

National Juvenile Defender Center

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**Attorney General's Advisory Committee on
American Indian/Alaska Native Children Exposed to Violence
Hearing #2: February 11, 2014**

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Members of the Committee:

Thank you for inviting the National Juvenile Defender Center (NJDC) to share our perspective on the role of the juvenile defender and the importance of juvenile defense for American Indian and Alaska Native youth involved in the juvenile justice system. We value this opportunity to discuss these critically important justice issues and appreciate your time, your consideration of our comments, and your ultimate recommendations. Today I will share our recommendations with a specific focus on the essential role a juvenile defender plays in protecting youth in juvenile courts, which reflects our specialized expertise.

NJDC serves *to promote justice for all children by ensuring excellence in juvenile defense*. To this end, NJDC provides national leadership on juvenile indigent defense and delivers training, technical assistance, and support to juvenile defenders across the country. NJDC was created in 1999 to respond to the critical need to build the capacity of the juvenile defense bar and to improve access to and quality of counsel for all young people in the juvenile justice system. NJDC gives juvenile defense attorneys a more permanent capacity to address practice issues, improve advocacy skills, build partnerships, exchange information, participate in the national debate over juvenile crime, and advocate for reform of court systems that negatively impact our nation's youth. We provide support to public defenders, appointed counsel, law school clinical programs and non-profit law centers to ensure quality representation of youth in urban, suburban, rural, and tribal areas.

Over the last 15 years, NJDC has had the privilege to acquire a deep and distinct understanding of juvenile indigent defense systems through an in-depth, state-by-state assessment process. To date, NJDC has conducted 21 state assessments of access to and quality of juvenile defense counsel. Each assessment involved a rigorous process involving months of interviewing stakeholders, observing court proceedings, speaking with youth, and concluding with a written assessment of the state's juvenile indigent defense system. The defense assessments provide comprehensive examinations of the systemic and institutional barriers that prevent lawyers from providing adequate legal services to indigent children within a particular state's legal system. In addition to gathering general data and information about the structure of the juvenile indigent defense system, assessments examine various issues including timing of appointment of counsel, waiver of counsel, representation at detention hearings, disposition and post-disposition practices, resource allocation, attorney compensation, supervision and training, and access to investigators, experts, social workers, and support staff. NJDC assessments also highlight promising approaches and innovative practices within the state and offer recommendations to

promoting justice for all children by ensuring excellence in juvenile defense

improve juvenile defense practices and policies. Defenders, judges, legislatures, bar associations, and others have acted to implement recommendations from their respective state assessments, significantly improving the access to and quality of representation for children.

NJDC has seen firsthand the positive outcomes that result from effective legal representation for juveniles. We have also seen the lasting adverse effects that follow when children charged with crimes are provided with inadequate or no representation. We strongly believe that *all* youth involved in the juvenile justice system should have ready and timely access to capable well-trained legal counsel, with individualized representation that is developmentally appropriate, free from bias, and strength-based.

We recognize the unique and special status of childhood and the impact that immaturity, disabilities, or exposure to violence and trauma may have on that representation. We also recognize the unique challenges American Indian and Alaska Native youth face when they come into contact with the juvenile justice system where, unlike the majority of youth in the United States, they may be prosecuted in three distinct justice systems: federal, state, or tribal courts, and subject to transfer to adult court within any of these systems. We are particularly cognizant that the constitutional rights and due process protections that afford indigent defendants in the United States the right to court appointed defense counsel, do not apply to American Indian or Alaska Native defendants—adults or youth—who are prosecuted in tribal court. We understand that under well-settled principles of tribal sovereignty, tribal governments and, by extension, tribal courts are not bound by the Fifth Amendment due process guarantees, nor the Sixth Amendment right to counsel. We believe, however, that juvenile defenders play a vital role in ensuring all youth who enter the juvenile justice system, especially those who have been exposed to violence and may benefit from trauma-informed services, are treated fairly and protected from further harm within the system, or abuses of power by judges, prosecutors, probation officers, detention staff, and other system players. Moreover, given the gross over representation of American Indian and Alaska Native youth in state and federal justice systems, and in secure confinement, we believe it is critical that culturally competent, well-trained juvenile defense counsel be afforded to these youth in order to challenge these disturbing inequities.

The role of the juvenile defender is unique in the justice system, as defense counsel is the only party in juvenile proceedings required to represent the expressed interest of the child. By representing the expressed interests of a child, the defense attorney becomes that child's voice in a proceeding that is often overwhelming, confusing, and frightening for young people. Beyond protecting the child's rights in any proceeding, the defender's job is to empower the child to take an active role in his or her defense. As expressed interest attorneys, defenders do not simply bend to any and every whim of the child. Instead, they elicit a child's perspective, counsel the child on the practical and legal consequences of any decision, and help the child arrive at informed choices and decisions, understanding the myriad of direct and collateral consequences they may face. As such it is invaluable that *all* children have meaningful access to legal counsel in delinquency proceedings to represent their interests and help them negotiate the complicated terrain of the justice system.

Although decisions of the United States Supreme Court that afford a constitutional right to counsel for youth are not binding on tribal nations, NJDC believes these decisions provide persuasive and compelling arguments for the importance of legal representation for all juveniles,

including American Indian and Alaska Native youth. Taken together with the findings of the Attorney General Eric Holder's Defending Childhood Initiative, that American Indian and Alaska Native children are disproportionately exposed to crime and violence and have an exceptional degree of unmet needs for service and support to prevent and respond to the levels of violence they experience, it is essential that defense counsel zealously represent the interests of these youth who come into the juvenile justice system to protect them from further abuse and violence.

ROLE OF JUVENILE DEFENSE COUNSEL

Forty-seven years ago, in *In re Gault*, the United States Supreme Court held that children charged with delinquency have a fundamental constitutional right to counsel under the Due Process clause of the Fourteenth Amendment. 387 U.S. 1 (1967). *Gault* followed on the heels of the Supreme Court's decision four years earlier in *Gideon v Wainwright*, where the Court held that criminal defendants have a constitutional right to counsel under the Sixth and Fourteenth amendments. 372 U.S. 335 (1963). In *Gault* the Court stated:

There is no material difference in this respect between adult and juvenile proceedings... The juvenile needs the assistance of counsel to cope with problems of law, to make skilled inquiry into the facts, to insist upon regularity of the proceedings, and to ascertain whether he has a defense and to prepare and submit it. The child `requires the guiding hand of counsel at every step in the proceedings against him.'

The Court recognized the unique and critical role of the juvenile defender, stating “[t]he probation officer cannot act as counsel for the child. His role is . . . an arresting officer and witness against the child. Nor can the judge represent the child.” Today, in the face of juvenile court systems that are increasingly punitive, this role of the juvenile defender is even more critical. The need to provide children with zealous representation in delinquency hearings is amplified by the increasingly serious and far-reaching consequences that can follow from a juvenile adjudication. No one other than counsel for the juvenile has the duty to argue for the expressed interest of the youthful client. Without defense counsel to argue on their behalf, juveniles face an increased risk of punishment—which may not be proportionate to the offense—whether they are adjudicated delinquent after trial or on entering a plea. This risk of disproportionate punishment is of particular concern for American Indian and Native American children, who often receive little to no court intervention, or disproportionately severe sanctions such as secure confinement and transfer to the adult criminal system. Neelum Arya and Addie C. Rolnick, *A Tangled Web of Justice: American Indian and Alaska Native Youth in Federal, State and Tribal Justice Systems*, Campaign for Youth Justice (June 3, 2008); Terry Cross, *Native Americans and Juvenile Justice: A Hidden Tragedy*, Poverty & Race Research Action Council (Nov/Dec 2008).

Even in courts that truly believe in a rehabilitative process for youth, many well-intentioned stakeholders can put the perceived need of getting a youth services or having the youth participate in restorative justice programs over fundamental fairness for the accused youth. This can be true whether in tribal or state courts. While many children exposed to violence and living with trauma will benefit from services, the juvenile justice system does not always need to

be the doorway to service provision. If a youth can safely be diverted from the court system, services should be provided for in the community. Juvenile defenders can help identify appropriate alternatives.

Where a juvenile cannot be diverted, defense counsel will explore alternatives to detention. For American Indian and Alaska Native youth who have been exposed to violence, this is imperative. The report of the Attorney General's Task Force on Children Exposed to violence makes clear that detention should only be a last resort for youth that pose a safety risk or who cannot receive effective treatment in the community and every safeguard should be employed to ensure that young people are not further victimized or exposed to violence in the system. In hearings before the Indian Law and Order Commission, Bart Lubow, Director of the Annie E. Casey Foundation's Juvenile Justice Strategy Group, told the Commission that "[J]uvenile detention and incarceration are generally unsafe, abusive, ineffective, and horribly expensive interventions that generally worsen the likelihood that the kids who come before juvenile courts will, in fact, succeed as adults" and pointed out the likelihood that "children from different racial or ethnic background would be treated differently simply as a result of those characteristics." Indian Law and Order Commission, *A Roadmap For Making Native America Safer: Report To The President And Congress Of The United States*, (November, 2013) at 168. The report also stated that:

Federal and State juvenile justice systems take Indian children, who are the least well, and make them the most incarcerated. When they do incarcerate them, it is often far from their homes, diminishing prospects for positive contact with their communities. Conditions of detention often contribute to the very trauma that American Indian and Alaska Native children experience. Detention is often the wrong alternative for Indian country youth, yet it is often the rule rather than the exception. *Id.* at 168-169.

A growing body of social science literature demonstrates that the incarceration of children following juvenile convictions may actually hinder the minor's prospects of rehabilitation and increase the likelihood of recidivist behavior. Barry Holman & Jason Ziedenberg, *The Dangers of Detention: The Impact of Incarcerating Youth in Detention and Other Secure Facilities*, Justice Policy Institute, at 4, 6 (2006). Similarly, those youth who are placed into programs or facilities that are poorly matched to their interests and needs, are set up to fail and likely to penetrate further into the justice system. Youth who are unnecessarily incarcerated experience negative peer influences; interference with critical stages of adolescent development; and an inability to engage in the very kinds of activities and relationships needed to build success in the community. Additionally, these consequences may extend well beyond the actual sentences imposed on convicted delinquents, encompassing a broad range of collateral consequences relating to education, employment, housing, public benefits, social stigma, and other areas. All of these consequences can substantially reduce a juvenile's ability to reintegrate into society and transition successfully to adulthood. This underscores the importance of providing all children with juvenile defense counsel who must, at a minimum, be knowledgeable about lessened culpability of adolescents and be prepared to present mitigating evidence in support of the least restrictive option at disposition. Defense counsel who is prepared to provide a vigorous and aggressive defense to proposed placement, services, or interventions through expressed interest representation plays a central role in minimizing the harmful consequences that result from juvenile justice system involvement and delinquency adjudications. Defense counsel for youth is

also critical post-adjudication, where a youth is committed, or under continued jurisdiction of the juvenile court. For American Indian and Alaska Native youth who are incarcerated at disproportionate rates and more likely to be subject to harsh treatment and bias within commitment facilities, access to defense counsel who can respond to issues or complaints regarding the safety of the youth, conditions of confinement, and help the client prepare for successful re-entry, can be invaluable.

ADOLESCENT DEVELOPMENT

Research on adolescent development, recognized by the Supreme Court, affirms the significance of juvenile defense counsel guiding youth through legal decision-making and navigation of the delinquency system. The research has underscored important behavioral differences between adults and adolescents with direct bearing on the design and operation of the justice system, raising doubts about the core assumptions driving the criminalization of youth behavior in the last decades of the 20th century. Youth decision-making capacities become increasingly impaired when they are with peers and when they do not have sufficient time, opportunity, and information to consider consequences. Adolescent development and recent brain research shows that young people differ from adults in ways that hold serious implications for determining what constitutes legally sufficient waivers of rights and for assessing culpability. These developmental differences should be taken into account when issuing dispositional orders and evaluating the adequacy of attorney/client relationships. Juvenile defense counsel is indispensable to a youth's understanding of legal rights and the juvenile justice system.

Adolescence is a distinct, yet transient, period of development between childhood and adulthood characterized by increased experimentation and risk-taking, a tendency to discount long-term consequences, and heightened sensitivity to peers and other social influences. A key function of adolescence is developing an integrated sense of self, including individuation, separation from parents, and personal identity. Experimentation and novelty-seeking behavior, such as alcohol and drug use, unsafe sex, and reckless driving, are thought to serve a number of adaptive functions despite their risks. Research indicates that for most youth, the period of risky experimentation does not extend beyond adolescence, ceasing as identity becomes settled with maturity. Much adolescent involvement in illegal activity is an extension of the kind of risk-taking that is part of the developmental process of identity formation, and most adolescents mature out of these tendencies. However, according to the findings of the Attorney General's Defending Childhood "[e]xposure to violence causes major disruptions of the basic cognitive, emotional, and brain functioning that are essential for optimal development ...when their trauma goes unrecognized and untreated, these children are at a significantly greater risk than their peers for aggressive, disruptive behaviors; school failure; posttraumatic stress disorder (PTSD); anxiety and depressive disorders; alcohol and drug abuse; risky sexual behavior; delinquency; and repeated victimization."

In *Roper v. Simmons*, 543 U.S. 551 (2005), *Graham v. Florida*, 560 U.S. 48 (2012), and *Miller v. Alabama*, 132 S. Ct. 2455 (2012), the U.S. Supreme Court recognized that children are fundamentally different from adults and categorically less deserving of the harshest forms of punishments. *Roper* held that imposing the death penalty on juvenile offenders violates the Eighth Amendment; *Graham* that life without parole sentences for juveniles convicted of non-homicide offenses violate the Eighth Amendment; and *Miller* held that mandatory life without

parole sentences imposed on juveniles convicted of homicide offenses violate the Eighth Amendment. Relying on *Roper*, the U.S. Supreme Court in *Graham* cited three essential characteristics which distinguish youth from adults for culpability purposes: As compared to adults, juveniles have a “lack of maturity” and an “underdeveloped sense of responsibility” which engenders “recklessness, impulsivity, and heedless risk-taking.” Second, juveniles are more susceptible to negative environmental influences and pressures, “including from their family and peers,” in part because minors “have limited control over their own environment and lack the ability to extricate themselves from horrific, crime-producing settings.” And third, juveniles are more likely to change and develop: “a child’s character is not as well-formed as an adult’s; his traits are less fixed and his actions are less likely to be evidence of irretrievable depravity.” *Graham* found that “[t]hese salient characteristics mean that ‘[i]t is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption.’ It remains true that “[f]rom a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor’s character deficiencies will be reformed.” In reaching these conclusions about a juvenile’s reduced culpability, the U.S. Supreme Court has relied upon an increasingly settled body of research confirming the distinct emotional, psychological, and neurological attributes of youth. The Court clarified in *Graham* that, since *Roper*, “developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds. For example, parts of the brain involved in behavior control continue to mature through late adolescence.”

Additionally, in *J.D.B. v. North Carolina* the Court recognized that a youth’s age “is far more than a chronological fact”; “[i]t is a fact that generates commonsense conclusions about behavior and perception” that are “self-evident to anyone who was a child once himself, including any police officer or judge” and are “what any parent knows—indeed, what any person knows—about children generally.” 131 S. Ct. 2394, 2403 (2011). Defense counsel plays a crucial role in ensuring youth understand the process and feel fairly represented. Youth are likely to view proceedings that adhere to due process requirements as fair, and research suggests even if the outcome of is negative, people who believe they were treated fairly are more likely to obey the law, comply with court orders, pay fines, and meet other obligations. Tom Tyler, *Procedural Justice and the Courts*, Court Review: The Journal of the American Judges Association (Vol. 44, 2007-2008). Conversely, children who are not allowed to participate meaningfully in proceedings lose respect for the law, and are less likely to disclose important information and comply with orders issued by a judge. Victoria Weisz, et. al., *Children and Procedural Justice*, Court Review: The Journal of the American Judges Association (Vol. 44, 2007-2008).

GUARANTEEING ACCESS TO JUVENILE DEFENSE COUNSEL IS KEY TO IMPROVED OUTCOMES FOR YOUTH

All youth in federal and state court—including American Indian and Alaskan Native youth—have a right to be represented by defense counsel. While that right may not be guaranteed in many tribal juvenile courts, a look at the reasons behind why representation by trained juvenile defense counsel is important, and why youth should not give up that right, can inform the treatment of American Indian and Native Alaskan youth in all court systems.

The U.S. Supreme Court in *Graham* recognized that youth's limited understanding puts them at a "significant disadvantage in criminal proceedings." Adolescent decision-makers are on average less future-oriented and less likely to properly consider the consequences of their actions. Even where youth have a constitutional right to counsel in state and federal courts, as a result of immaturity, stress, and anxiety, unrepresented youth may feel compelled to enter an admission in order to resolve their cases quickly, whether or not they are actually guilty and whether or not they fully understand the consequences of their decisions. Juveniles too often capitulate to pressures to waive counsel in order to expedite their cases, precipitously entering admissions without obtaining advice from counsel about possible defenses or mitigation, or the short and long-term consequences of such an admission. Youth without counsel may be influenced by probation officers, prosecutors, or judges who are not in a position to provide disinterested advice and indeed have no professional obligation to do so. Youth may be further pressured to proceed unrepresented by family members who have their own reasons to speed up the process, such as the need to limit the amount of days they take off work to attend court or to minimize some perceived shame involved in a longer process. Additionally, many parents have the mistaken idea that proceeding without lawyers leads to better results. As a result, youth often enter admissions without appreciating how an adjudication can affect their lives for years to come. Research shows that without appropriate guidance, juveniles are unlikely to understand rights they are asked to waive, let alone the consequences of waiving them. Mary Berkheiser, *The Fiction of Juvenile Right to Counsel: Waiver in the Juvenile Court*, 54 Fla. L. Rev. 577 (2002) (citing Thomas Grisso, *Juveniles' Waiver of Rights: Legal and Psychological Competence* 193-194 (1981)). Even prior court experience bears no direct relationship to juveniles' ability to understand their legal rights. Experts find that youth are able to make much better decisions when informed and unhurried than when under stress and peer or authority influences—meaning juveniles are less likely to waive their rights, including their right to counsel, if they are able to consult with counsel first. Lawrence Steinberg et al., *Are Adolescents More Mature than Adults?: Minors' Access to Abortion, the Juvenile Death Penalty, and the Alleged APA "Flip-Flop"*, 64 Am. Psychologist 583 (2009).

Youthful clients, like all defendants, need careful advice concerning their constitutional rights by someone who is expressly and solely identified with their interests. For many youth and their families, juvenile court is an unfamiliar and overwhelming experience. Attorneys play a critical role in helping youth and family members successfully navigate that process. The Supreme Court has long recognized that the child "needs counsel and support if he is not to become the victim first of fear, then of panic." *Haley v. Ohio*, 332 U.S. 596, 599-600 (1948). While the youth should certainly be encouraged to consult with a parent or guardian prior to waiver, in most instances that person will not be an expert in the law. Parents may themselves not be able to adequately understand the consequences of waiver or may be equally swayed by official pressures to waive. Without representation, youth are left to navigate complex and rushed court processes without adequate guidance. In practice, that means youth without counsel enter guilty pleas without offering any defense or mitigating evidence, accept assignments to commitment in secure facilities or unreasonable probation requirements, and face the long-term collateral consequences of having a juvenile record.

Youth without defense counsel also have a higher likelihood of being detained or incarcerated. Without a defender to provide context or mitigation for a youth's actions, judges are more likely see youth as a greater threat than they truly may be or are left without anyone to advocate for

more appropriate alternatives to detention that would effectively address the youth's issues. Detention and incarceration have long-term, serious consequences. Youth in detention are separated from their community and support systems and left to feel isolated and disconnected, which impedes their rehabilitation. It also interrupts whatever positive influences the child has, such as school, family, church, or community groups. Worse still, youth in detention are vulnerable to assault, suicide, and sexual abuse, and a higher likelihood to commit crimes after release. For American Indian and Alaska Native children who have been exposed to violence, the consequences of proceeding without an attorney in tribal court are potentially even more devastating. Research shows that the stress associated with separation and detention, let alone the entire court process, can exacerbate mental health and trauma issues. Without a defender to contextualize these problems to the courts and advocate for appropriate responses to any delinquent behavior, children may be at greater risk for damage.

STANDARDS

The importance of quality juvenile defense counsel is widely recognized. National standards, model rules, and guidelines direct that the court, prosecutor, and defense counsel are responsible for ensuring that a youths' right to due process, including the right to quality defense counsel is protected in all stages of the juvenile court process. Regardless of the court system, these standards lay out important ethical obligations for juvenile justice stakeholders.

In 1980, the American Bar Association, in collaboration with the Institute of Judicial Administration, produced 23 volumes of Juvenile Justice Standards. One of the volumes, *Standards Related to Counsel for Private Parties* sets forth the role of counsel in juvenile proceedings, and contains recommendations to aid juvenile defense attorneys in providing high quality representation for children. In 2005, the National Council of Juvenile Court Judges' issued the *Juvenile Delinquency Guidelines*, and in 2008, NJDC together with the National Legal Aid Defender Association put forth *Ten Core Principles for Providing Quality Delinquency Representation through Public Defense Delivery Systems*. In conjunction with the ABA-IJA Standards, these contemporary standards recognized the necessity of protections for youth in delinquency cases, as they would be entitled in adult proceedings, in order to protect the youth's due process rights and ensure fundamental fairness in proceedings. Additionally, they affirm the important role of defense counsel and state that waiver of counsel should occur rarely. In those rare instances, waiver should not occur unless the youth has consulted with an attorney about the decision to waive and the waiver is made knowingly and intelligently.

More recently, in 2013, NJDC promulgated the *National Juvenile Defense Standards* to provide guidance, support, and direction to juvenile defense attorneys and other juvenile court stakeholders. The *Standards* provide a synthesized, exhaustive statement of the best practices in the representation of juveniles and were developed in order to strengthen and clarify juvenile defense practice and policy. The *Standards* reflect a core commitment to the unique role and critical importance of specialized defense counsel in juvenile courts, consistent with a young person's fundamental right to counsel. Every youth accused of a delinquency offense or who is at risk of losing his or her liberty, has a constitutional right to meaningful access to specialized, high-quality counsel throughout the duration of the court process consistent with state and constitutional law, codes of professional responsibility. The juvenile defender is central to the fulfillment of that right and to advocating for the least restrictive option for their client.

The *Standards* establish that a key defense counsel function is to protect the juvenile's rights at all stages of the juvenile court proceeding and affirm that youth need attorneys to help them navigate the complexities of the justice system. *Standard 1.1 Ethical Obligations of Juvenile Defense Counsel* states "[c]ounsel must provide competent, diligent, and zealous advocacy to protect the client's procedural and substantive rights," citing to the earlier IJA-ABA Standards and the ABA Model Rules of Professional Conduct. The commentary following this standard recognizes that while *In re Gault* extends the right to counsel to juveniles, the actual delivery of quality representation remains out of reach for many youth, who may face negative consequences as a result of juvenile justice system involvement. Additionally, *Standard 10.4 Prevent Invalid Waiver of Counsel* calls for juvenile defenders to oppose waivers of counsel without consultation with defense counsel prior to judicial proceedings, or other mechanisms that directly or indirectly encourage youth to waive counsel.

These *Standards* provide guidance for defense counsel representing American Indian and Alaska Native youth, just as they provide guidance in the representation of any youth that faces juvenile court involvement. They can also inform the development of individual tribe's practice standards, and serve as a tool to educate other system stakeholders on the importance of counsel to advocate for better outcomes for American Indian and Alaska Native youth.

SPECIALIZATION IN JUVENILE DEFENSE IS CRITICAL

While the right to counsel for youth has been long established for youth in state and federal juvenile justice proceedings, that right means little if the youth's lawyer is unprepared or uneducated with the proper training and knowledge to competently represent their young clients. The same is true of any youth advocate in a tribal system. The integrity of juvenile justice systems depends on the ability of its component parts to skillfully and zealously play their role. If defense counsel lacks the skills to fully investigate, prepare, and litigate the case it is much more likely that an unjust result will be reached. Every child should have a lawyer who has meaningful access to ongoing juvenile defense training and support. Given the well-settled distinctions between youth and adults, providing competent juvenile defense assistance requires a skill set that is considerably different and broader than that needed for adult criminal defense. Juvenile defense counsel need to know criminal law, but also must be aware of the separate juvenile standards for related to representation of youth. Counsel must advocate with knowledge of the different purpose of juvenile court proceedings—which requires that youth receive care, treatment and guidance in accordance with their individual needs, and that they be held accountable for their actions, but without retributive punishment. Juvenile defense counsel must communicate with their clients in age and developmentally appropriate ways in order to explain complex legal principles in an understandable way, and must assert their clients' expressed wishes even when others system players might like to impose their own views of the child's "best interest." Competent representation requires counsel to be familiar with the kinds of services or programs that produce good rehabilitative results, and the providers available to provide those services. It requires counsel to engage families and assure that needed supports are in place to ensure success. In performing this work, juvenile defenders must understand and be able to apply the principles of adolescent development; education and special education law; and mental health law.

The *National Juvenile Defense Standards* reflect these important ethical obligations of defense counsel through *Standard 1.1 Ethical Obligations of Juvenile Defense Counsel*, requiring that counsel be skilled in juvenile defense and knowledgeable about adolescent development; *Standard 1.3 Specialized Training Requirements for Juvenile Defense*; *Standard 8.1 Specialized Training and Experience Necessary*, where a client faces the risk of adult prosecution; and *Standard 9.2 Supervisor's Obligation to Ensure Access to Specialized Training*, which states that it is the supervising attorney's role to ensure that line defenders have specialized training in delinquency practice. In addition, in juvenile court, representation should not end at the time of "sentencing." Because the goal of the juvenile justice system is to actually address the factors that led to juvenile court involvement, counsel must monitor post-disposition progress in implementing the court's orders and take appropriate action if there are problems. This is reflected in PART VII Role of Juvenile Defense Counsel After Disposition, of the *Standards* and more specifically in *Standard 7.1 Maintain Regular Contact with Client Following Disposition*; *Standard 7.5 Represent the Client Post-Disposition*; and *Standard 7.7 Provide Representation at Probation and Parole Review and Violation Hearings*. All of these ethical responsibilities of defense counsel are important for protecting American Indian and Native Alaskan youth, regardless of which court system they are prosecuted in.

To further ensure defenders obtain the training required to develop a specialization in juvenile defense, NJDC has developed a training curriculum specifically intended to ensure best practices on the frontlines of juvenile defense representation. The Juvenile Training Immersion Program (JTIP) is a 40-lesson, full immersion, trial advocacy training program for juvenile defenders. JTIP is the only juvenile defense training curriculum that integrates comprehensive trial advocacy with substantive juvenile law. Over five years in the making, and developed with the assistance of juvenile defense specialists from around the country, JTIP is intended to serve as the "gold standard" in juvenile defense training aimed at creating a cadre of lawyers who specialize in juvenile defense. JTIP not only addresses substantive issues, but focuses practicing new-found skills and knowledge through a comprehensive program of interactive, on-your-feet exercises. JTIP is designed to equip defenders to provide the highest level of advocacy for their clients and improve defense practice—all while producing better outcomes for youth in the juvenile justice system.

RACIAL AND ETHNIC DISPARITY

It is without question that American Indian and Alaska Native youth, along with other racial and ethnic minorities, and youth that are economically disadvantaged, are over-represented in the justice system. These youth are more at risk of disparate treatment and this is compounded, if they are not adequately represented by counsel and given a venue from which their views can be expressed. There is evidence that "race matters" above and beyond the characteristics of an offense. Numerous national and local studies provide evidence of bias in the justice system that negatively impact these youth and demonstrate that in nearly all juvenile justice systems youth of color also remain in the system longer than white youth. With few exceptions, data consistently show that youth of color are overrepresented at every stage of the juvenile justice system, but in particular in the early stages—arrest, referral to court and placement in secure detention. The role of juvenile defense counsel representing the expressed interest of their client can be a significant factor in challenging the disparate treatment of racial and ethnic minorities in the justice system. In policy adopted in August 2003, the American Bar Association encouraged "state, local and

territorial bar associations, judges, prosecutors, defenders and police to instill public confidence in the fairness of the justice system by making concerted efforts to assure that the justice system provides fair and equal treatment of all youth.” The *National Juvenile Defense Standards*, specifically *Standard 2.7* calls upon defenders to challenge the disparate treatment of vulnerable clients. Working to ensure that youth clients in the juvenile justice systems are protected from individualized or systemic bias, treated with respect, provided culturally competent services, and offered appropriate cultural support and alternate dispositions where available, is an important part of challenging bias and positively impacting youth by acting as their true defender and is imperative to gaining positive outcomes for justice involved youth. For American Indian and Alaska Native youth, having defense counsel who recognizes the rich heritage of native communities and the youth’s unique tribal identity can help the youth to feel more empowered. A defender who works with the youth to fashion detention alternatives or disposition plans that reflect the strength of the youth’s culture and customs will also serve to educate the court and other system players about creative alternatives that are available for youth within their communities.

RECOMMENDATIONS:

As discussed throughout, the stakes in juvenile court have risen as it has taken on a more punitive focus. Social science research has confirmed that most youth lack the capacity, on their own, to understand the nature of those stakes and to make informed decisions about how to navigate the increasingly complex dimensions of the modern juvenile court. The United States Supreme Court has repeatedly recognized that constitutional doctrines are informed and influenced by juvenile status. Regardless of whether that case law is binding on tribal communities, it certainly is sound reasoning. It is now well settled that youth are categorically less mature, more impulsive, and more vulnerable to the influence of authority figures than adults. Youth are also less future-oriented and less risk-averse than adults. They are unlikely to understand that juvenile courts can impose dispositions of indeterminate duration, and that minor technical probation violations can lead to long periods of incarceration. As such, consistent with what has been discussed above, the NJDC recommends that specialized, well-trained, juvenile defense counsel be afforded to all youth including American Indian and Alaska Native youth in tribal courts. Counsel should be appointed at the earliest point that a youth enters the juvenile justice system. *The National Juvenile Defense Standards* provide guidance on the role of the juvenile defender and we recommend it be shared broadly with all system stakeholders in tribal courts and beyond to help cultivate an understanding of the unique role the defender plays in advocating for system involved youth. Juvenile specific training, such as NJDC’s Juvenile Training Immersion Program should be provided for all tribal defenders, and is also recommended for all juvenile defense attorneys representing American Indian and Alaska Native youth. Specialized ongoing support for juvenile defense attorneys representing American Indian and Alaska Native children should also be provided. Guaranteeing legal representation will safeguard the needs and interests of youth who have been exposed to violence and ensure that children are not further traumatized by the imposition the law without the protection of a specialized juvenile defender.

NJDC appreciates the opportunity to provide comment on this critical issue affecting youth who are in conflict with the law. Thank you for your consideration.