

**IN THE
INDIANA COURT OF APPEALS
CAUSE NO. 43A05-1101-CR-00027**

PAUL H. GINGERICH,)	Appeal from the
Appellant (Defendant below),)	Kosciusko Superior Court
)	
vs.)	Cause No. 43C01-1004-MR-77
)	
STATE OF INDIANA,)	The Honorable Rex Reed,
Appellee (Plaintiff below).)	Judge

**BRIEF OF AMICUS CURIAE
ON BEHALF OF APPELLANT, PAUL H. GINGERICH**

Marsha L. Levick, Esq.
Counsel of Record for Amicus Curiae
JUVENILE LAW CENTER
1315 Walnut St.
Suite 400
Philadelphia PA 19107
(215) 625-0551
Fax: (215) 628-2808
mlevick@jlc.org

Joel M. Schumm, Esq.
IN Attorney ID number 20661 49
I.U. School of Law---Indianapolis
530 W. New York St. #210C
Indianapolis, IN 46202
(317) 278-4733
Fax (317) 274-8565
jmschumm@iupui.edu

CONTENTS

CONTENTS i

TABLE OF AUTHORITIES..... ii

INTEREST OF THE *AMICUS CURIAE* 1

STATEMENT OF ISSUES 1

STATEMENT OF THE CASE 1

STATEMENT OF THE FACTS..... 1

SUMMARY OF THE ARGUMENT..... 1

ARGUMENT 2

CONCLUSION..... 16

WORD COUNT CERTIFICATE..... 17

CERTIFICATE OF SERVICE..... 18

TABLE OF AUTHORITIES

CASES

<i>Bellotti v. Baird</i> , 443 U.S. 622 (1979).....	2
<i>Bridges v. State</i> , 299 N.E.2d 616 (Ind. 1973).....	7
<i>Clemons v. State</i> , 317 N.E.2d 859 (Ind. Ct. App. 1974).....	9
<i>Donald v. State</i> , 930 N.E.2d 76 (Ind. Ct. App. 2010).....	10
<i>Drope v. Missouri</i> , 420 U.S. 162 (1975)	6, 14
<i>Dusky v. United States</i> , 362 U.S. 402 (1960)	6
<i>Ex Parte Potter</i> , 21 S.W. 3d 290 (Tex. Crim. App. 2000)	10
<i>Gallegos v. Colorado</i> , 370 U.S. 49 (1962).....	2
<i>Godinez v. Moran</i> , 509 U.S. 389 (1993).....	13
<i>Graham v. Florida</i> , 130 S. Ct. 2011	2
<i>Hagan v. State</i> , 682 N.E.2d 1292 (Ind. Ct. App. 1996).....	9
<i>Haley v. Ohio</i> , 332 U.S. 596 (1948).....	3
<i>Henson v. State</i> , 354 N.E.2d 174 (Ind. 1976).....	13
<i>In re Gault</i> , 387 U.S. 1 (1967).....	7
<i>In re K.G.</i> , 808 N.E.2d 631 (Ind. 2004)	7
<i>In the Interest of S.H.</i> , 469 S.E.2d 810 (Ga. Ct. App. 1996).....	14
<i>In the Matter of James Paul H.</i> , 143 Cal. Rptr. 398 (Cal. App. 1978)	8, 9
<i>In the Matter of K.G.</i> , 808 N.E.2d 631 (Ind. 2004).....	12
<i>J.D.B. v. North Carolina</i> , ___ U.S. ___, 131 S. Ct. 2394 (2011).....	2, 3
<i>Jackson v. Indiana</i> , 406 U.S. 715 (1972)	12
<i>Kent v. United States</i> , 383 U.S. 541 (1966).....	5, 7, 9
<i>Mast v. State</i> , 914 N.E.2d 851 (Ind. Ct. App. 2009)	14
<i>McKeiver v. Pennsylvania</i> , 403 U.S. 528 (1971)	7
<i>Pate v. Robinson</i> , 383 U.S. 375 (1966).....	13
<i>Perkins v. State</i> , 718 N.E.2d 790 (Ind. Ct. App.1999).....	7
<i>Pruett v. Barry</i> , 696 P.2d 789 (Colo.1985).....	10
<i>Roper v. Simmons</i> , 543 U.S. 551 (2005).....	2

<i>State v. Tyler</i> , 398 So.2d 1108 (La.1981).....	10
<i>Summers v. State</i> , 248 Ind. 551, 230 N.E.2d 320 (Ind. 1967).....	6, 11, 12
<i>Thomas v. State</i> , 562 N.E.2d 43 (Ind. Ct. App. 1990).....	5, 11
<i>Tyrone B. v. Superior Court</i> , 78 Cal. Rptr.3d 569 (Cal. Ct. App. 2008).....	8
<i>Villalon v. State</i> , ---N.E.2d ---, 2011 WL 3806341 (Ind. Ct. App.).....	9

CONSTITUTIONAL PROVISIONS

IN Const. Art 1, §13.....	7
---------------------------	---

STATUTES

33 VT. STAT. ANN. § 5204(d)(1).....	11
42 PA. CONS. STAT. § 6355(G)(3).....	11
ALA. CODE 1975 § 12-15-30(d)(5).....	11
ARK. CODE ANN. § 9-27-318(g)(6).....	11
ARK. CODE ANN. § 9-27-502(b)(1)(A).....	12
COLO. REV. STAT. § 19-2-518 (4) (b)(IV).....	11
D.C. SCR-Juvenile Rule 108(c).....	12
F. S. A. § 985.223 (West 2011).....	3
FLA. STAT. § 985.556.....	11
HAW. REV. STAT. § 571-22(c)(5).....	11
I.C. § 31-32-4-1.....	7
I.C. § 31-30-3-4.....	8
I.C. § 31-30-3-4.....	8
I.C. § 31-30-3-4 (1)-(3).....	10
I.C. § 35-36-3-1.....	14
I.C. § 35-36-3-1(b).....	12
I.C. § 35-36-3-3(a).....	12
I.C. § 35-36-3-3(b).....	12
IDAHO CODE ANN. § 20-508(8)(d).....	11
KAN. STAT. ANN. § 38-2347.....	11
LA. CHILD. CODE ANN. Art 862(A)(2)(a).....	11

LA. CHILD. CODE ANN. Art. 305(E)(1).....12

MISS. CODE ANN. § 43-21-157(5)(f).....11

MO. REV. STAT. § 211.071 6(6)11

MODEL PENAL CODE § 4.06(3)(2001)..... 8

N.C. GEN. STAT. § 7B-2203(b)(2).....11

N.D. CENT. CODE § 27-20-34(3)(c)11

N.H. REV. STAT. ANN. § 169-B:24(I)(f)11

N.M. STAT. ANN. § 32A-2-20(c)(5).....11

NEB. REV. STAT. § 43-276(6)11

NEV. REV. STAT. § 62B.390(3)(a).....12

OHIO REV. CODE ANN. § 2152.12(E)(6)11

OKLA. STAT. ANN. § 2-5-205(E)(4).....11

OR. REV. STAT. § 419C.349(3).....11

TEX. CODE ANN. § 54.02 (f)(2)11

UTAH CODE ANN. 1953 § 78A-6-703(3)(e)11

VA. CODE ANN. § 16.1-269.1(A)(3).....12

West’s Ann. Cal. Welf. & Inst. Code § 707 (a)(1)(C)..... 8

WIS. STAT. ANN § 938.18(5)(a)11

WYO. STAT. ANN. 1977 § 14-6-237(b)(v).....11

OTHER AUTHORITIES

Richard Bonnie, *The Competence of Criminal Defendants: A Theoretical Reformulation*, 10 BEHAV. SCI. & L., 291 (1992) 7

Vance Cowden & Geoffrey McKee, *Competency to Stand Trial in Juvenile Delinquency Proceedings: Cognitive Maturity and the Attorney-Client Relationship*, 33 U. OF LOUISVILLE J. FAM. L. 629 (1995)..... 4

Nitin Gogtay et al., *Dynamic Mapping of Human Cortical Development During Childhood Through Early Adulthood*, 101 PROC. OF THE NAT’L ACAD. OF SCI. 8174 (2004) 5

Thomas Grisso et al., *Juveniles’ Competence to Stand Trial: A Comparison of Adolescents’ and Adults’ Capacities as Trial Defendants*, 27 LAW & HUM. BEHAV. 333 (2003)..... 4

Thomas Grisso, *What We Know about Youths' Capacities as Trial Defendants*, in YOUTH ON TRIAL: A DEVELOPMENTAL PERSPECTIVE ON JUVENILE JUSTICE 139 (Thomas Grisso & Robert G. Schwartz eds. 2000) 4

Elizabeth Scott & Thomas Grisso, *Developmental Incompetence, Due Process, and Juvenile Justice Policy*, 83 N.C.L. REV. 793 (2005) 3, 13

Elizabeth S. Scott & Laurence Steinberg, *Rethinking Juvenile Justice* 46-68 (2008)..... 5

Laurence Steinberg, *Juveniles on Trial: MacArthur Foundation Study Calls Competency Into Question*, 18 CRIM. JUST 20 (2003) 3

Patricia Torbert et al., *State Responses to Serious and Violent Juvenile Crime*, Washington, D.C., Office of Juvenile Justice and Delinquency Prevention (1996). 6

Youth in the Criminal Justice System: An ABA Task Force Report 4, available at: http://www.americanbar.org/content/dam/aba/publishing/criminal_justice_section_newsletter/crimjust_juvjus_jjpolicies_YCJSReport.authcheckdam.pdf. 5

INTEREST OF THE *AMICUS CURIAE*

Founded in 1975, Juvenile Law Center (JLC) is the oldest multi-issue public interest law firm for children in the United States. Juvenile Law Center works generally to advance the rights and well-being of children in jeopardy. JLC works to ensure children are treated fairly by systems that are supposed to help them. JLC also works to ensure that children's due process rights are protected at all stages of juvenile court proceedings, and that the laws policies and practices which govern the juvenile and adult criminal justice systems consider the unique developmental differences between youth and adults.

STATEMENT OF ISSUES

Amicus adopted the statement of issues presented by appellant.

STATEMENT OF THE CASE

Amicus adopted the statement of the case presented by appellant.

STATEMENT OF THE FACTS

Amicus adopts the statement of facts presented by appellant.

SUMMARY OF THE ARGUMENT

By ignoring settled research on adolescent and child development, the trial court failed to adequately protect the due process rights of Paul Gingerich. In particular, the court failed in its obligation at three pivotal points in these proceedings to assure that Paul was competent: prior to the initiation of the transfer hearing, at the transfer hearing itself and prior to acceptance of the plea agreement. The failure of the court to raise on its own or otherwise address the issue of competency violates the due process clause of the United States Constitution as well as Indiana

law. This failure resulted in fundamentally unfair proceedings in juvenile and criminal court that can only be remedied by vacating the plea agreement.¹

ARGUMENT

I. Children’s Distinct Developmental Characteristics Must be Accounted for in the Court’s Determination of Whether Due Process Requires that a Child be Competent at All Stages of Transfer Proceedings.

A. The Law Recognizes that Children are Fundamentally Different than Adults.

The Supreme Court has repeatedly recognized that juvenile status drives legal status, and that abundant research on child development supports children’s distinct status under law. Children’s immaturity and lack of experience hinder their ability to protect and exercise their rights. In *Gallegos v. Colorado*, a case involving the admissibility of a juvenile’s statement, the Court observed that an adolescent “cannot be compared with an adult in full possession of his senses and knowledgeable of the consequences of his admissions. . . . Without some adult protection against this inequality, a 14-year-old boy would not be able to know, let alone assert, such constitutional rights as he had.” 370 U.S. 49, 54 (1962). In *Roper v. Simmons*, 543 U.S. 551 (2005) and *Graham v. Florida*, the Court also recognized that a youth’s immaturity and vulnerability impacts their decision making as well as their culpability. 130 S. Ct. 2011, 2026 (2010) (quoting *Roper*, 543 U.S. at 569-70)). Most recently in *J.D.B. v. North Carolina*, the Court emphasized the importance of age and youth in ensuring adequate protection of children’s due process rights. ___ U.S. ___, 131 S. Ct. 2394 (2011) (finding that a juvenile’s age is a factor that must be considered under the *Miranda* analysis). Children “often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them.” *Id.*

¹ Among the terms of the plea agreement which *amicus* argues is invalid is the waiver of Gingerich’s right to appeal his transfer to adult court.

at 2397 (quoting *Bellotti v. Baird*, 443 U.S. 622, 635 (1979)). Immaturity confounds a child's understanding of the law and court process: "events that 'would leave a man cold and unimpressed can overawe and overwhelm a lad in his early teens.'" *Id.* (quoting *Haley v. Ohio*, 332 U.S. 596, 599 (1948) (plurality opinion)). These cases support the application of rigorous scrutiny when considering the impact of immaturity and youth on due process protections for children, including requiring competency at all stages of the proceedings.

B. Research Confirms that Young Teens Lack Adjudicative and Decisional Competency Necessary To Ensure Fundamental Fairness in the Justice System.

As discussed in detail below, establishing competency is a cornerstone of due process. Social science research establishes that age and competency are directly related. While incompetence can be a result of mental illness, it can also be a result of developmental delays in adults or children' inherent developmental immaturity.² Laurence Steinberg, *Juveniles on Trial: MacArthur Foundation Study Calls Competency Into Question*, 18 CRIM. JUST 20, 21 (2003). For twelve year old Gingerich, charged with murder, questions of his incompetence due to developmental immaturity should have been obvious. When such young children are subject to prosecution in criminal court, the justice system must recognize the likelihood of incompetence not because of mental illness or cognitive delays, but simply because of their age-appropriate immaturity. *See e.g.*, Elizabeth Scott & Thomas Grisso, *Developmental Incompetence, Due Process, and Juvenile Justice Policy*, 83 N.C.L. REV. 793 (2005).

As research confirms, many youth, and especially youth under age fourteen, are not legally competent to understand legal proceedings and participate in their defense, the benchmarks of competency. The MacArthur Juvenile Competency Study found that approximately one

² Florida, for example, distinguishes incompetence due to "age or immaturity" from incompetence that may result from mental illness. F. S. A. § 985.223 (West 2011).

third of 11 to 13 year olds are as impaired in their capacities relevant to adjudicative competency as are seriously mentally ill adults likely to be found incompetent to stand trial in adult court. See Thomas Grisso et al., *Juveniles' Competence to Stand Trial: A Comparison of Adolescents' and Adults' Capacities as Trial Defendants*, 27 LAW & HUM. BEHAV. 333 (2003) (summarizing the MacArthur Study). See also Vance Cowden & Geoffrey McKee, *Competency to Stand Trial in Juvenile Delinquency Proceedings: Cognitive Maturity and the Attorney-Client Relationship*, 33 U. OF LOUISVILLE J. FAM. L. 629, 652 (1995) (only 16.7% of children younger than age 13 were evaluated as competent as compared with 80-90 percent of adults who were referred for evaluations); D. Cooper, *Juveniles' Understanding of Trial-related Information: Are They Competent Defendants?* 15 BEHAV. SCI. & L. 167-180 (1997) (youth thirteen or younger performed much more poorly than the older teens recently adjudicated delinquent). Adolescents' understanding of important legal principles, such as a legal right, are highly impaired.³ This lack of capacity and understanding puts a youth's due process rights in jeopardy:

Understanding the legal process and one's choices in it requires knowing not only that one has certain rights, but also knowing what a right is. Defendants' decisions about waiving the right to avoid self-incrimination (for example, in the context of a guilty plea) or waiving the right to a jury trial will be ill informed if they do not conceptualize a right as a legal entitlement, providing protection that authorities in the justice system cannot arbitrarily set aside.

Thomas Grisso, *What We Know about Youths' Capacities as Trial Defendants*, in YOUTH ON TRIAL: A DEVELOPMENTAL PERSPECTIVE ON JUVENILE JUSTICE 139, 148 (Thomas Grisso & Robert G. Schwartz eds. 2000).

Neuroscientific research likewise confirms that many youth, but especially young teens, do not have the capacity to adequately understand the legal process and assist in their own

³ This inquiry is especially important in this case where the child entered a guilty plea agreement forfeiting significant legal rights, such as the right to a jury trial and the right to appeal.

defense. The area of the brain responsible for reasoning and problem solving is the last to develop in the brain. *See* Nitin Gogtay et al., *Dynamic Mapping of Human Cortical Development During Childhood Through Early Adulthood*, 101 PROC. OF THE NAT'L ACAD. OF SCI. 8174 (2004) (study by National Institute of Mental Health). Brain imaging show that areas of the brain associated with impulse control, judgment, and the rational integration of cognitive, social, and emotional information do not fully mature until early adulthood. Elizabeth S. Scott & Laurence Steinberg, *Rethinking Juvenile Justice* 46-68 (2008). This research provides overwhelming support for presuming that 12 or 13-year-olds lack the developmental capacities necessary for adjudicative competence.⁴

II. Due Process Requires that the Court Inquire into the Competency of A Twelve Year Old Child Prior to and During the Consideration of Transfer to Adult Court.

A. Supreme Court Jurisprudence and Indiana Law Make Clear that Due Process Protections Must be Provided to Children Commensurate with the Critical Nature of Waiver Proceedings.

Over four decades ago the Supreme Court established that the transfer to adult criminal court from juvenile court is a pivotal decision that has significant impact on the liberty, rights and future of a child. *Kent v. United States*, 383 U.S. 541, 546 (1966) (finding that transfer is a “‘critically important’ action determining vitally important statutory rights of the juvenile”). Transfer proceedings to adult court must provide due process protections commensurate with the critical nature of the proceedings as “there is no place in our system of law for reaching a result [waiver of juvenile court jurisdiction] of such tremendous consequences without ceremony—

⁴ This research led the ABA Task Force on Youth in the Criminal Justice System to recommend that courts order competency evaluations for any youth. *See Youth in the Criminal Justice System: An ABA Task Force Report* 4 (Feb 2002). Available at http://www.americanbar.org/content/dam/aba/publishing/criminal_justice_section_newsletter/crimjust_juvjus_jjolicies_YCJSReport.authcheckdam.pdf.

without hearing, without effective assistance of counsel, without a statement of reasons.” *Id.* at 553. *See also Thomas v. State*, 562 N.E.2d 43, 45 (Ind. Ct. App. 1990) (same).

This state’s highest court has also extended key due process protections to children during waiver proceedings, stating that the child “should have the right to counsel at such hearing; the right to confrontation of the witnesses against him; and the right to present evidence, if any be available to him, of any circumstances that would entitle him to the benefits that might be afforded to him by the provisions of the Juvenile Act.” *Summers v. State*, 248 Ind. 551, 230 N.E.2d 320, 325 (Ind. 1967). These protections ensure a meaningful, accurate fact-finding hearing prior to transfer. To “protect the full panoply of rights provided by our state and federal constitutions,” waiver proceedings must include “a full investigation and hearing” and a “conscientious determination” by the court. *Vance v. State*, 640 N.E. 2d 51, 55 (Ind. 1994).

In the decades since *Kent*, states have enacted laws that expose more and younger children to criminal court prosecution. *See e.g.*, Patricia Torbert et al., *State Responses to Serious and Violent Juvenile Crime*, Washington, D.C., Office of Juvenile Justice and Delinquency Prevention (1996). Rigorous protection of children’s due process is even more critical today than it was at the time of *Kent*. Fundamental fairness requires that courts consider the competency of young teens at all stages of the transfer process.

B. Establishing Competency Prior to Commencing a Transfer Hearing is Fundamental to Providing Children Due Process Protections.

Assuring the competency of a defendant is essential to maintaining the legitimacy, fairness, and dignity of the judicial process. “It has long been accepted that a person whose mental condition is such that he lacks the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense may not be subjected to a trial.” *Drope v. Missouri*, 420 U.S. 162, 171 (1975). The minimum legal requirements for

adjudicative competence were established in *Dusky v. United States*, 362 U.S. 402 (1960). These are “whether the defendant has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding— and whether he has a rational as well as factual understanding of the proceeding against him.” *Id.* An individual’s ability to assist counsel and make rational decisions is key components of the *Dusky* standard.⁵ This State Supreme Court agrees:

Without question, these rights [elaborated in *In re Gault*, 387 U.S. 1 (1967)] include the right to adequate notice of the charges, appointment of counsel, the constitutional privilege against self-incrimination, and the right to confront opposing witnesses. *The cornerstone of these substantive rights is competence to understand the nature of the charge and to assist in a defense. In our view the want of competence renders the other rights meaningless.*

In re K.G., 808 N.E.2d 631, 635 (Ind. 2004) (internal citations omitted)(emphasis added).

Competency is a fundamental precursor to the exercise of the child’s due process rights at all stages of court proceedings, including transfer hearings.

The right to counsel and the effective assistance of counsel⁶ is among the “essentials of due process and fair treatment” in transfer hearings that the Supreme Court referred to in *Kent*. 383 U.S at 562. Effective assistance of counsel is a vital to assure accurate fact prior to transfer. *See McKeiver v. Pennsylvania*, 403 U.S. 528, 543(1971) (central to the Court’s due process analysis is whether a procedure improves the accuracy of “fact finding procedures”). *A child must be*

⁵ Experts have broken the *Dusky* standard into three measurable capacities: (1) the ability to understand the nature and possible consequence of charges, the trial process, the participants' roles, and the accused's rights; (2) the ability to participate with and meaningfully assist counsel in developing and presenting a defense; and (3) the ability to make decisions to exercise or waive important rights. Richard Bonnie, *The Competence of Criminal Defendants: A Theoretical Reformulation*, 10 BEHAV. SCI. & L., 291 (1992).

⁶ *See Bridges v. State*, 299 N.E.2d 616, 617 (Ind. 1973) (clarifying right to assistance of counsel in all stages of juvenile matters). The right to counsel for juveniles in Indiana is also provided in the constitution and state law. *See* IN Const. Art 1, §13; I.C. § 31-32-4-1. The right to counsel includes a right to effective assistance of counsel. *Perkins v. State*, 718 N.E.2d 790, 793 (Ind. Ct. App.1999).

competent for counsel to be effective. A transfer hearing is not a proceeding or judicial action where counsel can proceed without the participation of the youth.⁷ See *In the Matter of James Paul H.*, 143 Cal. Rptr. 398, 400 (Cal. App. 1978). The youth’s participation and ability to communicate with his attorney is necessary to ensure accurate facts are presented to the court. In *In the Matter of James Paul H.*, the court was explicit in holding that the youth was permitted by California statute to present evidence about his fitness for juvenile court. *Id.* Distinguishing other motions, the court wrote: “However, [fitness] proceedings are not such proceedings. The section itself provides that the court may consider not only the probation officer’s report but ‘any other relevant evidence which . . . the minor may wish to submit.’” *Id.* See also *Tyrone B. v. Superior Court*, 78 Cal. Rptr.3d 569, 572 (Cal. Ct. App. 2008)(to provide effective assistance of counsel—and due process-- in a transfer hearing the child must be competent).

A child’s informed participation is essential to effective representation, particularly where the child carries the burden of rebutting the presumption of waiver.⁸ Like California,⁹ Indiana law places the burden on the youth to demonstrate “it would be in the best interests of the child and of the safety and welfare of the community for the child to remain within the juvenile justice

⁷ See also MODEL PENAL CODE § 4.06(3)(2001) (not precluding “any legal objection to the prosecution which is susceptible of fair determination prior to trial and without the personal participation of the defendant.”)

⁸ The law requires that “after full investigation and hearing, the juvenile court shall waive jurisdiction if it finds that: (1) the child is charged with an act that would be murder if committed by an adult; (2) there is probable cause to believe that the child has committed the act; and (3) the child was at least ten (10) years of age when the act charged was allegedly committed; unless it would be in the best interests of the child and of the safety and welfare of the community for the child to remain within the juvenile justice system. I.C. § 31-30-3-4. As applied to Paul, it is the “unless” clause where effective assistance of counsel is most crucial. However, it is easy to imagine situations where communication with a competent client would be central to challenging whether the state established probable cause. For this inquiry, communicating with the client about the facts surrounding the alleged incident as well as other relevant information would be required to defeat the presumption of waiver.

⁹ See West’s Ann. Cal. Welf. & Inst. Code § 707 (a)(1)(C).

system,” I.C. § 31-30-3-4, and allows him to present “evidence of any circumstances that would entitle him to the benefits inherent in the juvenile justice system.” *Clemons v. State*, 317 N.E.2d 859, 863 (Ind. Ct. App. 1974). “The child is provided with *the opportunity* to present evidence to the juvenile court that it would be in the best interests of the child and of the community to have the child remain within the juvenile justice system.” *Villalon v. State*, ---N.E.2d ---, 2011 WL 3806341 (Ind. Ct. App.) (emphasis added). To have any chance of sustaining the child’s burden, counsel must be able to consult with a competent client so this critical individualized decision can be considered “on its own merit-factors.” *Clemons*, 317 N.E.2d at 863. For the child’s counsel to put forth information specific to his client he must be able to communicate with his client to elicit and confirm relevant information. “If a person cannot effectively communicate or cooperate with his counsel that counsel rather obviously cannot be effective.” *James Paul H.*, 143 Cal. Rptr. at 400.

The effective assistance of counsel takes on greater importance given the reduced due process protections available at transfer hearings in Indiana. Hearsay, for example, is permitted, *see Clemons*, 317 N.E.2d at 865, because, according to the court, all information presented is subject to “examination, criticism, and refutation.” *Id.* at 867. This testing of evidence is “precisely the role of counsel.” *Id.* at 866-67 (*citing Kent*, at 563). If counsel cannot adequately present evidence to rebut the presumption or waiver or challenge evidence presented by the state due to impaired communication with his client, transfer becomes a forgone conclusion. This converts a presumptive transfer statute into a mandatory transfer provision, which was rejected in *Hagan v. State*, 682 N.E.2d 1292, 1295 (Ind. Ct. App. 1996).¹⁰

¹⁰ The court’s denial of the request for a continuance because “the reasons for the continuance go mainly to the underlying case and such discovery will be had if this Court does waive juvenile jurisdiction” demonstrates a lack of understanding of the transfer provision which amounts to a

Other non-adjudicative hearings where competency has been deemed a precondition to proceed support Amici's argument. For example, competency of the defendant must be established before conducting extradition or probation revocations hearings. In *Ex Parte Potter*, the court held that due process required that the individual had to be competent prior to being exposed to extradition proceedings despite a very limited number of facts are at issue. 21 S.W. 3d 290 (Tex. Crim. App. 2000). "Given that an alleged fugitive is entitled to counsel and entitled to challenge the legality of his arrest and assert defenses on the basis of which the extradition warrant may be dismissed, the accused must be sufficiently competent to discuss with his counsel facts relating to the limited defenses that may be raised." *Id.* at 296-7. See also *Pruett v. Barry*, 696 P.2d 789, 793 (Colo.1985); *State v. Tyler*, 398 So.2d 1108, 1112 (La.1981). This Court has joined with many other states in finding that due process requires the establishment of competency before a probation revocation hearing can proceed. *Donald v. State*, 930 N.E.2d 76 (Ind. Ct. App. 2010). Much like transfer proceedings, a probation revocation hearing is civil in nature and lacks the full array of due process rights afforded an adult defendant at trial. *Id.* at 79-80 (listing due process protections similar to those found in transfer proceedings). "[I]ncluding the opportunity of the defendant to be heard and present witnesses and the right to confront and cross-examine witnesses, 'may be rendered null if the defendant is not competent to understand and to participate in or to assist counsel in participating in the proceedings.'" *Id.* at 80 (citing *State v. Chambers*, 783 N.E.2d 965, 968 (Ohio Ct. App. 2002)). Likewise, such protections must be provided to children in transfer proceedings in which they "have the right to counsel at such hearing; the right to confrontation of the witnesses against denial of due process. Waiver Hr'g Tr. 7-8, April 29, 2010. In the court's view, only I.C. § 31-30-3-4 (1)-(3) is relevant to transfer. By ignoring the "unless" clause the court excluded the consideration of competency and best interests.

him; and the right to present evidence, if any be available to him, of *any circumstances* that would entitle him to the benefits that might be afforded to him by the provisions of the Juvenile Act.” *Summers v. State*, 240 Ind. 551, 230 N.E.2d at 325. Non-convicted children facing transfer are no less entitled to the due process protection of assuring competency than a probationer who has already been convicted of criminal conduct.

C. Competency of the Juvenile to Participate in Criminal Court must be considered at the Transfer Hearing.

Whether the juvenile is competent to stand trial as an adult must be considered by the juvenile court at the time of transfer. In addition to considering “whether certain juveniles are beyond rehabilitative philosophy,” *Thomas*, 562 N.E.2d at 45, the court must also find that they are capable of understanding criminal court proceedings and assisting their lawyer in their defense. Transferring an incompetent child violates basic principles of due process and serves no legitimate public policy.

Indiana is in the minority in failing to legislatively require consideration of a child’s developmental competence or maturity at transfer. Many states consider developmental maturity,¹¹ and five explicitly require that competency is addressed prior to transfer.¹² These statutes acknowledge that competency is a precursor to fair proceedings and that a child’s

¹¹ See ALA. CODE 1975 § 12-15-30(d)(5); ARK. CODE ANN. § 9-27-318(g)(6); COLO. REV. STAT. § 19-2-518 (4) (b)(IV); FLA. STAT. § 985.556; HAW. REV. STAT. § 571-22(c)(5); IDAHO CODE ANN. § 20-508(8)(d); KAN. STAT. ANN. § 38-2347; LA. CHILD. CODE ANN. Art 862(A)(2)(a); MISS. CODE ANN. § 43-21-157(5)(f); MO. REV. STAT. § 211.071 6(6); N.C. GEN. STAT. § 7B-2203(b)(2); N.D. CENT. CODE § 27-20-34(3)(c); NEB. REV. STAT. § 43-276(6); N.H. REV. STAT. ANN. § 169-B:24(I)(f); N.M. STAT. ANN. § 32A-2-20(c)(5); OHIO REV. CODE ANN. § 2152.12(E)(6); OKLA. STAT. ANN. § 2-5-205(E)(4); OR. REV. STAT. § 419C.349(3); 42 PA. CONS. STAT. § 6355(G)(3); TEX. CODE ANN. § 54.02 (f)(2); UTAH CODE ANN. 1953 § 78A-6-703(3)(e); 33 VT. STAT. ANN. § 5204(d)(1); WIS. STAT. ANN § 938.18(5)(a); WYO. STAT. ANN. 1977 § 14-6-237(b)(v).

¹² ARK. CODE ANN. § 9-27-502(b)(1)(A); D.C. SCR-Juvenile Rule 108(c); LA. CHILD. CODE ANN. Art. 305(E)(1); NEV. REV. STAT. § 62B.390(3)(a); VA. CODE ANN. § 16.1-269.1(A)(3).

capacities based on their development and age impact their ability to understand criminal proceedings. Evidence related to a child's competency is among the relevant "circumstances that would entitle him to the benefits that might be afforded to him by the provisions of the Juvenile Act." *Summers*, 230 N.E.2d at 325.

Transferring an incompetent child to criminal court serves no legitimate policy interest. Transfer statutes allow for harsher sentences for children than those available in juvenile court. Transferring an incompetent child fails to satisfy that purpose because 1) the incompetent child is not subject to criminal proceedings and 2) the competency restoration scheme was not designed to address incompetency based on immaturity.¹³ Under Indiana law, if a child is found incompetent in criminal court under I.C. § 35-36-3-1(b), he must be committed to the division of mental health and addiction services (DMHA) be provided competency restoration services. Within ninety days, the service provider must certify whether the defendant has a "substantial probability" of attaining competency. I.C. § 35-36-3-3(a) (2008). If there is no substantial probability, then regular commitment proceedings are initiated. I.C. § 35-36-3-3(b). If there is a substantial probability that competency can be regained, the DMHA has another ninety days to continue providing services. *Id.* Incompetent individuals cannot be held indefinitely with charges pending. *See Jackson v. Indiana*, 406 U.S. 715, 738 (1972). Yet where incompetency is based on a child's immaturity, the child's 'competency' cannot be restored. "Immaturity-based incompetence based on the child's limited understanding and decision making capacity often can be remedied only through the maturation process. If this process extends into the future for a year or more, *Jackson's* due process concerns are implicated." Elizabeth Scott & Thomas Grisso,

¹³ While *In the Matter of K.G.*, addresses the inapplicability of the adult competency standard to children in juvenile court, it makes clear the lack of appropriate services and facilities run by the division of mental health available for incompetent children. 808 N.E.2d 631, 638 (Ind. 2004).

Developmental Incompetence, Due Process, and Juvenile Justice Policy, 83 N.C.L.Rev. 793, 829 (2005). Transferring a twelve year old child to criminal court without any inquiry into his competency in criminal court violates basic due process principles and serves no legitimate criminal justice policy.

D. Due Process Requires that the Court Inquire into the Competency of A Twelve Year Old Child Before Accepting His Plea of Guilty.

The trial court had an obligation under both the United States Constitution and Indiana law to order a competency evaluation of Paul before accepting his guilty plea. A court may not accept a guilty plea from an incompetent defendant even where he is adequately represented by counsel. *See Godinez v. Moran*, 509 U.S. 389 (1993); *Henson v. State*, 354 N.E.2d 174 (Ind. 1976). It is *per se* error for a trial judge to fail to insist on a thorough inquiry into the child's competence before accepting a guilty plea. *See Pate v. Robinson*, 383 U.S. 375 (1966). In *Pate*, the Court held that even though no hearing on competency was requested at trial, the defendant was constitutionally entitled to a hearing on the issue, and the trial judge had a duty to raise the issue, when the facts suggested that the defendant was not competent. This important issue cannot be waived by the defendant. *Id.* at 384. In this case, the court failed in its responsibility to order a competency evaluation in the face of clear evidence of incompetency. It failed as well to engage in an adequate colloquy to ensure that the guilty plea was knowing, intelligent, and voluntary.¹⁴

As discussed above, a child's right to counsel would be rendered meaningless and ineffective if he were not competent. *See e.g., In the Interest of S.H.*, 469 S.E.2d 810 (Ga. Ct.

¹⁴ While engaging in a legally adequate colloquy would not have relieved the court of its obligation to order a competency evaluation, it would have highlighted Paul's incompetency. Competency, including an understanding of one's rights, is required for the courts to accept a guilty plea. *See Henson v. State*, 354 N.E.2d 174, 177 (Ind. 1976).

App. 1996). Importantly, under Indiana law, the court has an absolute obligation to order a competency evaluation if “at any time before final submission of any criminal case to the court or the jury trying the case, the court has reasonable grounds for believing that the defendant lacks the ability to understand the proceedings and assist in the preparation of a defense...” I.C. § 35-36-3-1.¹⁵ Determining whether to take a guilty plea rather than go to trial requires understanding of the legal process, the value and consequences of exercising legal rights, and an ability to communicate with counsel about these concepts. It is apparent from the record that Paul lacked the capacity to intelligently make the decision to plead guilty. At the very least there was significant indication that his competency was in doubt to require the court to do further investigation.

In *Tate v. State*, a Florida appeals court held that due process mandates a competency evaluation of a twelve year old transferred to adult court based on a murder charge “due to his extremely young age and lack of previous exposure to the judicial system.” 864 So.2d 44, 48 (Fla. Dist. Ct. App. 2003). The court held that a competency hearing was necessary

in light of Tate’s age, the facts developed pre-trial and post-trial, and his lack of previous exposure to the judicial system...particularly given the complexity of the legal proceedings....

Id. at 50. The serious nature of the charges also impacted the competency analysis: “...it cannot be determined, absent a hearing, whether Tate could meet competency standards incident to facing a first-degree murder charge involving profound decisions regarding strategy, whether to make disclosures, intelligently analyze plea offers, and consider waiving important rights.” *Id.*

¹⁵Whether there are sufficient facts requiring the court to inquire further into competency is determined by the facts of each case. *Mast v. State*, 914 N.E.2d 851, 856 (Ind. Ct. App. 2009). The Supreme Court has stated that there are a “wide range of manifestations and subtle nuances” that may indicate further inquiry. *Drope*, 420 U.S. at 182.

Counsel below repeatedly raised Paul's immaturity and lack of experience with the justice system. Indeed, driving counsel's request for a continuance of the waiver hearing was the desire to get a psychological evaluation and the input of other professionals. A preliminary evaluation raising explicit doubts about competence was presented to the court with the motion for reconsideration. *See* Stephen Ross, PsyD, *Preliminary Report of Forensic Evaluation*, August 4, 2010. App. 322. At the time of sentencing, a full Report had been provided presenting the uncontroverted opinion of a psychologist that Gingerich was incompetent. *See* Stephen Ross, PsyD, *Summary of Evaluation*, October 26, 2010. App. 350. The evaluation called into question whether Paul understood the concept of a right and the consequence of waiving his *Miranda* rights. App. 360-362. It also showed that he lacked a basic understanding of the judicial process and was unable to communicate with and assist his lawyer. For example, Gingerich did not understand why he should not speak to the prosecutor without having defense counsel present or understand many of the legal strategies his lawyers proposed. App. 363. He was unable to convey an understanding of the concept of "plea bargaining". App. 363. The court also received information from an experienced attorney who reported concern about this child's understanding of the legal process. She explained that:

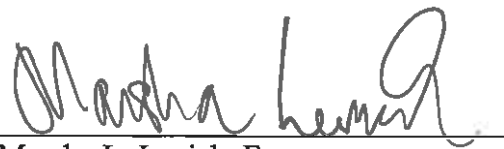
After each hearing I would ask what it was about and what happened. He was never able to articulate any degree of understanding or comprehension. He would shrug his shoulders and say he didn't really know. Paul [would] share with me when his attorney came to visit, yet he never understood the purpose of the visit or anything they talked about.

Patti Taylor Letter, at 2, December 31, 3010. App. 369. Given these significant indicia of incompetency, Paul's young age, the lack of a meaningful colloquy, and the settled research, the court erred in accepting Paul's guilty plea without assuring that he was competent.

CONCLUSION

For the foregoing reasons, Amici respectfully request that the guilty plea be vacated.

Respectfully submitted,

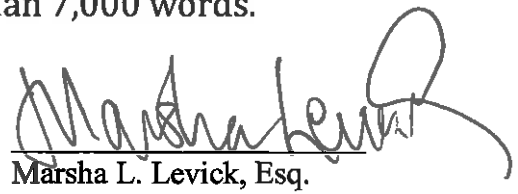


Marsha L. Levick, Esq.
Counsel of Record for Amicus Curiae
JUVENILE LAW CENTER
1315 Walnut St.
Suite 400
Philadelphia PA 19107
(215) 625-0551
Fax: (215) 628-2808
mlevick@jlc.org

Joel M. Schumm, Esq.
IN Attorney ID number 20661 49
I.U. School of Law---Indianapolis
530 W. New York St. #210C
Indianapolis, IN 46202
(317) 278-4733
Fax (317) 274-8565
jmschumm@iupui.edu

WORD COUNT CERTIFICATE

I verify that this brief contains no more than 7,000 words.



Marsha L. Levick, Esq.

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing brief was served on this ____ day of

_____, 2011 upon each of the following:

(BY PERSONAL DELIVERY)

Attorney General Greg Zoeller,
219 Statehouse
Indianapolis, Indiana 46204

(BY U.S. FIRST CLASS MAIL)

Monica Foster
1455 N. Pennsylvania Street
Indianapolis, IN 45202

Robert Joe Hill
151 North Delaware Street, Suite 200
Indianapolis, IN 46204

Victoria Lee Bailey
151 North Delaware Street, Suite 200
Indianapolis, IN 46204

Erin Davies
1002 Russell Street
Covington, KY 41011

Michael James Jenuwine
725 Howard Street
South Bend, IN 46617

Joel M. Schumm