. at ¶23.

{¶91} Ordinarily we would find that appellant waived the issue of imposing community control sanctions in lieu of financial sanctions by failing to either move the court at the time of sentencing or objecting to the magistrate's decision. However, under the facts of this case we are unwilling to conclude that the appellant waived his objection to payment of costs and restitution. Specifically, the magistrate did not inform the appellant that he could be ordered to pay court costs and restitution. While we have found that Juv. R. 29 was not violated and that Appellant's constitutional rights were not violated we cannot say that appellant had an opportunity to move the court to impose community control sanctions in lieu of costs and restitution. Further the record before

us does not reflect that either the magistrate or the judge considered community service in lieu of sanctions as mandated by R.C. 2152.20(D).

{¶92} Accordingly appellant's Third Assignment of Error is sustained insofar as the trial court's orders concerning the payment of court costs and restitution are reversed. The case is remanded to the trial court for compliance with R.C. 2152.20(D). The court may hold a hearing if necessary to determine whether appellant is able to pay a sanction under this section pursuant to R.C. 2152.20(C).

{¶93} For the foregoing reasons, the judgment of the Licking County Court of Common Pleas is affirmed in part and reversed in part and this case is remanded to the trial court for further proceedings consistent with this Opinion.

By Gwin, J.,

Wise, P.J., and

Hoffman, J., concur

JUDGE W. SCOTT GWIN

JUDGE JOHN W. WISE

JUDGE WILLIAM B. HOFFMAN

WSG:clw 0406

IN THE COURT OF APPEALS FOR LICKING COUNTY, OHIO

FILED

FIFTH APPELLATE DISTRICT 2006 APR 17 AM 9:07

CLERK
LICKING COUNTY, OH
GARY P. WALTERS

IN RE: COREY SPEARS,
A MINOR CHILD

FILED
2006 APR 20 AM 11:27
JUDGE ROBERT H. HUBBELL
LICKING CO. JUVENILE CT.
NEWARK, OHIO

JUDGMENT ENTRY

CASE NO. 2005-CA-93

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Licking County Court of Common Pleas is affirmed in part and vacated in part and this case is remanded to the trial court for further proceedings consistent with this Opinion. Costs to be equally divided between appellant and appellee.

JUDGE W. SCOTT GWIN

JUDGE JOHN W. WISE

JUDGE WILLIAM B. HOFFMAN

SCANNED

AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES

AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES

AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim or the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

CONSTITUTION OF THE STATE OF OHIO

ARTICLE I: BILL OF RIGHTS

§ 10 [Trial of accused persons and their rights; depositions by state and comment on failure to testify in criminal cases.]

Except in cases of impeachment, cases arising in the army and navy, or in the militia when in actual service in time of war or public danger, and cases involving offenses for which the penalty provided is less than imprisonment in the penitentiary, no person shall be held to answer for a capital, or otherwise infamous, crime, unless on presentment or indictment of a grand jury; and the number of persons necessary to constitute such grand jury and the number thereof necessary to concur in finding such indictment shall be determined by law. In any trial, in any court, the party accused shall be allowed to appear and defend in person and with counsel; to demand the nature and cause of the accusation against him, and to have a copy thereof; to meet the witnesses face to face, and to have compulsory process to procure the attendance of witnesses in his behalf, and a speedy public trial by an impartial jury of the county in which the offense is alleged to have been committed; but provision may be made by law for the taking of the deposition by the accused or by the state, to be used for or against the accused, of any witness whose attendance can not be had at the trial, always securing to the accused means and the opportunity to be present in person and with counsel at the taking of such deposition, and to examine the witness face to face as fully and in the same manner as if in court. No person shall be compelled, in any criminal case, to be a witness against himself; but his failure to testify may be considered by the court and jury and may be made the subject of comment by counsel. No person shall be twice put in jeopardy for the same offense. (As amended September 3, 1912.)

CONSTITUTION OF THE STATE OF OHIO

ARTICLE I: BILL OF RIGHTS

§ 16 REDRESS FOR INJURY; DUE PROCESS

All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay. Suits may be brought against the state, in such courts and in such manner, as may be provided by law.

HISTORY: 1912 constitutional convention, am. eff. 1-1-13
1851 constitutional convention, adopted eff. 9-1-1851

LEXSTAT ORC 2151.352

* CURRENT THROUGH LEGISLATION PASSED BY THE 126TH OHIO GENERAL ASSEMBLY *
* AND FILED WITH THE SECRETARY OF STATE THROUGH DECEMBER 19, 2006 *
* ANNOTATIONS CURRENT THROUGH OCTOBER 1, 2006 *

TITLE 21. COURTS -- PROBATE -- JUVENILE
CHAPTER 2151. JUVENILE COURT
DISTRICT DETENTION HOMES

GO TO CODE ARCHIVE DIRECTORY FOR THIS JURISDICTION

ORC Ann. 2151.352 (2006)

§ 2151.352. Right to counsel

A child, the child's parents or custodian, or any other person in loco parentis of the child is entitled to representation by legal counsel at all stages of the proceedings under this chapter or Chapter 2152. of the Revised Code. If, as an indigent person, a party is unable to employ counsel, the party is entitled to have counsel provided for the person pursuant to Chapter 120. of the Revised Code except in civil matters in which the juvenile court is exercising jurisdiction pursuant to division (A)(2), (3), (9), (10), (11), (12), or (13); (B)(2), (3), (4), (5), or (6); (C); (D); or (F)(1) or (2) of *section 2151.23 of the Revised Code.* If a party appears without counsel, the court shall ascertain whether the party knows of the party's right to counsel and of the party's right to be provided with counsel if the party is an indigent person. The court may continue the case to enable a party to obtain counsel, to be represented by the county public defender or the joint county public defender, or to be appointed counsel upon request pursuant to Chapter 120. of the Revised Code. Counsel must be provided for a child not represented by the child's parent, guardian, or custodian. If the interests of two or more such parties conflict, separate counsel shall be provided for each of them.

Section 2935.14 of the Revised Code applies to any child taken into custody. The parents, custodian, or guardian of a child taken into custody, and any attorney at law representing them or the child, shall be entitled to visit the child at any reasonable time, be present at any hearing involving the child, and be given reasonable notice of the hearing.

Any report or part of a report concerning the child, which is used in the hearing and is pertinent to the hearing, shall for good cause shown be made available to any attorney at law representing the child and to any attorney at law representing the parents, custodian, or guardian of the child, upon written request prior to any hearing involving the child.

HISTORY:

133 v H 320 (Eff 11-19-69); 136 v H 164 (Eff 1-13-76); 148 v S 179, § 3. Eff 1-1-2002; 150 v H 95, § 1, eff. 9-26-03; 151 v H 66, § 101.01, eff. 9-29-05.

LEXSTAT ORC ANN. 2152.20

* CURRENT THROUGH LEGISLATION PASSED BY THE 126TH OHIO GENERAL ASSEMBLY *
* AND FILED WITH THE SECRETARY OF STATE THROUGH DECEMBER 19, 2006 *
* ANNOTATIONS CURRENT THROUGH OCTOBER 1, 2006 *

TITLE 21. COURTS -- PROBATE -- JUVENILE
CHAPTER 2152. DELINQUENT CHILDREN; JUVENILE TRAFFIC OFFENDERS

GO TO CODE ARCHIVE DIRECTORY FOR THIS JURISDICTION

ORC Ann. 2152.20 (2006)

§ 2152.20. Fines; costs; restitution; order of criminal forfeiture; community service

(A) If a child is adjudicated a delinquent child or a juvenile traffic offender, the court may order any of the following dispositions, in addition to any other disposition authorized or required by this chapter:

(1) Impose a fine in accordance with the following schedule:

(a) For an act that would be a minor misdemeanor or an unclassified misdemeanor if committed by an adult, a fine not to exceed fifty dollars;

(b) For an act that would be a misdemeanor of the fourth degree if committed by an adult, a fine not to exceed one hundred dollars;

(c) For an act that would be a misdemeanor of the third degree if committed by an adult, a fine not to exceed one hundred fifty dollars;

(d) For an act that would be a misdemeanor of the second degree if committed by an adult, a fine not to exceed two hundred dollars;

(e) For an act that would be a misdemeanor of the first degree if committed by an adult, a fine not to exceed two hundred fifty dollars;

(f) For an act that would be a felony of the fifth degree or an unclassified felony if committed by an adult, a fine not to exceed three hundred dollars;

(g) For an act that would be a felony of the fourth degree if committed by an adult, a fine not to exceed four hundred dollars;

(h) For an act that would be a felony of the third degree if committed by an adult, a fine not to exceed seven hundred fifty dollars;

(i) For an act that would be a felony of the second degree if committed by an adult, a fine not to exceed one thousand dollars;

(j) For an act that would be a felony of the first degree if committed by an adult, a fine not to exceed one thousand five hundred dollars;

(k) For an act that would be aggravated murder or murder if committed by an adult, a fine not to exceed two thousand dollars.

(2) Require the child to pay costs;

(3) Unless the child's delinquent act or juvenile traffic offense would be a minor misdemeanor if committed by an adult or could be disposed of by the juvenile traffic violations bureau serving the court under *Traffic Rule 13.1* if the court has established a juvenile traffic violations bureau, require the child to make restitution to the victim of the child's delinquent act or juvenile traffic offense or, if the victim is deceased, to a survivor of the victim in an amount based upon the victim's economic loss caused by or related to the delinquent act or juvenile traffic offense. The court may not require a child to make restitution pursuant to this division if the child's delinquent act or juvenile traffic offense would be a minor misdemeanor if committed by an adult or could be disposed of by the juvenile traffic violations bureau serving the court under *Traffic Rule 13.1* if the court has established a juvenile traffic violations bureau. If the court requires restitution under this division, the restitution shall be made directly to the victim in open court or to the probation department that serves the jurisdiction or the clerk of courts on behalf of the victim.

If the court requires restitution under this division, the restitution may be in the form of a cash reimbursement paid in a lump sum or in installments, the performance of repair work to restore any damaged property to its original condition, the performance of a reasonable amount of labor for the victim or survivor of the victim, the performance of community service work, any other form of restitution devised by the court, or any combination of the previously described forms of restitution.

If the court requires restitution under this division, the court may base the restitution order on an amount recommended by the victim or survivor of the victim, the delinquent child, the juvenile traffic offender, a presentence investigation report, estimates or receipts indicating the cost of repairing or replacing property, and any other information, provided that the amount the court orders as restitution shall not exceed the amount of the economic loss suffered by the victim as a direct and proximate result of the delinquent act or juvenile traffic offense. If the court decides to order restitution under this division and the amount of the restitution is disputed by the victim or survivor or by the delinquent child or juvenile traffic offender, the court shall hold a hearing on the restitution. If the court requires restitution under this division, the court shall determine, or order the determination of, the amount of restitution to be paid by the delinquent child or juvenile traffic offender. All restitution payments shall be credited against any recovery of economic loss in a civil action brought by or on behalf of the victim against the delinquent child or juvenile traffic offender or the delinquent child's or juvenile traffic offender's parent, guardian, or other custodian.

If the court requires restitution under this division, the court may order that the delinquent child or juvenile traffic offender pay a surcharge, in an amount not exceeding five per cent of the amount of restitution otherwise ordered under this division, to the entity responsible for collecting and processing the restitution payments.

The victim or the survivor of the victim may request that the prosecuting authority file a motion, or the delinquent child or juvenile traffic offender may file a motion, for modification of the payment terms of any restitution ordered under this division. If the court grants the motion, it may modify the payment terms as it determines appropriate.

(4) Require the child to reimburse any or all of the costs incurred for services or sanctions provided or imposed, including, but not limited to, the following:

(a) All or part of the costs of implementing any community control imposed as a disposition under *section 2152.19 of the Revised Code*, including a supervision fee;

(b) All or part of the costs of confinement in a residential facility described in *section 2152.19 of the Revised Code* or in a department of youth services institution, including, but not limited to, a per diem fee for room and board, the costs of medical and dental treatment provided, and the costs of repairing property the delinquent child damaged while so confined. The amount of reimbursement ordered for a child under this division shall not exceed the total amount of reimbursement the child is able to pay as determined at a hearing and shall not exceed the actual cost of the confinement. The court may collect any reimbursement ordered under this division. If the court does not order reimbursement under this division, confinement costs may be assessed pursuant to a repayment policy adopted under *section 2929.37 of the Revised Code* and division (D) of section 307.93, division (A) of section 341.19, division (C) of section 341.23 or 753.16, division (C) of section 2301.56, or division (B) of *section 341.14, 753.02, 753.04*, or *2947.19 of the Revised Code*.

(B) (1) If a child is adjudicated a delinquent child for violating *section 2923.32 of the Revised Code*, the court shall enter an order of criminal forfeiture against the child in accordance with divisions (B)(3), (4), (5), and (6) and (C) to (F) of *section 2923.32 of the Revised Code*.

(2) *Sections 2925.41* to *2925.45 of the Revised Code* apply to children who are adjudicated or could be adjudicated by a juvenile court to be delinquent children for an act that, if committed by an adult, would be a felony drug abuse offense. Subject to division (B) of section 2925.42 and division (E) of *section 2925.43 of the Revised Code*, a delinquent child of that nature loses any right to the possession of, and forfeits to the state any right, title, and interest that the delinquent child may have in, property as defined in *section 2925.41 of the Revised Code* and further described in *section 2925.42* or *2925.43 of the Revised Code*.

(3) *Sections 2923.44* to *2923.47 of the Revised Code* apply to children who are adjudicated or could be adjudicated by a juvenile court to be delinquent children for an act in violation of *section 2923.42 of the Revised Code*. Subject to division (B) of section 2923.44 and division (E) of *section 2923.45 of the Revised Code*, a delinquent child of that nature loses any right to the possession of, and forfeits to the state any right, title, and interest that the delinquent child may have in, property as defined in *section 2923.41 of the Revised Code* and further described in *section 2923.44* or *2923.45 of the Revised Code*.

(C) The court may hold a hearing if necessary to determine whether a child is able to pay a sanction under this section.

(D) If a child who is adjudicated a delinquent child is indigent, the court shall consider imposing a term of community service under division (A) of *section 2152.19 of the Revised Code* in lieu of imposing a financial sanction under this section. If a child who is adjudicated a delinquent child is not indigent, the court may impose a term of community service under that division in lieu of, or in addition to, imposing a financial sanction under this section. The court may order community service for an act that if committed by an adult would be a minor misdemeanor.

If a child fails to pay a financial sanction imposed under this section, the court may impose a term of community service in lieu of the sanction.

(E) The clerk of the court, or another person authorized by law or by the court to collect a financial sanction imposed under this section, may do any of the following:

(1) Enter into contracts with one or more public agencies or private vendors for the collection of the amounts due under the financial sanction, which amounts may include interest from the date of imposition of the financial sanction;

(2) Permit payment of all, or any portion of, the financial sanction in installments, by credit or debit card, by another type of electronic transfer, or by any other reasonable method, within any period of time, and on any terms that the court considers just, except that the maximum time permitted for payment shall not exceed five years. The clerk may pay any fee associated with processing an electronic transfer out of public money and may charge the fee to the delinquent child.

(3) To defray administrative costs, charge a reasonable fee to a child who elects a payment plan rather than a lump sum payment of a financial sanction.

HISTORY:

148 v S 179, § 3 (Eff 1-1-2002); 149 v H 170. Eff 9-6-2002; 149 v H 490, § 1, eff. 1-1-04; 150 v H 52, § 1, eff. 6-1-04; 151 v H 162, § 1, eff. 10-12-06.

LEXSTAT GA CODE ANN 15-11-6

OFFICIAL CODE OF GEORGIA ANNOTATED

*** Current Through the 2006 Regular Session ***
*** Annotations Current Through October 13, 2006 ***

TITLE 15. COURTS
CHAPTER 11. JUVENILE PROCEEDINGS
ARTICLE 1. JUVENILE PROCEEDINGS
PART 1. GENERAL PROVISIONS

GO TO CODE ARCHIVE DIRECTORY FOR THIS JURISDICTION

O.C.G.A. § 15-11-6 (2006)

§ 15-11-6. Right to counsel

(a) *"Indigent person" defined.* An indigent person is one who at the time of requesting counsel is unable without undue financial hardship to provide for full payment of legal counsel and all other necessary expenses for representation.

(b) *Right to legal representation.* Except as otherwise provided under this article, a party is entitled to representation by legal counsel at all stages of any proceedings alleging delinquency, unruliness, incorrigibility, or deprivation and if, as an indigent person, a party is unable to employ counsel, he or she is entitled to have the court provide counsel for him or her. If a party appears without counsel, the court shall ascertain whether such party knows of his or her right to counsel and to be provided with counsel by the court if he or she is an indigent person. The court may continue the proceeding to enable a party to obtain counsel and shall provide counsel for an unrepresented indigent person upon the request of such a person. Counsel must be provided for a child not represented by the child's parent, guardian, or custodian. If the interests of two or more parties conflict, separate counsel shall be provided for each of them.

HISTORY: Ga. L. 1968, p. 1013, § 11; Code 1933, § 24A-2001, enacted by Ga. L. 1971, p. 709, § 1; Code 1981, § 15-11-30; Ga. L. 1986, p. 1017, § 1; Ga. L. 1990, p. 1930, § 2; Code 1981, § 15-11-6, as redesignated by Ga. L. 2000, p. 20, § 1.

LEXSTAT ND CENT CODE 27-20-26

NORTH DAKOTA CENTURY CODE

*** THIS DOCUMENT IS CURRENT THROUGH THE 2005 SESSION ***
*** ANNOTATIONS CURRENT THROUGH MARCH 2, 2006 ***

TITLE 27 Judicial Branch of Government
CHAPTER 27-20 Uniform Juvenile Court Act

GO TO CODE ARCHIVE DIRECTORY FOR THIS JURISDICTION

N.D. Cent. Code, § 27-20-26 (2006)

27-20-26. Right to counsel.

1. Except as otherwise provided under this chapter, a party is entitled to representation by legal counsel at custodial, post-petition, and informal adjustment stages of proceedings under this chapter and, if as a needy person the party is unable to employ counsel, to have the court provide counsel for the party. If a party appears without counsel the court shall ascertain whether the party knows of the party's right to counsel and to be provided with counsel by the court if the party is a needy person. The court may continue the proceeding to enable a party to obtain counsel and shall provide counsel for an unrepresented needy person upon the person's request. Counsel must be provided for a child not represented by the child's parent, guardian, or custodian at custodial, post-petition, and informal adjustment stages of proceedings under this chapter. If the interests of two or more parties conflict, separate counsel must be provided for each of them.

2. A needy person is one who at the time of requesting counsel is unable, without undue financial hardship, to provide for full payment of legal counsel and all other necessary expenses for representation. A child is not to be considered needy under this section if the child's parents or parent can, without undue financial hardship, provide full payment for legal counsel and other expenses of representation. Any parent entitled to the custody of a child involved in a proceeding under this chapter is, unless undue financial hardship would ensue, responsible for providing legal counsel and for paying other necessary expenses of representation for the parent's child. The court may enforce performance of this duty by appropriate order. As used in this subsection, the word "parent" includes adoptive parents.

HISTORY: S.L. 1969, ch. 289, § 1; 1973, ch. 249, § 1; 1995, ch. 124, § 13.

LEXSTAT OAC 120-1-03

OHIO ADMINISTRATIVE CODE

*** THIS DOCUMENT IS CURRENT THROUGH OCTOBER 23, 2006 ***

120 PUBLIC DEFENDER COMMISSION
Chapter 120-1 General Provisions

OAC Ann. 120-1-03 (Anderson 2006)

120-1-03 Standards of indigency.

Ohio public defender commission's rules are promulgated pursuant to divisions (B)(1), (B)(6), (B)(7), and (B)(8) of *section 120.03 of the Revised Code.* Further considerations include *State vs. Tymcio (1975), 42 Ohio St.2d. 39* and the Ohio supreme court rules of superintendence.

(A) General statement of policy. When required by rule or law to appoint counsel for indigent persons, the criteria for determining indigency shall include: ownership and ready availability of real or personal property; all household income, inheritance, expectancies, and other assets; number and age of dependents; outstanding debts, obligations and liabilities; and any other relevant considerations. The pivotal issue in determining indigency is not whether the applicant ought to be able to employ counsel but whether the applicant is, in fact, able to do so. Possible sources of income, assets, and liabilities are listed on the financial disclosure form attached hereto in appendix A.

(B) Income standards.

(1) Presumptive eligibility. Without other substantial assets, individuals whose income is not greater than 125 per cent of the current poverty threshold established by the United States office of management and budget may be presumed to require the appointment of counsel. An individual whose income is between 125 percent and 187.5 per cent of the federal poverty guidelines may still be presumed to require the appointment of counsel if any of the following apply:

(a) Applicant's household income, minus allowable expenses, yields no more than 125 per cent of the federal poverty income guidelines.

(b) Allowable expenses are the cost of medical care, childcare, transportation, and other costs required for work, or the cost associated with the infirmity of a resident family member incurred during the preceding twelve months and child support actually paid from household income.

(c) The applicant has liabilities and or expenses, including unpaid taxes, the total of which exceeds the applicant's income.

(2) Presumptive ineligibility. Applicants having liquid assets that exceed one thousand dollars for misdemeanor cases and five thousand dollars in felony cases shall be presumed to be not indigent. For purposes of this rule, "liquid assets" are defined as those resources that are in cash or payable upon demand. The most common types of liquid assets are cash on hand, savings accounts, checking accounts, trusts, stocks, and mortgages. Applicants with an income over 187.5 per cent of the federal poverty level shall be deemed not indigent.

(3) The poverty income thresholds (125 per cent-187.5 per cent) are updated annually by the United States office of management and budget and may be found in the federal register. These income thresholds are based on gross income. They will be available, on request, from the Ohio public defender commission.

(4) Applicants being detained in a state institution shall have only their own income and assets considered, as they have no "household" for purposes of this rule.

(C) Other factors.

(1) Seriousness of charge weighed against possession of liquid assets. In determining whether a defendant is indigent, the seriousness of the charge shall be taken into consideration. A defendant may be found not indigent if the indi-

vidual possesses liquid assets in excess of the assigned/appointed counsel fees paid for a case of equal seriousness in the county in which the charges are brought. In lieu of using the assigned/appointed counsel fee, other methods of determining fees for competent counsel may be used, including a survey of attorneys representing defendants in criminal cases.

(2) The equity value in the applicant's principal residence and other valuable assets may be included in the consideration.

(3) Release on bail shall not prevent a person from being determined indigent.

(4) Counsel shall not be denied solely because an applicant's friends or relatives have resources adequate to retain counsel.

(D) Juvenile court. 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.

(E) Redetermination. A preliminary determination of ineligibility for legal representation shall not foreclose a redetermination of eligibility when, at a subsequent stage of a proceeding, new information or changes in circumstances concerning the financial inability to retain competent counsel becomes available.

(F) Waiver. The person or agency determining indigency in individual cases has the authority to waive these guidelines in unusual or meritorious situations. In such situations, the waiver decision shall be documented and included in the client's file. However, despite the income and assets of the individual requesting court-appointed counsel, the person or agency making the determination of indigency must consider *State vs. Tymcio (1975) 42 Ohio St. 2d. 39,* which states "to make the right of court-appointed counsel a factual reality, the determination of need must turn, not upon whether an accused ought to be able to employ counsel, but whether he is, in fact, able to do so." *Id. at 45.*

(G) Confidentiality. Rules, regulations, and procedures concerning the determination of initial eligibility and/or continued eligibility shall not require assigned/appointed counsel and/or public defenders to make any disclosures concerning the client's financial status beyond disclosures mandated by the binding ethical rules of the jurisdiction, the court's determination of indigency, and *section 120.38 of the Revised Code.*

(H) Other prohibitions. The procedure whereby it is determined whether or not a person is entitled to have publicly provided counsel shall not deter a person from exercising any constitutional, statutory, or procedural right. Specifically, such rights shall not be deprived by any means, including, but not limited to the following:

(1) By such stringency of application of financial eligibility standard as may cause a person to waive representation of counsel rather than incur the expense of retained counsel;

(2) By unnecessarily conditioning the exercise of the right to counsel on the waiver of some other constitutional, statutory, or procedural right.

(I) Requests for specific appointed counsel. When a defendant makes a request for a specific appointed counsel pursuant to *section 120.33(A) of the Revised Code,* such request shall be acted upon promptly.

(J) Those counties that appoint counsel for persons with incomes between 125 per cent and 187.5 per cent of the current poverty threshold, shall establish a reimbursement, recoupment, contribution, or partial payment program that includes a fee for the cost of income verification.

(K) Financial disclosure form. A form requesting information from the applicant shall be completed for each client prior to appointment of counsel or as soon thereafter as practicable. Each county shall use the application for court-appointed representation form as set forth in appendix A of this rule.

(1) The financial disclosure/affidavit of indigency form set forth in appendix A shall be used unless the county submits their own form to the Ohio public defender commission for review and approval. The form must include the information listed in paragraph (D) of this rule. The form must also contain an affidavit of indigency and the judge certification as set forth in appendix A. Counties that are already using their own form may continue to use this form during the review process. The commission shall, in turn, notify such jurisdiction of the approval or disapproval of the financial disclosure form within ninety days of submission.

(L) Review and approval. Any programs established pursuant to paragraph (J) of this rule shall be sent to the Ohio public defender commission for review and approval before the program becomes effective. In counties that already have such a program, the program may continue during the review process. The commission shall, in turn, notify such jurisdiction of the approval or disapproval of local programs within ninety days of submission.

(M) Partial reimbursement. The ability to contribute a portion of the cost of adequate legal representation shall not preclude eligibility for assigned/appointed counsel. All programs developed to seek reimbursement for the cost of assigned/appointed counsel from the defendant shall be subject to guidelines established for such programs in other commission rules. Programs established for those who fall above income/asset levels shall be approved by the Ohio public defender commission.

(N) Verification procedures. All counties shall have an income verification process. This process shall be used to verify the financial information provided by the applicant on the financial disclosure form. Income verification need not be done on every case, but may be done randomly based on complaints, or by any other method that is practical.

History

Eff 1-9-78; 9-27-91; 1-1-96; 1-1-2000

Rule promulgated under: *RC 111.15*

Rule authorized by: *RC 120.03(B)*

Rule amplifies: *RC 120.03(B)(1)*

RC 119.032 review dates: 8/27/99, 8/27/04

Research Aids

Research Aids

Determination of indigence

O-Jur3d: Civil Serv § 416; Crim L § 310

Case Notes and OAG

CASE NOTES AND OAG

1. (2000) The court's inquiry was insufficient to determine whether or not the defendant was able to employ counsel: *Brook Park v. Kirsch, 138 OApp3d 741, 742 NE2d 224.*

LEXSTAT OHIO CRIM R 5

*** RULES CURRENT THROUGH UPDATES RECEIVED NOVEMBER 28, 2006 ***
*** ANNOTATIONS CURRENT THROUGH OCTOBER 1, 2006 ***

OHIO RULES OF CRIMINAL PROCEDURE

Ohio Crim. R. 5 (2006)

Rule 5. INITIAL APPEARANCE, PRELIMINARY HEARING

(A) *Procedure upon initial appearance.* --When a defendant first appears before a judge or magistrate, the judge or magistrate shall permit the accused or his counsel to read the complaint or a copy thereof, and shall inform the defendant:

(1) Of the nature of the charge against him;

(2) That he has a right to counsel and the right to a reasonable continuance in the proceedings to secure counsel, and, pursuant to *Crim. R. 44*, the right to have counsel assigned without cost to himself if he is unable to employ counsel;

(3) That he need make no statement and any statement made may be used against him;

(4) Of his right to a preliminary hearing in a felony case, when his initial appearance is not pursuant to indictment;

(5) Of his right, where appropriate, to jury trial and the necessity to make demand therefore in petty offense cases.

In addition, if the defendant has not been admitted to bail for a bailable offense, the judge or magistrate shall admit the defendant to bail as provided in these rules.

In felony cases the defendant shall not be called upon to plead either at the initial appearance or at a preliminary hearing.

In misdemeanor cases the defendant may be called upon to plead at the initial appearance. Where the defendant enters a plea the procedure established by *Crim. R. 10* and *Crim. R. 11* applies.

(B) *Preliminary hearing in felony cases; procedure.*

(1) In felony cases a defendant is entitled to a preliminary hearing unless waived in writing. If the defendant waives preliminary hearing, the judge or magistrate shall forthwith order the defendant bound over to the court of common pleas. If the defendant does not waive the preliminary hearing, the judge or magistrate shall schedule a preliminary hearing within a reasonable time, but in any event not later than ten consecutive days following arrest or service of summons if the defendant is in custody and not later than fifteen consecutive days following arrest or service of summons if he is not in custody. The preliminary hearing shall not be held, however, if the defendant is indicted. With the consent of the defendant and upon a showing of good cause, taking into account the public interest in the prompt disposition of criminal cases, time limits specified in this division may be extended. In the absence of such consent by the defendant, time limits may be extended only as required by law, or upon a showing that extraordinary circumstances exist and that delay is indispensable to the interests of justice.

(2) At the preliminary hearing the prosecuting attorney may state orally the case for the state, and shall then proceed to examine witnesses and introduce exhibits for the state. The defendant and the judge or magistrate have full right

of cross-examination, and the defendant has the right of inspection of exhibits prior to their introduction. The hearing shall be conducted under the rules of evidence prevailing in criminal trial generally.

(3) At the conclusion of the presentation of the state's case, defendant may move for discharge for failure of proof, and may offer evidence on his own behalf. If the defendant is not represented by counsel, the court shall advise him, prior to the offering of evidence on behalf of the defendant:

(a) That any such evidence, if unfavorable to him in any particular, may be used against him at later trial.

(b) That he may make a statement, not under oath, regarding the charge, for the purpose of explaining the facts in evidence.

(c) That he may refuse to make any statement, and such refusal may not be used against him at trial.

(d) That any statement he makes may be used against him at trial.

(4) Upon conclusion of all the evidence and the statement, if any, of the accused, the court shall do one of the following:

(a) Find that there is probable cause to believe the crime alleged or another felony has been committed and that the defendant committed it, and bind the defendant over to the court of common pleas of the county or any other county in which venue appears.

(b) Find that there is probable cause to believe that a misdemeanor was committed and that the defendant committed it, and retain the case for trial or order the defendant to appear for trial before an appropriate court.

(c) Order the accused discharged.

(5) Any finding requiring the accused to stand trial on any charge shall be based solely on the presence of substantial credible evidence thereof. No appeal shall lie from such decision and the discharge of defendant shall not be a bar to further prosecution.

(6) In any case in which the defendant is ordered to appear for trial for any offense other than the one charged the court shall cause a complaint charging such offense to be filed.

(7) Upon the conclusion of the hearing and finding, the court or the clerk of such court, shall, within seven days, complete all notations of appearance, motions, pleas, and findings on the criminal docket of the court, and shall transmit a transcript of the appearance docket entries, together with a copy of the original complaint and affidavits, if any, filed with the complaint, the journal or docket entry of reason for changes in the charge, if any, together with the order setting bail and the bail including any bail deposit, if any, filed, to the clerk of the court in which defendant is to appear. Such transcript shall contain an itemized account of the costs accrued.

HISTORY: Amended, eff 7-1-75; 7-1-76; 7-1-82; 7-1-90

LEXSTAT OHIO CRIM. R. 10

OHIO RULES OF COURT SERVICE

*** RULES CURRENT THROUGH UPDATES RECEIVED NOVEMBER 28, 2006 ***
*** ANNOTATIONS CURRENT THROUGH OCTOBER 1, 2006 ***

OHIO RULES OF CRIMINAL PROCEDURE

Ohio Crim. R. 10 (2006)

Rule 10. ARRAIGNMENT

(A) *Arraignment procedure.* --Arraignment shall be conducted in open court, and shall consist of reading the indictment, information or complaint to the defendant, or stating to him the substance of the charge, and calling on him to plead thereto. The defendant may in open court waive the reading of the indictment, information, or complaint. The defendant shall be given a copy of the indictment, information, or complaint, or shall acknowledge receipt thereof, before being called upon to plead.

(B) *Presence of defendant.* --The defendant must be present, except that the court, with the written consent of the defendant and the approval of the prosecuting attorney, may permit arraignment without the presence of the defendant, if a plea of not guilty is entered.

(C) *Explanation of rights.* --When a defendant not represented by counsel is brought before a court and called upon to plead, the judge or magistrate shall cause him to be informed and shall determine that he understands all of the following:

(1) He has a right to retain counsel even if he intends to plead guilty, and has a right to a reasonable continuance in the proceedings to secure counsel.

(2) He has a right to counsel, and the right to a reasonable continuance in the proceeding to secure counsel, and, pursuant to *Crim. R. 44*, the right to have counsel assigned without cost to himself if he is unable to employ counsel.

(3) He has a right to bail, if the offense is bailable.

(4) He need make no statement at any point in the proceeding, but any statement made can and may be used against him.

(D) *Joint arraignment.* --If there are multiple defendants to be arraigned, the judge or magistrate may by general announcement advise them of their rights as prescribed in this rule.

HISTORY: Amended, eff 7-1-90

LEXSTAT OHIO CRIM. R. 11

*** RULES CURRENT THROUGH UPDATES RECEIVED NOVEMBER 28, 2006 ***
*** ANNOTATIONS CURRENT THROUGH OCTOBER 1, 2006 ***

OHIO RULES OF CRIMINAL PROCEDURE

Ohio Crim. R. 11 (2006)

Rule 11. PLEAS, RIGHTS UPON PLEA

(A) *Pleas.* --A defendant may plead not guilty, not guilty by reason of insanity, guilty or, with the consent of the court, no contest. A plea of not guilty by reason of insanity shall be made in writing by either the defendant or the defendant's attorney. All other pleas may be made orally. The pleas of not guilty and not guilty by reason of insanity may be joined. If a defendant refuses to plead, the court shall enter a plea of not guilty on behalf of the defendant.

(B) *Effect of guilty or no contest pleas.* --With reference to the offense or offenses to which the plea is entered:

(1) The plea of guilty is a complete admission of the defendant's guilt.

(2) The plea of no contest is not an admission of defendant's guilt, but is an admission of the truth of the facts alleged in the indictment, information, or complaint, and the plea or admission shall not be used against the defendant in any subsequent civil or criminal proceeding.

(3) When a plea of guilty or no contest is accepted pursuant to this rule, the court, except as provided in divisions (C)(3) and (4) of this rule, shall proceed with sentencing under *Crim. R. 32*.

(C) *Pleas of guilty and no contest in felony cases.*

(1) Where in a felony case the defendant is unrepresented by counsel the court shall not accept a plea of guilty or no contest unless the defendant, after being readvised that he or she has the right to be represented by retained counsel, or pursuant to *Crim. R. 44* by appointed counsel, waives this right.

(2) In felony cases the court may refuse to accept a plea of guilty or a plea of no contest, and shall not accept a plea of guilty or no contest without first addressing the defendant personally and doing all of the following:

(a) Determining that the defendant is making the plea voluntarily, with understanding of the nature of the charges and of the maximum penalty involved, and, if applicable, that the defendant is not eligible for probation or for the imposition of community control sanctions at the sentencing hearing.

(b) Informing the defendant of and determining that the defendant understands the effect of the plea of guilty or no contest, and that the court, upon acceptance of the plea, may proceed with judgment and sentence.

(c) Informing the defendant and determining that the defendant understands that by the plea the defendant is waiving the rights to jury trial, to confront witnesses against him or her, to have compulsory process for obtaining witnesses in the defendant's favor, and to require the state to prove the defendant's guilt beyond a reasonable doubt at a trial at which the defendant cannot be compelled to testify against himself or herself.

(3) With respect to aggravated murder committed on and after January 1, 1974, the defendant shall plead separately to the charge and to each specification, if any. A plea of guilty or no contest to the charge waives the defendant's right to a jury trial, and before accepting a plea of guilty or no contest the court shall so advise the defendant and determine that the defendant understands the consequences of the plea.

If the indictment contains no specification, and a plea of guilty or no contest to the charge is accepted, the court shall impose the sentence provided by law.

If the indictment contains one or more specifications, and a plea of guilty or no contest to the charge is accepted, the court may dismiss the specifications and impose sentence accordingly, in the interests of justice.

If the indictment contains one or more specifications that are not dismissed upon acceptance of a plea of guilty or no contest to the charge, or if pleas of guilty or no contest to both the charge and one or more specifications are accepted, a court composed of three judges shall: (a) determine whether the offense was aggravated murder or a lesser offense; and (b) if the offense is determined to have been a lesser offense, impose sentence accordingly; or (c) if the offense is determined to have been aggravated murder, proceed as provided by law to determine the presence or absence of the specified aggravating circumstances and of mitigating circumstances, and impose sentence accordingly.

(4) With respect to all other cases the court need not take testimony upon a plea of guilty or no contest.

(D) *Misdemeanor cases involving serious offenses.* --In misdemeanor cases involving serious offenses the court may refuse to accept a plea of guilty or no contest, and shall not accept such plea without first addressing the defendant personally and informing the defendant of the effect of the pleas of guilty, no contest, and not guilty and determining that the defendant is making the plea voluntarily. Where the defendant is unrepresented by counsel the court shall not accept a plea of guilty or no contest unless the defendant, after being readvised that he or she has the right to be represented by retained counsel, or pursuant to *Crim. R. 44* by appointed counsel, waives this right.

(E) *Misdemeanor cases involving petty offenses.* --In misdemeanor cases involving petty offenses the court may refuse to accept a plea of guilty or no contest, and shall not accept such plea without first informing the defendant of the effect of the pleas of guilty, no contest, and not guilty.

The counsel provisions of *Crim. R. 44(B)* and (C) apply to division (E) of this rule.

(F) *Negotiated plea in felony cases.* --When, in felony cases, a negotiated plea of guilty or no contest to one or more offenses charged or to one or more other or lesser offenses is offered, the underlying agreement upon which the plea is based shall be stated on the record in open court.

(G) *Refusal of court to accept plea.* --If the court refuses to accept a plea of guilty or no contest, the court shall enter a plea of not guilty on behalf of the defendant. In such cases neither plea shall be admissible in evidence nor be the subject of comment by the prosecuting attorney or court.

(H) *Defense of insanity.* --The defense of not guilty by reason of insanity must be pleaded at the time of arraignment, except that the court for good cause shown shall permit such a plea to be entered at any time before trial.

HISTORY: Amended, eff 7-1-76; 7-1-80; 7-1-98

LEXSTAT OHIO CRIM. R. 15

*** RULES CURRENT THROUGH UPDATES RECEIVED NOVEMBER 28, 2006 ***
*** ANNOTATIONS CURRENT THROUGH OCTOBER 1, 2006 ***

OHIO RULES OF CRIMINAL PROCEDURE

Ohio Crim. R. 15 (2006)

Rule 15. DEPOSITION

(A) *When taken.* --If it appears probable that a prospective witness will be unable to attend or will be prevented from attending a trial or hearing, and if it further appears that his testimony is material and that it is necessary to take his deposition in order to prevent a failure of justice, the court at any time after the filing of an indictment, information, or complaint shall upon motion of the defense attorney or the prosecuting attorney and notice to all the parties, order that his testimony be taken by deposition and that any designated books, papers, documents or tangible objects, not privileged, be produced at the same time and place.

If a witness is committed for failure to give bail or to appear to testify at a trial or hearing, the court on written motion of the witness and notice to the parties, may direct that his deposition be taken. After the deposition is completed, the court may discharge the witness.

(B) *Notice of taking.* --The party at whose instance a deposition is to be taken shall give to every other party reasonable written notice of the time and place for taking the deposition. The notice shall state the name and address of each person to be examined. On motion of a party upon whom the notice is served, the court for cause shown may extend or shorten the time or fix the place of deposition.

(C) *Attendance of defendant.* --The defendant shall have the right to attend the deposition. If he is confined the person having custody of the defendant shall be ordered by the court to take him to the deposition. The defendant may waive his right to attend the deposition, provided he does so in writing and in open court, is represented by counsel, and is fully advised of his right to attend by the court at a recorded proceeding.

(D) *Counsel.* --Where a defendant is without counsel the court shall advise him of his right to counsel and assign counsel to represent him unless the defendant waives counsel or is able to obtain counsel. If it appears that a defendant at whose instance a deposition is to be taken cannot bear the expense thereof, the court may direct that all deposition expenses, including but not limited to travel and subsistence of the defendant's attorney for attendance at such examination together with a reasonable attorney fee, in addition to the compensation allowed for defending the defendant, and the expenses of the prosecuting attorney in the taking of such deposition, shall be paid out of public funds upon the certificate of the court making such order. Waiver of counsel shall be as prescribed in Rule 44(C).

(E) *How taken.* --Depositions shall be taken in the manner provided in civil cases. The prosecution and defense shall have the right, as at trial, to full examination of witnesses. A deposition taken under this rule shall be filed in the court in which the action is pending.

(F) *Use.* --At the trial or upon any hearing, a part or all of a deposition, so far as otherwise admissible under the rules of evidence, may be used if it appears: that the witness is dead; or, that the witness is out of the state, unless it appears that the absence of the witness was procured by the party offering the deposition; or that the witness is unable to attend or testify because of sickness or infirmity; or that the party offering the deposition has been unable to procure the attendance of the witness by subpoena. Any deposition may also be used by any party for the purpose of refreshing the

recollection, or contradicting or impeaching the testimony of the deponent as a witness. If only a part of a deposition is offered in evidence by a party, any party may offer other parts.

(G) *Objections to admissibility.* --Objections to receiving in evidence a deposition or a part thereof shall be made as provided in civil actions.

LEXSTAT OHIO CRIM. R. 32.3

*** RULES CURRENT THROUGH UPDATES RECEIVED NOVEMBER 28, 2006 ***
*** ANNOTATIONS CURRENT THROUGH OCTOBER 1, 2006 ***

OHIO RULES OF CRIMINAL PROCEDURE

Ohio Crim. R. 32.3 (2006)

Rule 32.3. REVOCATION OF COMMUNITY RELEASE

(A) *Hearing.* –The court shall not impose a prison term for violation of the conditions of a community control sanction or revoke probation except after a hearing at which the defendant shall be present and apprised of the grounds on which action is proposed. The defendant may be admitted to bail pending hearing.

(B) *Counsel.* --The defendant shall have the right to be represented by retained counsel and shall be so advised. Where a defendant convicted of a serious offense is unable to obtain counsel, counsel shall be assigned to represent the defendant, unless the defendant after being fully advised of his or her right to assigned counsel, knowingly, intelligently, and voluntarily waives the right to counsel. Where a defendant convicted of a petty offense is unable to obtain counsel, the court may assign counsel to represent the defendant.

(C) *Confinement in petty offense cases.* --If confinement after conviction was precluded by *Crim. R. 44(B)*, revocation of probation shall not result in confinement.

If confinement after conviction was not precluded by *Crim. R. 44(B)*, revocation of probation shall not result in confinement unless, at the revocation hearing, there is compliance with *Crim. R. 44(B)*.

(D) *Waiver of counsel.* --Waiver of counsel shall be as prescribed in *Crim. R. 44(C)*.

HISTORY: Amended, eff 7-1-98

LEXSTAT OHIO CRIM. R. 44

*** RULES CURRENT THROUGH UPDATES RECEIVED NOVEMBER 28, 2006 ***
*** ANNOTATIONS CURRENT THROUGH OCTOBER 1, 2006 ***

OHIO RULES OF CRIMINAL PROCEDURE

Ohio Crim. R. 44 (2006)

Rule 44. ASSIGNMENT OF COUNSEL

(A) *Counsel in serious offenses.* --Where a defendant charged with a serious offense is unable to obtain counsel, counsel shall be assigned to represent him at every stage of the proceedings from his initial appearance before a court through appeal as of right, unless the defendant, after being fully advised of his right to assigned counsel, knowingly, intelligently, and voluntarily waives his right to counsel.

(B) *Counsel in petty offenses.* --Where a defendant charged with a petty offense is unable to obtain counsel, the court may assign counsel to represent him. When a defendant charged with a petty offense is unable to obtain counsel, no sentence of confinement may be imposed upon him, unless after being fully advised by the court, he knowingly, intelligently, and voluntarily waives assignment of counsel.

(C) *Waiver of counsel.* --Waiver of counsel shall be in open court and the advice and waiver shall be recorded as provided in Rule 22. In addition, in serious offense cases the waiver shall be in writing.

(D) *Assignment procedure.* --The determination of whether a defendant is able or unable to obtain counsel shall be made in a recorded proceeding in open court.

LEXSTAT OHIO JUV R 1

OHIO RULES OF COURT SERVICE

*** RULES CURRENT THROUGH UPDATES RECEIVED NOVEMBER 28, 2006 ***
*** ANNOTATIONS CURRENT THROUGH OCTOBER 1, 2006 ***

OHIO RULES OF JUVENILE PROCEDURE

Ohio Juv. R. 1 (2006)

Rule 1. SCOPE OF RULES: APPLICABILITY; CONSTRUCTION; EXCEPTIONS

LEXSTAT OHIO JUV. R. 3

*** RULES CURRENT THROUGH UPDATES RECEIVED NOVEMBER 28, 2006 ***
*** ANNOTATIONS CURRENT THROUGH OCTOBER 1, 2006 ***

OHIO RULES OF JUVENILE PROCEDURE

Ohio Juv. R. 3 (2006)

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 may be waived with the permission of the court.

HISTORY: Amended, eff 7-1-94

LEXSTAT OHIO JUV. R. 4

OHIO RULES OF COURT SERVICE

*** RULES CURRENT THROUGH UPDATES RECEIVED NOVEMBER 28, 2006 ***
*** ANNOTATIONS CURRENT THROUGH OCTOBER 1, 2006 ***

OHIO RULES OF JUVENILE PROCEDURE

Ohio Juv. R. 4 (2006)

Rule 4. ASSISTANCE OF COUNSEL; GUARDIAN *AD LITEM*

(A) *Assistance of counsel.* --Every party shall have the right to be represented by counsel and every child, parent, custodian, or other person in loco parentis the right to appointed counsel if indigent. These rights shall arise when a person becomes a party to a juvenile court proceeding. When the complaint alleges that a child is an abused child, the court must appoint an attorney to represent the interests of the child. This rule shall not be construed to provide for a right to appointed counsel in cases in which that right is not otherwise provided for by constitution or statute.

(B) *Guardian ad litem; when appointed.* --The court shall appoint a guardian *ad litem* to protect the interests of a child or incompetent adult in a juvenile court proceeding when:

(1) The child has no parents, guardian, or legal custodian;

(2) The interests of the child and the interests of the parent may conflict;

(3) The parent is under eighteen years of age or appears to be mentally incompetent;

(4) The court believes that the parent of the child is not capable of representing the best interest of the child.

(5) Any proceeding involves allegations of abuse or neglect, voluntary surrender of permanent custody, or termination of parental rights as soon as possible after the commencement of such proceeding.

(6) There is an agreement for the voluntary surrender of temporary custody that is made in accordance with *section 5103.15 of the Revised Code*, and thereafter there is a request for extension of the voluntary agreement.

(7) The proceeding is a removal action.

(8) Appointment is otherwise necessary to meet the requirements of a fair hearing.

(C) *Guardian ad litem as counsel.*

(1) When the guardian *ad litem* is an attorney admitted to practice in this state, the guardian may also serve as counsel to the ward providing no conflict between the roles exist[s].

(2) If a person is serving as guardian *ad litem* and as attorney for a ward and either that person or the court finds a conflict between the responsibilities of the role of attorney and that of guardian *ad litem,* the court shall appoint another person as guardian *ad litem* for the ward.

(3) If a court appoints a person who is not an attorney admitted to practice in this state to be a guardian *ad litem,* the court may appoint an attorney admitted to practice in this state to serve as attorney for the guardian *ad litem.*

(D) *Appearance of attorneys.* --An attorney shall enter appearance by filing a written notice with the court or by appearing personally at a court hearing and informing the court of said representation.

(E) *Notice to guardian ad litem* --The guardian *ad litem* shall be given notice of all proceedings in the same manner as notice is given to other parties to the action.

(F) *Withdrawal of counsel or guardian ad litem* --An attorney or guardian *ad litem* may withdraw only with the consent of the court upon good cause shown.

(G) *Costs.* --The court may fix compensation for the services of appointed counsel and guardians *ad litem,* tax the same as part of the costs and assess them against the child, the child's parents, custodian, or other person in loco parentis of such child.

HISTORY: Amended, eff 7-1-76; 7-1-94; 7-1-95; 7-1-98

LEXSTAT OHIO JUV. R. 7

OHIO RULES OF COURT SERVICE

*** RULES CURRENT THROUGH UPDATES RECEIVED NOVEMBER 28, 2006 ***
*** ANNOTATIONS CURRENT THROUGH OCTOBER 1, 2006 ***

OHIO RULES OF JUVENILE PROCEDURE

Ohio Juv. R. 7 (2006)

Rule 7. DETENTION AND SHELTER CARE

(A) *Detention: standards.* --A child taken into custody shall not be placed in detention or shelter care prior to final disposition unless any of the following apply:

(1) Detention or shelter care is required:

(a) to protect the child from immediate or threatened physical or emotional harm; or

(b) to protect the person or property of others from immediate or threatened physical or emotional harm.

(2) The child may abscond or be removed from the jurisdiction of the court;

(3) The child has no parent, guardian, custodian or other person able to provide supervision and care for the child and return the child to the court when required;

(4) An order for placement of the child in detention or shelter care has been made by the court;

(5) Confinement is authorized by statute.

(B) *Priorities in placement prior to hearing.* --A person taking a child into custody shall, with all reasonable speed, do either of the following:

(1) Release the child to a parent, guardian, or other custodian;

(2) Where detention or shelter care appears to be required under the standards of division (A) of this rule, bring the child to the court or deliver the child to a place of detention or shelter care designated by the court.

(C) *Initial procedure upon detention.* --Any person who delivers a child to a shelter or detention facility shall give the admissions officer at the facility a signed report stating why the child was taken into custody and why the child was not released to a parent, guardian or custodian, and shall assist the admissions officer, if necessary, in notifying the parent pursuant to division (E)(3) of this rule.

(D) *Admission.* --The admissions officer in a shelter or detention facility, upon receipt of a child, shall review the report submitted pursuant to division (C) of this rule, make such further investigation as is feasible and do either of the following:

(1) Release the child to the care of a parent, guardian or custodian;

(2) Where detention or shelter care is required under the standards of division (A) of this rule, admit the child to the facility or place the child in some appropriate facility.

(E) *Procedure after admission.* --When a child has been admitted to detention or shelter care the admissions officer shall do all of the following:

(1) Prepare a report stating the time the child was brought to the facility and the reasons the child was admitted;

(2) Advise the child of the right to telephone parents and counsel immediately and at reasonable times thereafter and the time, place, and purpose of the detention hearing;

(3) Use reasonable diligence to contact the child's parent, guardian, or custodian and advise that person of all of the following:

(a) The place of and reasons for detention;

(b) The time the child may be visited;

(c) The time, place, and purpose of the detention hearing;

(d) The right to counsel and appointed counsel in the case of indigency.

(F) *Detention hearing.*

(1) Hearing: time; notice. When a child has been admitted to detention or shelter care, a detention hearing shall be held promptly, not later than seventy-two hours after the child is placed in detention or shelter care or the next court day, whichever is earlier, to determine whether detention or shelter care is required. Reasonable oral or written notice of the time, place, and purpose of the detention hearing shall be given to the child and to the parents, guardian, or other custodian, if that person or those persons can be found.

(2) Hearing: advisement of rights. Prior to the hearing, the court shall inform the parties of the right to counsel and to appointed counsel if indigent and the child's right to remain silent with respect to any allegation of a juvenile traffic offense, delinquency, or unruliness.

(3) Hearing procedure. The court may consider any evidence, including the reports filed by the person who brought the child to the facility and the admissions officer, without regard to formal rules of evidence. Unless it appears from the hearing that the child's detention or shelter care is required under division (A) of this rule, the court shall order the child's release to a parent, guardian, or custodian. Whenever abuse, neglect, or dependency is alleged, the court shall determine whether there are any appropriate relatives of the child who are willing to be temporary custodians and, if so, appoint an appropriate relative as the temporary custodian of the child. The court shall make a reasonable efforts determination in accordance with *Juv. R. 27(B)(1).*

(G) *Rehearing.* --If a parent, guardian, or custodian did not receive notice of the initial hearing and did not appear or waive appearance at the hearing, the court shall rehear the matter promptly. After a child is placed in shelter care or detention care, any party and the guardian *ad litem* of the child may file a motion with the court requesting that the child be released from detention or shelter care. Upon the filing of the motion, the court shall hold a hearing within seventy-two hours.

(H) *Separation from adults.* --No child shall be placed in or committed to any prison, jail, lockup, or any other place where the child can come in contact or communication with any adult convicted of crime, under arrest, or charged with crime.

(I) *Physical examination.* --The supervisor of a shelter or detention facility may provide for a physical examination of a child placed in the shelter or facility.

(J) *Telephone and visitation rights.* --A child may telephone the child's parents and attorney immediately after being admitted to a shelter or detention facility and at reasonable times thereafter.

The child may be visited at reasonable visiting hours by the child's parents and adult members of the family, the child's pastor, and the child's teachers. The child may be visited by the child's attorney at any time.

HISTORY: Amended, eff 7-1-94; 7-1-01

LEXSTAT OHIO JUV. R. 29

*** RULES CURRENT THROUGH UPDATES RECEIVED NOVEMBER 28, 2006 ***
*** ANNOTATIONS CURRENT THROUGH OCTOBER 1, 2006 ***

OHIO RULES OF JUVENILE PROCEDURE

Ohio Juv. R. 29 (2006)

Rule 29. ADJUDICATORY HEARING

(A) *Scheduling the hearing.* --The date for the adjudicatory hearing shall be set when the complaint is filed or as soon thereafter as is practicable. If the child is the subject of a complaint alleging a violation of a section of the Revised Code that may be violated by an adult and that does not request a serious youthful offender sentence, and if the child is in detention or shelter care, the hearing shall be held not later than fifteen days after the filing of the complaint. Upon a showing of good cause, the adjudicatory hearing may be continued and detention or shelter care extended.

The prosecuting attorney's filing of either a notice of intent to pursue or a statement of an interest in pursuing a serious youthful offender sentence shall constitute good cause for continuing the adjudicatory hearing date and extending detention or shelter care.

The hearing of a removal action shall be scheduled in accordance with *Juv. R. 39(B).*

If the complaint alleges abuse, neglect, or dependency, the hearing shall be held no later than thirty days after the complaint is filed. For good cause shown, the adjudicatory hearing may extend beyond thirty days either for an additional ten days to allow any party to obtain counsel or for a reasonable time beyond thirty days to obtain service on all parties or complete any necessary evaluations. However, the adjudicatory hearing shall be held no later than sixty days after the complaint is filed.

The failure of the court to hold an adjudicatory hearing within any time period set forth in this rule does not affect the ability of the court to issue any order otherwise provided for in statute or rule and does not provide any basis for contesting the jurisdiction of the court or the validity of any order of the court.

(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;

(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 offer evidence, to cross-examine witnesses, and, upon request, to have a record of all proceedings made, at public expense if indigent.

(C) *Entry of admission or denial.* --The court shall request each party against whom allegations are being made in the complaint to admit or deny the allegations. A failure or refusal to admit the allegations shall be deemed a denial, except in cases where the court consents to entry of a plea of no contest.

(D) *Initial procedure upon entry of an admission.* --The court may refuse to accept an admission and shall not accept an admission without addressing the party personally and determining both of the following:

(1) The party is making the admission voluntarily with understanding of the nature of the allegations and the consequences of the admission;

(2) The party understands that by entering an admission the party is waiving the right to challenge the witnesses and evidence against the party, to remain silent, and to introduce evidence at the adjudicatory hearing.

The court may hear testimony, review documents, or make further inquiry, as it considers appropriate, or it may proceed directly to the action required by division (F) of this rule.

(E) *Initial procedure upon entry of a denial.* --If a party denies the allegations, the court shall:

(1) Direct the prosecuting attorney or another attorney-at-law to assist the court by presenting evidence in support of the allegations of a complaint;

(2) Order the separation of witnesses, upon request of any party;

(3) Take all testimony under oath or affirmation in either question-answer or narrative form; and

(4) Determine the issues by 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.

(F) *Procedure upon determination of the issues.* --Upon the determination of the issues, the court shall do one of the following:

(1) If the allegations of the complaint, indictment, or information were not proven, dismiss the complaint;

(2) If the allegations of the complaint, indictment, or information are admitted or proven, do any one of the following, unless precluded by statute:

(a) Enter an adjudication and proceed forthwith to disposition;

(b) Enter an adjudication and continue the matter for disposition for not more than six months and may make appropriate temporary orders;

(c) Postpone entry of adjudication for not more than six months;

(d) Dismiss the complaint if dismissal is in the best interest of the child and the community.

(3) Upon request make written findings of fact and conclusions of law pursuant to *Civ. R. 52.*

(4) Ascertain whether the child should remain or be placed in shelter care until the dispositional hearing in an abuse, neglect, or dependency proceeding. In making a shelter care determination, the court shall make written finding of facts with respect to reasonable efforts in accordance with the provisions in *Juv. R. 27(B)(1)* and to relative placement in accordance with *Juv. R. 7(F)(3).*

HISTORY: Amended, eff 7-1-76; 7-1-94; 7-1-98; 7-1-01; 7-1-04

LEXSTAT OHIO JUV. R. 34

*** RULES CURRENT THROUGH UPDATES RECEIVED NOVEMBER 28, 2006 ***
*** ANNOTATIONS CURRENT THROUGH OCTOBER 1, 2006 ***

OHIO RULES OF JUVENILE PROCEDURE

Ohio Juv. R. 34 (2006)

Rule 34. DISPOSITIONAL HEARING

(A) *Scheduling the hearing.* --Where a child has been adjudicated as an abused, neglected, or dependent child, the court shall not issue a dispositional order until after it holds a separate dispositional hearing. The dispositional hearing for an adjudicated abused, neglected, or dependent child shall be held at least one day but not more than thirty days after the adjudicatory hearing is held. The dispositional hearing may be held immediately after the adjudicatory hearing if all parties were served prior to the adjudicatory hearing with all documents required for the dispositional hearing and all parties consent to the dispositional hearing being held immediately after the adjudicatory hearing. Upon the request of any party or the guardian ad litem of the child, the court may continue a dispositional hearing for a reasonable time not to exceed the time limit set forth in this division to enable a party to obtain or consult counsel. The dispositional hearing shall not be held more than ninety days after the date on which the complaint in the case was filed. If the dispositional hearing is not held within this ninety day period of time, the court, on its own motion or the motion of any party or the guardian ad litem of the child, shall dismiss the complaint without prejudice.

In all other juvenile proceedings, the dispositional hearing shall be held pursuant to *Juv. R. 29(F)(2)(a)* through (d) and the ninety day requirement shall not apply. Where the dispositional hearing is to be held immediately following the adjudicatory hearing, the court, upon the request of any party, shall continue the hearing for a reasonable time to enable the party to obtain or consult counsel.

(B) *Hearing procedure.* --The hearing shall be conducted in the following manner:

(1) The judge or magistrate who presided at the adjudicatory hearing shall, if possible, preside;

(2) Except as provided in division (I) of this rule, the court may admit evidence that is material and relevant, including, but not limited to, hearsay, opinion, and documentary evidence;

(3) Medical examiners and each investigator who prepared a social history shall not be cross-examined, except upon consent of all parties, for good cause shown, or as the court in its discretion may direct. Any party may offer evidence supplementing, explaining, or disputing any information contained in the social history or other reports that may be used by the court in determining disposition.

(C) *Judgment.* --After the conclusion of the hearing, the court shall enter an appropriate judgment within seven days. A copy of the judgment shall be given to any party requesting a copy. In all cases where a child is placed on probation, the child shall receive a written statement of the conditions of probation. If the judgment is conditional, the order shall state the conditions. If the child is not returned to the child's home, the court shall determine the school district that shall bear the cost of the child's education and may fix an amount of support to be paid by the responsible parent or from public funds.

(D) *Dispositional orders.* --Where a child is adjudicated an abused, neglected, or dependent child, the court may make any of the following orders of disposition:

(1) Place the child in protective supervision;

(2) Commit the child to the temporary custody of a public or private agency, either parent, a relative residing within or outside the state, or a probation officer for placement in a certified foster home or approved foster care;

(3) Award legal custody of the child to either parent or to any other person who, prior to the dispositional hearing, files a motion requesting legal custody;

(4) Commit the child to the permanent custody of a public or private agency, if the court determines that the child cannot be placed with one of the child's parents within a reasonable time or should not be placed with either parent and determines that the permanent commitment is in the best interest of the child;

(5) Place the child in a planned permanent living arrangement with a public or private agency if the agency requests the court for placement, if the court finds that a planned permanent living arrangement is in the best interest of the child, and if the court finds that one of the following exists:

(a) The child because of physical, mental, or psychological problems or needs is unable to function in a family-like setting;

(b) The parents of the child have significant physical, mental or psychological problems and are unable to care for the child, adoption is not in the best interest of the child and the child retains a significant and positive relationship with a parent or relative;

(c) The child is sixteen years of age or older, has been counseled, is unwilling to accept or unable to adapt to a permanent placement and is in an agency program preparing the child for independent living.

(E) *Protective supervision.* --If the court issues an order for protective supervision, the court may place any reasonable restrictions upon the child, the child's parents, guardian, or any other person including, but not limited to, any of the following:

(1) Ordering a party within forty-eight hours to vacate the child's home indefinitely or for a fixed period of time;

(2) Ordering a party, parent, or custodian to prevent any particular person from having contact with the child;

(3) Issuing a restraining order to control the conduct of any party.

(F) *Case plan.* --As part of its dispositional order, the court shall journalize a case plan for the child. The agency required to maintain a case plan shall file the case plan with the court prior to the child's adjudicatory hearing but not later than thirty days after the earlier of the date on which the complaint in the case was filed or the child was first placed in shelter care. The plan shall specify what additional information, if any, is necessary to complete the plan and how the information will be obtained. All parts of the case plan shall be completed by the earlier of thirty days after the adjudicatory hearing or the date of the dispositional hearing for the child. If all parties agree to the content of the case plan and the court approves it, the court shall journalize the plan as part of its dispositional order. If no agreement is reached, the court, based upon the evidence presented at the dispositional hearing and the best interest of the child, shall determine the contents of the case plan and journalize it as part of the dispositional order for the child.

(G) *Modification of temporary order.* --The department of human services or any other public or private agency or any party, other than a parent whose parental rights have been terminated, may at any time file a motion requesting that the court modify or terminate any order of disposition. The court shall hold a hearing upon the motion as if the hearing were the original dispositional hearing and shall give all parties and the guardian *ad litem* notice of the hearing pursuant to these rules. The court, on its own motion and upon proper notice to all parties and any interested agency, may modify or terminate any order of disposition.

(H) *Restraining orders.* --In any proceeding where a child is made a ward of the court, the court may grant a restraining order controlling the conduct of any party if the court finds that the order is necessary to control any conduct or relationship that may be detrimental or harmful to the child and tend to defeat the execution of a dispositional order.

(I) *Bifurcation; Rules of Evidence.* --Hearings to determine whether temporary orders regarding custody should be modified to orders for permanent custody shall be considered dispositional hearings and need not be bifurcated. The Rules of Evidence shall apply in hearings on motions for permanent custody.

(J) *Advisement of rights after hearing.* --At the conclusion of the hearing, the court shall advise the child of the child's right to record expungement and, where any part of the proceeding was contested, advise the parties of their right to appeal.

HISTORY: Amended, eff 7-1-94; 7-1-96; 7-1-02

LEXSTAT OHIO JUV. R. 35

OHIO RULES OF COURT SERVICE

*** RULES CURRENT THROUGH UPDATES RECEIVED NOVEMBER 28, 2006 ***
*** ANNOTATIONS CURRENT THROUGH OCTOBER 1, 2006 ***

OHIO RULES OF JUVENILE PROCEDURE

Ohio Juv. R. 35 (2006)

Rule 35. PROCEEDINGS AFTER JUDGMENT

(A) *Continuing jurisdiction; invoked by motion.* --The continuing jurisdiction of the court shall be invoked by motion filed in the original proceeding, notice of which shall be served in the manner provided for the service of process.

(B) *Revocation of probation.* --The court shall not revoke probation except after a hearing at which the child shall be present and apprised of the grounds on which revocation is proposed. The parties shall have the right to counsel and the right to appointed counsel where entitled pursuant to *Juv. R. 4(A)*. Probation shall not be revoked except upon a finding that the child has violated a condition of probation of which the child had, pursuant to *Juv. R. 34(C)*, been notified.

(C) *Detention.* --During the pendency of proceedings under this rule, a child may be placed in detention in accordance with the provisions of Rule 7.

HISTORY: Amended, eff 7-1-94

LEXSTAT OHIO JUV. R. 40

*** RULES CURRENT THROUGH UPDATES RECEIVED NOVEMBER 28, 2006 ***
*** ANNOTATIONS CURRENT THROUGH OCTOBER 1, 2006 ***

OHIO RULES OF JUVENILE PROCEDURE

Ohio Juv. R. 40 (2006)

Rule 40. MAGISTRATES

(A) *Appointment.* --The court may appoint one or more magistrates who shall be attorneys at law admitted to practice in Ohio. A magistrate appointed under this rule also may serve as a magistrate under *Crim. R. 19*. The court shall not appoint as a magistrate any person who has contemporaneous responsibility for working with, or supervising the behavior of, children who are subject to dispositional orders of the appointing court or any other juvenile court.

(B) *Compensation.* --The compensation of magistrates shall be fixed by the court, and no part of the compensation shall be taxed as costs.

(C) *Authority.*

(1) *Scope.* To assist juvenile courts of record and pursuant to reference under *Juv. R. 40(D)(1)*, magistrates are authorized, subject to the terms of the relevant reference, to do any of the following:

(a) Determine any motion in any case, except a case involving the determination of a child's status as a serious youthful offender;

(b) Conduct the trial of any case that will not be tried to a jury, except the adjudication of a case against an alleged serious youthful offender;

(c) Upon unanimous written consent of the parties, preside over the trial of any case that will be tried to a jury; except the adjudication of a case against an alleged serious youthful offender;

(d) Exercise any other authority specifically vested in magistrates by statute and consistent with this rule.

(2) *Regulation of proceedings.* In performing the responsibilities described in *Juv. R. 40(C)(1)*, magistrates are authorized, subject to the terms of the relevant reference, to regulate all proceedings as if by the court and to do everything necessary for the efficient performance of those responsibilities, including but not limited to, the following:

(a) Issuing subpoenas for the attendance of witnesses and the production of evidence;

(b) Ruling upon the admissibility of evidence;

(c) Putting witnesses under oath and examining them;

(d) Calling the parties to the action and examining them under oath;

(e) When necessary to obtain the presence of an alleged contemnor in cases involving direct or indirect contempt of court, issuing an attachment for the alleged contemnor and setting the type, amount, and any conditions of bail pursuant to *Crim. R. 46*;

(f) Imposing, subject to *Juv. R. 40(D)(8)*, appropriate sanctions for civil or criminal contempt committed in the presence of the magistrate.

(D) *Proceedings in Matters Referred to Magistrates.*

(1) *Reference by court of record.*

(a) *Purpose and method.* A court may, for one or more of the purposes described in *Juv. R. 40(C)(1)*, refer a particular case or matter or a category of cases or matters to a magistrate by a specific or general order of reference or by rule

(b) *Limitation.* A court may limit a reference by specifying or limiting the magistrate's powers, including but not limited to, directing the magistrate to determine only particular issues, directing the magistrate to perform particular responsibilities, directing the magistrate to receive and report evidence only, fixing the time and place for beginning and closing any hearings, or fixing the time for filing any magistrate's decision on the matter or matters referred.

(2) *Magistrate's order; motion to set aside magistrate's order.*

(a) *Magistrate's order.*

(i) *Nature of order.* Subject to the terms of the relevant reference, a magistrate may enter orders without judicial approval if necessary to regulate the proceedings and if not dispositive of a claim or defense of a party.

(ii) *Form, filing, and service of magistrate's order.* A magistrate's order shall be in writing, identified as a magistrate's order in the caption, signed by the magistrate, filed with the clerk, and served on all parties or their attorneys.

(iii) *Magistrate's order include.* A magistrate's order includes any of the following:

(A) Pretrial proceedings under *Civ. R. 16*;

(B) Discovery proceedings under *Civ. R. 26* to *37*, *Juv. R. 24*, and *Juv. R.25*;

(C) Appointment of an attorney or guardian ad litem pursuant to *Juv. R. 4* and *Juv. R.29(B)(4)*;

(D) Taking a child into custody pursuant to *Juv. R. 6*;

(E) Detention hearings pursuant to *Juv. R. 7*;

(F) Temporary orders pursuant to *Juv. R. 13*;

(G) Extension of temporary orders pursuant to *Juv. R. 14*;

(H) Summons and warrants pursuant to *Juv. R. 15*;

(I) Preliminary conferences pursuant to *Juv. R. 21*;

(J) Continuances pursuant to *Juv. R. 23*;

(K) Deposition orders pursuant to *Juv. R. 27(B)(3)*;

(L) Orders for social histories, physical and mental examinations pursuant to *Juv. R. 32*;

(M) Proceedings upon application for the issuance of a temporary protection order as authorized by law;

(N) Other orders as necessary to regulate the proceedings.

(b) *Motion to set aside magistrate's order.* Any party may file a motion with the court to set aside a magistrate's order. The motion shall state the moving party's reasons with particularity and shall be filed not later than ten days after the magistrate's order is filed. The pendency of a motion to set aside does not stay the effectiveness of the magistrate's order, though the magistrate or the court may by order stay the effectiveness of a magistrate's order.

(3) *Magistrate's decision; objections to magistrate's decision.*

(a) *Magistrate's decision.*

(i) *When required.* Subject to the terms of the relevant reference, a magistrate shall prepare a magistrate's decision respecting any matter referred under *Juv. R. 40(D)(1)*.

(ii) *Findings of fact and conclusions of law.* Subject to the terms of the relevant reference, a magistrate's decision may be general unless findings of fact and conclusions of law are timely requested by a party or otherwise required

by law. A request for findings of fact and conclusions of law shall be made before the entry of a magistrate's decision or within seven days after the filing of a magistrate's decision. If a request for findings of fact and conclusions of law is timely made, the magistrate may require any or all of the parties to submit proposed findings of fact and conclusions of law.

(iii) *Form; filing, and service of magistrate's decision.* A magistrate's decision shall be in writing, identified as a magistrate's decision in the caption, signed by the magistrate, filed with the clerk, and served on all parties or their attorneys no later than three days after the decision is filed. A magistrate's decision shall indicate conspicuously that a party shall not assign as error on appeal the court's adoption of any factual finding or legal conclusion, whether or not specifically designated as a finding of fact or conclusion of law under *Juv. R. 40(D)(3)(a)(ii)*, unless the party timely and specifically objects to that factual finding or legal conclusion as required by *Juv. R. 40(D)(3)(b)*.

(b) *Objections to magistrate's decision.*

(i) *Time for filing.* A party may file written objections to a magistrate's decision within fourteen days of the filing of the decision, whether or not the court has adopted the decision during that fourteen-day period as permitted by *Juv. R. 40(D)(4)(e)(i)*. If any party timely files objections, any other party may also file objections not later than ten days after the first objections are filed. If a party makes a timely request for findings of fact and conclusions of law, the time for filing objections begins to run when the magistrate files a decision that includes findings of fact and conclusions of law.

(ii) *Specificity of objection.* An objection to a magistrate's decision shall be specific and state with particularity all grounds for objection.

(iii) *Objection to magistrate's factual finding; transcript or affidavit.* An objection to a factual finding, whether or not specifically designated as a finding of fact under *Juv. R. 40(D)(3)(a)(ii)*, shall be supported by a transcript of all the evidence submitted to the magistrate relevant to that finding or an affidavit of that evidence if a transcript is not available. With leave of court, alternative technology or manner of reviewing the relevant evidence may be considered. The objecting party shall file the transcript or affidavit with the court within thirty days after filing objections unless the court extends the time in writing for preparation of the transcript or other good cause. If a party files timely objections prior to the date on which a transcript is prepared, the party may seek leave of court to supplement the objections.

(iv) *Waiver of right to assign adoption by court as error on appeal.* Except for a claim of plain error, a party shall not assign as error on appeal the court's adoption of any factual finding or legal conclusion, whether or not specifically designated as a finding of fact or conclusion of law under *Juv. R. 40(D)(3)(a)(ii)*, unless the party has objected to that finding or conclusion as required by *Juv. R. 40(D)(3)(b)*.

(4) *Action of court on magistrate's decision and on any objections to magistrate's decision; entry of judgment or interim order by court.*

(a) *Action of court required.* A magistrate's decision is not effective unless adopted by the court.

(b) *Action on magistrate's decision.* Whether or not objections are timely filed, a court may adopt or reject a magistrate's decision in whole or in part, with or without modification. A court may hear a previously-referred matter, take additional evidence, or return a matter to a magistrate.

(c) *If no objections are filed.* If no timely objections are filed, the court may adopt a magistrate's decision, unless it determines that there is an error of law or other defect evident on the face of the magistrate's decision.

(d) *Action on objections.* If one or more objections to a magistrate's decision are timely filed, the court shall rule on those objections. In ruling on objections, the court shall undertake an independent review as to the objected matters to ascertain that the magistrate has properly determined the factual issues and appropriately applied the law. Before so ruling, the court may hear additional evidence but may refuse to do so unless the objecting party demonstrates that the party could not, with reasonable diligence, have produced that evidence for consideration by the magistrate.

(e) *Entry of judgment or interim order by court.* A court that adopts, rejects, or modifies a magistrate's decision shall also enter a judgment or interim order.

(i) *Judgment.* The court may enter a judgment either during the fourteen days permitted by *Juv. R. 40(D)(3)(b)(i)* for the filing of objections to a magistrate's decision or after the fourteen days have expired. If the court

enters a judgment during the fourteen days permitted by *Juv. R. 40(D)(3)(b)(i)* for the filing of objections, the timely filing of objections to the magistrate's decision shall operate as an automatic stay of execution of the judgment until the court disposes of those objections and vacates, modifies, or adheres to the judgment previously entered.

(ii) *Interim order.* The court may enter an interim order on the basis of a magistrate's decision without waiting for or ruling on timely objections by the parties where immediate relief is justified. The timely filing of objections does not stay the execution of an interim order, but an interim order shall not extend more than twenty-eight days from the date of entry, subject to extension by the court in increments of twenty-eight additional days for good cause shown.

(5) *Extension of time.* For good cause shown, the court shall allow a reasonable extension of time for a party to file a motion to set aside a magistrate's order or file objections to a magistrate's decision. "Good cause" includes, but is not limited to, a failure by the clerk to timely serve the party seeking the extension with the magistrate's order or decision.

(6) *Disqualification of a magistrate.* Disqualification of a magistrate for bias or other cause is within the discretion of the court and may be sought by motion filed with the court.

(7) *Recording of proceedings before a magistrate.* Except as otherwise provided by law, all proceedings before a magistrate shall be recorded in accordance with procedures established by the court.

(8) *Contempt in the presence of a magistrate.*

(a) *Contempt order.* Contempt sanctions under *Juv. R. 40(C)(2)(f)* may be imposed only by a written order that recites the facts and certifies that the magistrate saw or heard the conduct constituting contempt.

(b) *Filing and provision of copies of contempt order.* A contempt order shall be filed and copies provided forthwith by the clerk to the appropriate judge of the court and to the subject of the order.

(c) *Review of contempt order by court; bail.* The subject of a contempt order may by motion obtain immediate review by a judge. A judge or the magistrate entering the contempt order may set bail pending judicial review of the order.

HISTORY: Amended, eff 7-1-75; 7-1-85; 7-1-92; 7-1-95; 7-1-98; 7-1-01; 7-1-03; 7-1-06