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

REPLY BRIEF OF APPELLANT COREY SPEARS

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STATEMENT OF THE CASE AND FACTS

The record does not support the State's assertion that the juvenile court "was provided a copy of the Appellant's priors, which include convictions on two Assaults, and four prior probation violations in 2004 and 2005." Answer, p. 1. First, the document attached as Appellee's Exhibit 1 could not have been provided to the court before Corey's hearing on August 9, 2005, because the results from the August 9, 2005, hearing appear on page two of the document. Second, there is nothing in the record that suggests that anyone "provided the juvenile court" anything before the hearing began, much less a document that had not yet been created. Third, the State's assertion that Corey's "priors" include "convictions on two Assaults and four prior probation violations in 2004 and 2005" is inaccurate and misleading. To clarify, Corey has never been *convicted* of any offense; rather, he has been adjudicated delinquent in juvenile court of two misdemeanor assault charges that occurred when he was twelve years old, and four probation violations that occurred when he was 13 years old.

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.

In its argument, the State makes six contradictory points, which, when read together, go a long way toward supporting Appellant's argument that the sentence: "Counsel must be provided for a child not represented by the child's parent, guardian, or custodian" is confusing, and its existence in the statute impinges upon a juvenile's right to counsel in juvenile court.

At once, the State argues that:

- "appellant was entitled to appointed counsel provided he did not knowingly waive that right" (Answer, p. 4);
- "R.C. 2151.352 can, and should be, construed as creating a nonwaivable right to counsel for a child not represented by his parent guardian or custodian" (Answer, p. 4);
- "representation" by parent means mere presence (Answer, p. 5);
- "representation" by parent means something more than mere presence (Answer, p. 5);
- "representation" by a child's parent has no bearing on the fundamental right to counsel (Answer, p. 4); and
- there is no need to sever the sentence from the statute (Answer, p. 6).

The State makes no attempt to reconcile its contradictory statements. Appellant asserts that the State's contradictory statements cannot, and need not be reconciled because there can be but one solution to the problem at issue here: severance.

II. The meaning of the term "representation" in the fifth sentence of R.C. 2151.352 is not plain, and there is no possible construction of it which would respect the fundamental right to counsel in juvenile court.[1]

Like the courts of appeals, the State struggles with the meaning of the term "representation" in the context of a juvenile defendant's parent's role and its effect on a child's right to counsel in juvenile court. For example, the State incorrectly asserts that Appellant "equates his mother's presence with providing legal representation." Answer, p. 4. The State's assertion suggests that the State assumes that the term, "representation" means "legal representation." In fact, Appellant did not equate his mother's presence with legal representation; rather, Appellant explained that in the first sentence of R.C. 2151.352, in Juv.R. 3, and in Juv.R. 4, the term "representation" means "representation by counsel." Brief, pp. 14-15. Obviously, a parent cannot "represent" her child's legal interests unless she is licensed to practice law.

One problem highlighted by Appellant, but ignored by the State, is that Ohio law does not clearly define the term, "representation." The State proclaims "there is no need to attempt to define 'representation;'" therefore, it does not proffer a definition in its Answer. The State fails to recognize that various courts of appeals have applied varying definitions of a parent's "representation" of his or her child in juvenile court; instead, it concludes that "it is simply a fact specific variation, not a legal interpretation that has varied." Answer, p. 5. In reality, the problem is not a fact-specific variation as the State claims; rather, it is definitional. The cases the State cites illustrate this problem: Ohio's courts of appeals have not uniformly interpreted the word "representation" in the context at issue here.

[1] The fifth sentence of R.C. 2151.352 provides, "Counsel must be provided for a child not represented by the child's parent, guardian, or custodian."

For example, some of the cases cited by the State equate a child's parent's mere presence with "representation." See, e.g. In re Estes, 4th Dist. No. 04CA11, 2004-Ohio-5163, ¶11 ("we conclude that the presence of Estes' parents satisfied the requirements of R.C. 2151.352...."); Douglas v. State, (December 6, 1996), 5th Dist. No. 96 CA 44 (Douglas' grandmother was present with him and had signed her name as his parent on previous occasions); In re Smith (2001), 142 Ohio App. 3d 16, 20 (Smith's social worker, who appeared with her in court, "constituted a custodian for purposes of R.C. 2151.352."). Other cases cited by the State, including Spears, indicate that "representation" by parent requires more than mere presence. In re Spears, 5th Dist. No. 2005-CA-93, 2006-Ohio-1920, ¶58 (Ms. Spears was present, concurred with Corey's waiver, and had signed the waiver of rights form before Corey's hearing.); In re William B., 163 Ohio App. 3d 201, 2005-Ohio-4428, ¶¶16-18 (finding that a conflicted parent, although physically present, cannot "fully represent" her child's interests); In re R.B., 166 Ohio App. 3d 626, 2006-Ohio-264, ¶25 (acting in advisory role is "representation" under 2151.352).

Although the State refers to a parent's "representation" throughout its argument, it offers no insight about what the term does, or should, mean. Further, assuming the State was correct when it asserted that "'representation' by parent has no bearing on the child's right to counsel," it is difficult to imagine why it then argued that there is no need to sever the sentence from the statute. Answer, p. 6. The State fails to recognize what its own confusing and contradictory argument illustrates: The fifth sentence of R.C. 2151.352 confuses the right to counsel for a child in juvenile court. If this Court agrees with Appellant and Appellee, and finds that a parent's representation of his or her child has no bearing on the child's right to counsel, it

follows that no definition of the word "representation" could cure the problems the sentence creates.

III. Because a juvenile defendant's parent has no authority to waive her child's right to counsel or to veto her child's valid waiver of his right to counsel, "representation by parent" is wholly irrelevant to a child's right to counsel in juvenile court.

The State claims that a parent's "representation" has no bearing on a child's fundamental right to counsel, but argues that the right to counsel cannot be waived by a child not represented by his parent, guardian or custodian. Obviously, the State cannot have it both ways. If a parent's "representation" of her child has no bearing on her child's right to counsel, then the sentence does not belong in the statute. But the State asserts that "there is no need to attempt to define 'representation' or sever this particular sentence from the statute." In other words, the State argues that everything is fine. But the State's view that the sentence does not create confusion is besieged by its own proposition: "R.C. 2151.352 can, and should be, construed as creating a nonwaivable right to counsel for a child not represented by his parent, guardian, or custodian." Answer, p. 4.

The State's proposed construction is not advanced by either Spears or Appellant here.[2] In fact, on this point, Spears held that "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 that right*." Spears at ¶30, citing 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; and In re Gault, (1967), 387 U.S. 1, 42, 87 S. Ct. 1428. (Emphasis in original.)

[2] In his merit brief before the court of appeals, Corey did argue that the fifth sentence created a nonwaivable right to counsel for a child whose parent did not provide any "representation" in court. Since that time, Corey has reconsidered his view in light of Gault and basic due process.

Indeed, the right to counsel carries with it a correlative right to waive counsel. Faretta v. California (1975), 422 U.S. 806, 814, 95 S. Ct. 2525; State v. Martin, 103 Ohio St. 3d 385, 2004-Ohio-5471, ¶23.[3] If the sentence at issue here is construed so as to create a nonwaivable right to counsel for a child not represented by his parent, guardian, or custodian, as the State suggests, the sentence would remain an impingement upon the fundamental right to counsel. This is because, as was stated in Halbert v. Michigan (2005), 545 U.S. 605, 637, 125 S. Ct. 2582:

> Legal rights, even constitutional ones, are presumptively waivable. *** ("The most basic rights of criminal defendants are . . . subject to waiver"). The presumption of waivability holds true for the right to counsel. This Court has held repeatedly that a defendant may waive that right, both at trial and at the entry of a guilty plea, so long as the waiver is knowing and intelligent.

Id. (Thomas, J., Scalia, J., and Rehnquist, C.J., dissenting) (citing United States v. Mezzanatto (1995), 513 U.S. 196, 200-01, 115 S. Ct. 797; Iowa v. Tovar (2004), 541 U.S. 77, 88, 124 S. Ct. 1379; Faretta, 422 U.S. at 835; Adams v. United States ex rel. McCann (1942), 317 U.S. 269, 279, 63 S. Ct. 236; Johnson v. Zerbst (1938), 304 U.S. 458, 464-65, 58 S. Ct. 1019.

Despite its argument that the sentence can and should create a nonwaivable right to counsel, at the end of its argument, the State appears to have changed its mind, stating "The right to counsel is clear, subject to the right to waive, discussed below."

This version of the State's argument is supported by Ohio law. Some examples of the right to waive counsel for Ohio's adult defendants can be found in Martin at ¶23 (right to the assistance of counsel implicitly embodies a "correlative right to dispense with a lawyer's help") and Crim.R. 44(C). In Gault, the Court held that with respect to the right to counsel, "[t]here is

[3] This point—especially as it pertains to juvenile defendants in juvenile court—is thoroughly outlined in the Brief of Amici Curiae Justice for Children Project and Ohio Association of Criminal Defense Lawyers in Support of Appellant Corey Spears, at pp. 9-11.

no material difference between adult proceedings and juvenile proceedings...." Gault, 387 U.S. at 36. For juvenile defendants in juvenile court, Juv.R. 3 provides that "rights of a child [including the right to counsel] may be waived with the permission of the court."[4]

Contrary to the State's assertion that "R.C. 2151.352 can, and should be, construed as creating a nonwaivable right to counsel for a child not represented by his parent, guardian, or custodian" (Answer, p. 6), and in accordance with the State's assertion that the right to counsel under R.C. 2151.352 is "subject to the right to waive" (Answer, p. 6), Appellant urges this Court to soundly reject the notion that the right to counsel cannot be waived by a child not "represented" by his parent, guardian or custodian. Instead, this Court should recognize that the fifth sentence of R.C. 2151.352 impinges upon a child's right to counsel. Without action by this Court, Ohio's courts of appeals will continue to come to varying conclusions about what effect the sentence has on a child's right to counsel, and as in Spears, Ohio's courts will continue to rely on the presence an uninformed, though usually well-meaning, parent to cure what is otherwise an invalid waiver of the right to counsel. Because a parent's "representation" of her child has no bearing on the right to counsel, this Court should sever the fifth sentence from the statute. See State v. Foster, 109 Ohio St.3d 1, 2006-Ohio-856.

[4] Juv.R. 3 also provides that a child's right to counsel at a "hearing conducted pursuant to Juv.R. 30 may not be waived."

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.

Upon strict compliance with due process and Juv.R. 29(B), a juvenile defendant in juvenile court should be permitted to validly waive his right to counsel. In support of his Second Proposition of Law, Appellant offered the standard for waiver of counsel found in In re Royal (1999), 132 Ohio App. 3d 496, 502-03, 725 N.E.2d 685, as an excellent example of a clear and comprehensive standard that respects both the constitutional requirements for due process and the mandatory provisions in Juv.R. 29(B). Brief, pp. 36-37.[5] The State has not accepted, rejected, or even directly responded to Appellant's Second Proposition of Law. Answer, pp. 7-12.

Instead, the State declares, without referring to any standard of review, that "Appellant's waiver of counsel was voluntarily, knowingly, and intelligently made." Answer, p. 7. Given the context of the State's argument, Appellant assumes that the State advances the section from Spears, cited in its Answer at p. 10, as its proposed standard for waiver of counsel and responds accordingly. Along with this "standard," the State also emphasizes the "factual background" of Appellant's case—presumably to highlight what it believes is the usefulness of three facts to be considered when determining whether a child validly waived his right to counsel in juvenile court: signed "rights papers," a parent's expressed agreement with the child's statement

[5] The standard in Royal is also heralded by Amici Curiae Children's Law Center, et al., at p. 16, and Amici Curiae Justice for Children Project and Ohio Association of Criminal Defense Lawyers, at pp. 13-15

declining counsel, and the child's prior, uncounseled experiences before the juvenile court. However, because the State's standard fails to recognize Juv.R. 29(B)'s mandatory language and the strong presumption against waiver of the right to counsel, and because none of the State's proposed factors is supported by authority under Gault or Ohio law, the State's arguments must be rejected by this Court.

II. Strict compliance with the mandatory language found in Juv.R. 29(B) is the cornerstone of the standard for valid waiver of a child's right to counsel in Ohio's juvenile courts.

Juvenile Rule 29 provides an outline for all issues to be addressed at the adjudication phase of a hearing in juvenile court. Juvenile Rule 29(B)'s language is mandatory, and it provides the framework for what must occur before a child may waive his right to counsel (Juv.R. 29(B)(1)–(3)), what must occur if a child does not waive his right to counsel (Juv.R. 29(B)(4)), and what must occur after a child waives his right to counsel, should he elect to do so (Juv.R. 29(B)(5)).

Despite Juv.R. 29(B)'s mandatory steps, which are outlined in a logical order, the State suggests that there are "other due process predicates contained within Juv.R. 29(B)" that do not relate to the waiver of counsel. Answer, p. 10. It is unclear from the State's brief what those "other predicates" may be. Appellant, by contrast, asserts that some of the "due process predicates" contained in Juv.R. 29(B) are those stated by the United States Supreme 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." Von Moltke v. Gilles (1948), 332 U.S. 708, 724, 68 S. Ct. 316 (plurality opinion); Martin at ¶40. Appellant

recognizes that this Court has used "substantial compliance" with regard to all the factors in the cited passage from Von Moltke. Appellant notes, however, that Juv.R. 29(B) does not contain *all* of the factors from Von Moltke, and that Juv.R. 29(B) is mandatory. Therefore, it seems that the drafters of Juv.R. 29(B) intended to emphasize the factors mandated by Juv.R. 29(B)—perhaps because they recognized that children in juvenile court need more protections than do their adult counterparts. Just as Von Moltke has provided the foundation for the valid waiver of the right to counsel for adult defendants in adult court, Juv.R. 29(B) is the foundation for waiver of the right to counsel in juvenile court. Moreover, the clear language of Juv.R. 29(B) demonstrates that strict compliance with the rule is required to ensure that any waiver of the right to counsel comports with the accused juvenile's due process rights. Accordingly, this Court should reject the State's muddled view of Juv.R. 29(B), and adopt Juv.R. 29(B)'s unambiguous and mandatory language as the foundation for the standard for valid waiver of the right to counsel in juvenile court.

III. A juvenile court's inquiry about "rights papers," which were given to and signed by a child and his parent before his court hearing, does not amount to a sufficient "inquiry to determine that the relinquishment is of a 'fully known right' and is voluntar[il]y, knowingly, and intelligently made."[6]

The State places a great deal of emphasis on the "rights papers" (also referred to as "rights form" and "written rights waiver") that Corey and his mother received and signed just before Corey's hearing. Specifically, the State mentions these papers sixteen times—four times on p.1; six times on p.7; four times on p. 10; and, two times on p. 11. It seems that the State believes that the court's three-question inquiry about the "rights papers," and Corey's three

[6] Spears at ¶45; Gault at 42 (cited in Appellee's Answer, at p. 10).

"Yes, sir" responses that followed (T.p. 2) amount to a "sufficient inquiry" of Corey's right to counsel.

In his brief, Appellant critiqued the court's reliance on these rights forms and outlined six specific problems with the forms used in Corey's case. Brief, pp. 22-23. The State did not respond to Appellant's criticisms of the rights papers; rather, it repeatedly referred to the papers' existence, and said that "the trial court then engaged the juvenile i[n] a dialogue via question and answer regarding the Rights Forms, his right to an attorney, and the waiver of an attorney." Answer, pp. 10-11. The State then concluded, it is "clear that [Corey's] waiver was voluntary, knowingly, and intelligently made." Answer, p. 11.

While a court's use of a written waiver of the right to counsel form is not mandated or even suggested by the rules, an *in-court* colloquy to ensure the child knowingly, intelligently, and voluntarily waives his right to counsel is. Juv.R. 29(B). The dangers of a court's reliance on these rights papers is discussed fully in Appellant's Brief at pp. 22-23. Given the dangers associated with a court's reliance on "rights papers" and the requirements of Juv.R. 29(B), this Court must reject the State's reliance on written "rights papers" in favor of a truly "sufficient inquiry" of a child's right to counsel in juvenile court.

IV. A parent's agreement with her child's statement declining counsel cannot cure an otherwise invalid waiver of the right to counsel.

The State also relies on the fact that the court asked Corey's mother, "do you agree with Corey's decision today to go forward without an attorney?" and that she responded, "Yes, sir" to support its conclusion that Corey validly waived his right to counsel. Answer pp. 8, 11. (T.p. 3.) As was discussed in Appellant's First Proposition of Law at pp. 3-5 above, under Ohio law, a parent cannot waive her child's right to counsel, nor can she "veto" a child's valid waiver of his right to counsel. See In re Agler (1969), 19 Ohio St. 2d 70, 78, 249 N.E.2d 808; In re Doyle

(1997), 122 Ohio App. 3d 767, 771-72, 702 N.E.2d 970. A child's valid waiver of his right to counsel stands on its own—without interference or interjection by his parent. Obviously, if a parent were to express concerns that her child does not understand his right to counsel, the court would be wise to consider them. Because the State's emphasis on Ms. Spears' agreement with Corey's arguably invalid waiver of his right to counsel is misguided, it must be rejected.

V. A juvenile court's consideration of the child's prior, uncounseled experiences before the juvenile court—especially when there is no evidence of this consideration in the record—cannot be said to meet the court's duty to "consider the totality of the circumstances, including factors such as the juvenile's age, emotional stability, mental capacity, and prior [']criminal[] experience."[7]

In its answer, the State emphasizes what it calls Corey's "prior criminal experience." Answer, p. 10. The State asserts that "[t]he [juvenile court] was provided a copy of the Appellant's priors, which include convictions on two Assaults, and four prior probation violations in 2004 and 2005." Answer, p. 1. But, the document attached as Appellee's Exhibit 1 could not have been provided to the court before Corey's hearing on August 9, 2005, because the results from the August 9, 2005, hearing appear on page two. And, there is nothing in the record that suggests that anyone "provided the juvenile court" anything before the hearing began, much less a document that had not yet been created.

Although the State asserts that "the trial court should consider the totality of the circumstances, including factors such as the juvenile's age, emotional stability, mental capacity, and prior [']criminal[] experience" (Answer, p. 10), its emphasis on Corey's prior experiences before the juvenile court is illogical. First, there is no evidence in the record to show that the court actually considered Corey's age, emotional stability, mental capacity, and prior court

[7] Spears at ¶45; Royal at 503; In re Johnson (1995), 106 Ohio App. 3d 38, 41 (cited in Appellee's Answer, at p. 10).

experience. The State asserts, "No issue was demonstrated or has been raised regarding his emotional stability or mental capacity." Answer p. 10. The State also points out that "In the case sub judice, the juvenile was almost fourteen." Answer, p. 10. In Appellant's brief, he cites In re Johnson (1995), 106 Ohio App. 3d 38,41, 665 N.E.2d 247, in which the First District Court of Appeals said, "Within the totality-of-the-circumstances test, the court was required to take special care given [the juvenile's] age (thirteen)." Brief, p. 37. The State does not address Johnson, and does not attempt to show that the court should have taken "special care" with Corey, who, like Johnson, was thirteen at the time of his hearing.

Further, the State's statement that Corey's "priors" include "convictions on two Assaults and four prior probation violations in 2004 and 2005" is inaccurate and misleading. To clarify, Corey has never been *convicted* of any offense; rather, he has been adjudicated delinquent in juvenile court of two misdemeanor assault charges that occurred when he was twelve years old, and four probation violations that occurred when he was 13 years old. The State characterizes Corey's court history as "significant" and "criminal." Answer, p. 10. The State fails to recognize that at the hearing on August 9, 2005, Corey faced a felony-level charge for the first time. Further, and most importantly, the State emphasizes Corey's six prior appearances in juvenile court but fails to recognize that Corey has *never* been represented by counsel in any of his court appearances. It is difficult to imagine what significance Corey's prior uncounseled experiences with the court carries—especially when the record does not reflect that the court ever considered it.

The "totality of the circumstances" test, which is cited by Appellant (Brief, pp. 37-8) and Appellee (Answer, p. 10), is an important piece of a clear and comprehensive standard for waiver of the right to counsel in juvenile court—so long as it is not misused. In Spears, as is too

often the case in Ohio, the court used a post hoc application of the "totality of the circumstances" to find waiver when the record does not reflect that the court actually considered the factors such as a child's age, emotional stability, mental capacity, and prior court experience. Because the State's reliance on the totality of Corey's circumstances exemplifies the misuse of these factors, it must be rejected by this Court.

Despite the State's arguments, the issue here is not whether Corey validly waived his right to counsel. The issue is whether there should be one comprehensive waiver standard that requires strict compliance with constitutional safeguards to ensure such waiver is knowing, intelligent, and voluntary. Appellant and his Amici offer the standard applied in Royal, at 502-03, and ask this Court to soundly reject the factors advanced by the State.

CONCLUSION

In order to fully enforce the right to counsel in juvenile cases, this Court should rule that a child's right to counsel is the child's right alone. Further, the presumption is strongly against accepting any waiver of the right to counsel, and juveniles can make a knowing, intelligent, and voluntary waiver of their right to counsel only after strict compliance with Juv.R.29(B) and constitutional requirements.

This Court should remand the case to the court of appeals with instructions to send this case to the juvenile court for adjudication.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing **REPLY BRIEF OF APPELLANT COREY SPEARS** was forwarded by regular U.S. Mail this 6th day of March, 2007 to the office of Daniel H. Huston, Licking County Assistant Prosecutor, 20 South Second Street, 4th Floor, Newark, Ohio 43055.

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