

# ***IMPLEMENTATION OF Ohio Juvenile Rule 3***

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**Meaningful Consultation and the  
Disadvantages of Self-Representation**



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### **OHIO RULE OF JUVENILE PROCEDURE 3**

- (A) A child's right to be represented by counsel may not be waived in the following circumstances:
- (1) At a hearing conducted pursuant to Juv. R. 30;
  - (2) When a serious youthful offender dispositional sentence has been requested; or
  - (3) When there is a conflict or disagreement between the child and the parent, guardian, or custodian; or if the parent, guardian, or custodian requests that the child be removed from the home.
- (B) If a child is facing the potential loss of liberty, the child shall be informed on the record of the child's right to counsel and the disadvantages of self-representation.
- (C) If a child is charged with a felony offense, the court shall not allow any waiver of counsel unless the child has met privately with an attorney to discuss the child's right to counsel and the disadvantages of self-representation.
- (D) Any waiver of the right to counsel shall be made in open court, recorded, and in writing. In determining whether a child has knowingly, intelligently, and voluntarily waived the right to counsel, the court shall look to the totality of the circumstances including, but not limited to: the child's age; intelligence; education; background and experience generally and in the court system specifically; the child's emotional stability; and the complexity of the proceedings. The Court shall ensure that a child consults with a parent, guardian, or guardian ad litem, before any waiver of counsel. However, no parent, guardian, custodian, or other person may waive the child's right to counsel.
- (E) Other rights of a child may be waived with permission of the court.

Effective July 1, 2012  
(Changes are in Bold)

### **Staff Notes on Juvenile Rule 3**

Ohio Revised Code § 2151.352 establishes that juveniles have a right to counsel.

The amended rule is intended to implement a process for the mandates of the United States Supreme Court's decision *In re Gault* (1967), 387 U.S. 1 and the Supreme Court of Ohio's decision *In re C.S.* (2007), 115 Ohio St.3d 267, 2007-Ohio-4919, to ensure children have meaningful access to counsel and are able to make informed decisions about their legal representation.

Under Juv. R. 3 as it existed prior to amendment, a child facing a mandatory or discretionary bindover to adult court could not waive counsel. The amended rule adds to this prohibition on waiver of counsel by including a child charged as a serious youthful offender pursuant to ORC § 2152.13 as required by ORC § 2152.13(C)(2).

Division (A)(3) of the amendment differentiates between a conflict between the child and parent, custodian or guardian and a disagreement. If the interests of child, parent, custodian, or guardian are adverse in the proceeding, a conflict exists and the child should be appointed counsel. If the parent, custodian, or guardian and the child disagree on the question of whether counsel is necessary for the child or if the right to counsel should be waived, counsel should be appointed.

## **Juvenile Rule 3(A)(3): Parent-Child Conflict**

The issue of parent-child conflict or disagreement is a fact-intensive inquiry. However, there are certain types of conflict that can readily be identified:

1. As the rule makes clear, **any time the parent wants the child removed from the home.** Ohio Juvenile Rule 3(A)(3); *In re K.B.*, 170 Ohio App. 3d 121, 2007-Ohio-396, 866 N.E. 2d 66 (8th Dist.); *see also* Kristin N. Henning, *Eroding Confidentiality in Delinquency Proceedings: Should Schools and Public Housing Authorities Be Notified*, 79 N.Y.U. L. REV. 520, 573-74 (2004).
2. **Parent conflicts with the attorney and child on trial strategy.** *See* Kristin N. Henning, *It Takes a Lawyer to Raise a Child?: Allocating Responsibilities Among Parents, Children, and Lawyers in Delinquency Cases*, 6 NEV. L.J. 836, 854 (2006).
3. **Parents' personal liability for costs associated with juvenile court.** Henning at 859; *see also* ALA. CODE § 12-15-11 (1995); ALASKA STAT. § 47.12.230 (Michie 1998); ARIZ. REV. STAT. ANN. § 8-221 (1956); MISS. CODE ANN. § 43-21-619 (1972); N.D. CENT.CODE § 27-20-31.21 (1943).
4. **Parents do not want the child to appeal or exercise a legal right.** *See U.S. v. M.I.M.*, 932 F.2d 1016 (1st Cir. 1991).
5. **Parents pay for the child's attorney and direct litigation strategy.** *See* Nancy J. Moore, *Conflicts of Interests in the Representation of Children*, 64 FORDHAM L. REV. 1819, 1824 (1996); *see also* Ohio Rules of Professional Conduct, Rule 1.8(F).
6. **A potential impact on divorce proceedings.** *See generally* James Kenneth Genden, *Separate Legal Representation for Children: Protecting the Right and Interests of Minors in Judicial Proceedings*, 11 HARV. C.R.-C.L. L. REV. 564 (1976).
7. **Impact on parent's criminal proceedings.** *See* Henning, *It Takes a Lawyer* at 860; *see also* Naomi R. Cahn, *Pragmatic Questions About Parental Liability Statutes*, 1996 WIS. L. REV. 399,406-12 (1996).
8. **Parent does not understand the gravity of the situation.** *See In re Christopher T.*, 740 A.2d 69, 71 (Md. Ct. Spec. App. 1999).
9. **Situations where the parent is formally or in fact bringing the charge against the child.** *See* Testimony of The Honorable Ernestine Gray, Co-Chair, Juvenile Justice Committee of the American Bar Association Criminal Justice Section, Before the House of Representatives for the State of Louisiana Committee on the Administration of Criminal Justice on House Bill No. 1508 (May 12, 2004).

The above list is certainly not exhaustive, and it is important to remember that collateral consequences can also lead to disagreement, conflicts, and/or adverse interests between parent and child.

- Example: A family that faces eviction from public housing as a result of the juvenile's delinquency

### **Juvenile Rule 3(B): Expansive Checklist for Judicial Implementation**

Ohio Juv. R. 3(B): “If a child is facing the potential loss of liberty, the child shall be informed on the record of the child’s right to counsel and the disadvantages of self-representation.”

*U.S. v. Padilla*, 819 F. 2d 952, 956 (10th Cir. 1987): There must be “a showing on the record that the defendant who elects to conduct his own defense had some sense of the magnitude of the undertaking and the hazards inherent in self-representation when he made the election.”

*Von Moltke v. Gillies*, 332 U.S. 708, 723-24 (1948): The defendant must have an apprehension of the nature of the charges, the statutory offenses included within them, the range of allowable punishments thereunder, possible defenses to the charges, and circumstances in mitigation thereof, and all other facts essential to a broad understanding of the whole matter.

*State v. Johnson*, 112 Ohio St. 3d 210, 2006-Ohio-6404, 858 N.E.2d 1144, ¶ 100: The record must reflect that the defendant who elects to represent himself was “made aware of the dangers of self-representation, so that the record will establish that ‘he knows what he is doing.’”

#### *Before the child waives counsel...*

- ✓ The judge must ascertain whether notice requirements have been complied with. Juv. R. 29(B).
- ✓ The judge must inform both parent and child of the substance of the complaint. Juv. R. 29(B)(2).
- ✓ The judge must inform both parent and child of the purpose of the hearing. Juv. R. 29(B)(2).
- ✓ The judge must inform both parent and child of the possible consequences of the hearing. Juv. R. 29(B)(2).
  - This includes the possibility that the cause may be transferred to the appropriate adult court under Juv. R. 30. Juv. R. 29(B)(2).
- ✓ The judge must inform both parent and child of their individual rights to counsel. Juv. R. 29(B)(3); Juv. R. 3(B).
  - The judge must explain to both parent and child the right to be appointed counsel if indigent. Ohio Rev. Code Ann. § 2152.
- ✓ The judge must inform both parent and child of the “disadvantages of self-representation.” Juv. R. 3(B); *Faretta v. California*, 422 U.S. 806 (1975).

- **The judge must explain to both parent and child the nature of the charges and the statutory offenses included within them.** *Ohio v. Gibson*, 45 Ohio St. 2d 366, 377 (Ohio 1976), citing *Von Moltke v. Gillies*, 332 U.S. 708 (1948).
- **The judge must explain to both parent and child the range of allowable punishments for the charges.** *Ohio v. Gibson*, 45 Ohio St. 2d 366, 377 (Ohio 1976), citing *Von Moltke v. Gillies*, 332 U.S. 708 (1948).
- **The judge must explain to both parent and child the possible defenses to charges.** *Ohio v. Gibson*, 45 Ohio St. 2d 366, 377 (Ohio 1976), citing *Von Moltke v. Gillies*, 332 U.S. 708 (1948).
- **The judge must explain to both parent and child the possible circumstances that could mitigate the charges.** *Ohio v. Gibson*, 45 Ohio St. 2d 366, 377 (Ohio 1976), citing *Von Moltke v. Gillies*, 332 U.S. 708 (1948).
- **The judge must explain to both parent and child all other facts essential to a broad understanding of the whole matter.** *Ohio v. Gibson*, 45 Ohio St. 2d 366, 377 (Ohio 1976), citing *Von Moltke v. Gillies*, 332 U.S. 708 (1948).
- ✓ **The judge must ensure that the child consults with a parent, guardian, guardian ad litem, or attorney regarding his or her decision to waive counsel.** Juv. R. 3(D).

#### *Waiver requirements...*

- ✓ **In open court** Juv. R. 3(D).
- ✓ **Recorded** Juv. R. 3(D).
- ✓ **In writing** Juv. R. 3(D).
- ✓ **The judge must ascertain whether the child has consulted with a parent, guardian, guardian ad litem, or attorney regarding his or her decision to waive counsel** Juv. R. 3(D).
- ✓ **The judge must ascertain whether a conflict exists between the child and his or her parent, guardian, etc.** Juv. R. 3(A)(3).
- ✓ **The judge must ascertain whether the child's waiver was knowingly, intelligently, and voluntarily made by looking at the totality of the circumstances, including:**
  - **The child's age** Juv. R. 3(D).
  - **The child's intelligence** Juv. R. 3(D).
  - **The child's education** Juv. R. 3(D).
  - **The child's background and experience generally** Juv. R. 3(D).
  - **The child's background and experience in the court system** Juv. R. 3(D).
  - **The child's emotional stability** Juv. R. 3(D).
  - **The complexity of the proceedings** Juv. R. 3(D).

- **The language used by the court in describing the juvenile’s rights** *In re C.S.*, 115 Ohio St. 3d 267, 284, 2007-Ohio-4919, 874 N.E.2d 1177 (2007).
- **The juvenile’s conduct** *In re C.S.*, 115 Ohio St. 3d 267, 284, 2007-Ohio-4919, 874 N.E.2d 1177 (2007).
- **The degree to which the juvenile’s parent is capable of assisting and willing to assist the juvenile in the waiver analysis** *In re C.S.*, 115 Ohio St. 3d 267, 284, 2007-Ohio-4919, 874 N.E.2d 1177 (2007).

*After the child waives counsel...*

- ✓ **The judge must inform both parent and child of their individual rights to obtain counsel at any point during the proceedings** Juv. R. 29(B)(5).
- ✓ **The judge must inform both parent and child of the child’s right to remain silent** Juv. R. 29(B)(5).
- ✓ **The judge must inform both parent and child of the child’s right to offer evidence** Juv. R. 29(B)(5).
- ✓ **The judge must inform both parent and child of the child’s right to cross-examine witnesses** Juv. R. 29(B)(5).
- ✓ **The judge must inform both parent and child of the child’s right to request to have a record of all the proceedings made** Juv. R. 29(B)(5).

*In the case of a dispositional hearing immediately following the adjudicatory hearing or separate from the adjudicatory hearing...<sup>1</sup>*

- ✓ **The judge must ensure that the parent and child understand that the dispositional hearing, separate from the adjudicatory hearing, has begun and that the child may continue the hearing in order to obtain counsel** Juv. R. 34; *In re L.A.B.*, 121 Ohio St. 3d 112, 902 N.E.2d 471 (2009).
- ✓ **The court must reiterate to both parent and child the child’s right to counsel in the dispositional hearing** *In re M.T.*, 2007 Ohio 2446 (Ohio Ct. App., Madison County, May 21, 2007).
- ✓ **The judge must again ascertain knowing, voluntary, intelligent waiver of counsel in the dispositional hearing** *In re M.T.*, 2007 Ohio 2446 (Ohio Ct. App., Madison County, May 21, 2007).

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<sup>1</sup> See also *In re S.J.*, 9<sup>th</sup> Dist. No. 23058, 2006-Ohio-4467, 2006 Ohio App. Lexis 4395.

## **Implementation of Ohio Juv. R. 3(c) & (D)**

### A. Juvenile Defender's role in providing a meaningful consultation on the issue of waiver of counsel

- ✓ Obtain the arraignment docket in advance of the hearing
- ✓ Speak with the detained children first at the juvenile detention center
- ✓ Confirm with each detained child that he or she would like an attorney
- ✓ Have two attorneys present per courtroom
- ✓ Arrive at least an hour before court begins
- ✓ Advise the children that every child charged with an offense in Ohio is entitled to have a lawyer appoint to help him or her for free, because children are presumed indigent and qualify for the appointment of counsel
  - Explain that the attorney can talk to the judge and prosecutor for the juvenile
  - Explain that the attorney can make motions to help the juvenile's case; make witnesses come to court to testify; and generally fight for the juvenile, helping him or her to come up with better solutions for the case
- ✓ Confirm that the child wants an attorney to represent him or her
- ✓ Have each the parent or the child sign an affidavit of indigency
- ✓ Send the child into the courtroom and have a partnering lawyer enter a not guilty plea, waive reading of the charges, and request a pre-trial date

### B. For children who initially do not want representation:

- ✓ Look for and be aware of any competency concerns
- ✓ Explain that if the child or her parent is not sure about having an attorney, he or she and his or her parent can talk with an attorney about their concerns
- ✓ Sit down and talk with the child in a private area *without* the parent
- ✓ Ask the child why an attorney is being declined
- ✓ Answer the child's concerns
- ✓ Explain your role, the prosecutor's role, and the judge's role
- ✓ Explain the attorney-client privilege
- ✓ Read them the charging affidavit
- ✓ Tell them what the possible outcomes of the charge are, including the maximum/minimum penalties and collateral consequences
- ✓ Explain the possible court costs, cost of supervision, cost of commitment and attorney's fees
- ✓ Explain the benefits of having a lawyer
- ✓ Explain that parents cannot waive the child's right to a lawyer
- ✓ Confirm whether the child now wants an attorney
- ✓ Send the child into the courtroom

### C. If the child maintains his or her desire to waive counsel:

- ✓ Talk to the child about why she does not want an attorney
- ✓ Talk to the parent to see if the child has any mental health or educational problems
- ✓ Explain the waiver of counsel to the child and have her initial all paragraphs

## **OHIO JUVENILE DISPOSITIONS**

| <b>Offense</b>  | <b>Dispositional Minimum</b> | <b>Dispositional Max</b> |
|---|------------------------------|--------------------------|
| Underage purchase of a firearm  | Minimum 6 months             | Age 21                   |
| 3 <sup>rd</sup> , 4 <sup>th</sup> , or 5 <sup>th</sup> degree felony  | Minimum 6 months             | Age 21                   |
| 2 <sup>nd</sup> degree felony   | Minimum 1 year               | Age 21                   |
| 1 <sup>st</sup> degree felony (not otherwise designated)  | Minimum 1 year               | Age 21                   |
| Rape (other than certain statutory rapes)   | Minimum 1-3 years            | Age 21                   |
| Aggravated arson  | Minimum 1-3 years            | Age 21                   |
| Aggravated robbery  | Minimum 1-3 years            | Age 21                   |
| Kidnapping  | Minimum 1-3 years            | Age 21                   |
| Voluntary manslaughter  | Minimum 1-3 years            | Age 21                   |
| Felony murder   | Minimum 1-3 years            | Age 21                   |
| Attempted aggravated murder/ murder   | Minimum 6-7 years            | Age 21                   |
| Aggravated murder/ murder   | No minimum                   | Age 21                   |
| Firearm specifications  | Add 1 year at min.           | Add 5 yrs max            |
| Complicity to firearm-related conduct spec  | No minimum                   | Add 1 yr max             |
| Criminal gang activity with murder, aggravated murder, 1 <sup>st</sup> , 2 <sup>nd</sup> , or 3 <sup>rd</sup> degree felony | Add 1 year at min.           | Add 3 yrs max            |
| Body armor specification  | No minimum                   | Add 2 yrs max            |

\*Serious Youthful Offender (SYO) status suspends additional adult sentence until child has completed juvenile disposition

**Additional Disposition Orders** - Any of the following may apply in addition to a commitment to the Department of Youth Services (DYS):

- An order for the care and protection of an abused, neglected, or dependent child
- Temporary commitment to an institution operated for the care of delinquent children
- Up to 90 days in detention
- Basic probation
- Intensive probation
- Day reporting
- Up to 500 hours community service for a felony or 1<sup>st</sup> degree misdemeanor
- Up to 200 hours community service for a 2<sup>nd</sup>, 3<sup>rd</sup>, or 4<sup>th</sup> degree misdemeanor
- Up to 30 hours community service for a minor misdemeanor
- An order that the child obtain a high school diploma, GED, vocational training, or employment
- Drug and alcohol monitoring
- Alcohol or drug assessment or counseling
- Alcohol or drug treatment program (with or without security)
- Curfew
- Monitored time
- House arrest
- House arrest with electronic monitoring
- House arrest with alcohol monitoring
- Electronic monitoring or alcohol monitoring
- Driver's license/ permit suspension
- Commitment to custody of the court
- An order that the child attend school without unexcused absence
- Sex offender registry

## OHIO COLLATERAL CONSEQUENCES

Some of the most notable potential collateral consequences for juveniles in Ohio<sup>2</sup>

|                                 |   |
|---------------------------------|---|
| <b>Education</b>                | Expulsion from school pursuant to the school’s individual expulsion policy  |
|                                 | Problems accessing higher education   |
|                                 | Colleges & universities may not directly inquire about adjudications, but may inquire about suspensions /expulsions, and the school records may reveal an adjudication that was otherwise sealed or expunged. <ul style="list-style-type: none"> <li>▪ If used to determine permanent expulsion, the school may maintain its own records regarding the juvenile’s adjudication and offense, and those records may follow the student throughout the student’s education.<sup>3</sup></li> </ul> |
| <b>Public Housing</b>           | A juvenile will be banned from public housing: <ul style="list-style-type: none"> <li>▪ If a lifetime sex offender registry is required;<sup>4</sup></li> <li>▪ If he/she is involved in manufacturing methamphetamine on the premises of a federally-assisted housing program;<sup>5</sup></li> <li>▪ If evicted for drug-related activity, including drug abuse<sup>6</sup></li> </ul>  |
|                                 | A juvenile’s family can be evicted from public or subsidized housing as a result of the juvenile’s delinquent activity (sometimes even without an adjudication) <sup>7</sup>  |
| <b>Driving</b>                  | Adjudication affects ability to obtain a driver’s license   |
|                                 | If adjudicated or if the juvenile uses tobacco, the court may suspend driver’s license or temp license <sup>8</sup>   |
| <b>Sex Registry</b>             | A juvenile will be subject to mandatory sex offender registry: <ul style="list-style-type: none"> <li>▪ If 14-17 at the time of a second offense; or</li> <li>▪ If 16 or 17.<sup>9</sup></li> </ul>   |
|                                 | A juvenile will be subject to discretionary sex offender registry if 14 or older at the time of the sexually oriented offense.  |
| <b>Employment</b>               | Obtaining licenses for certain occupations  |
|                                 | Deciphering the difference between “conviction” & “adjudication” on applications/questionnaires   |
|                                 | Enlisting in the military   |
|                                 | Release of information in criminal background checks <ul style="list-style-type: none"> <li>▪ New law prohibits release of juvenile info <i>except</i> in cases of aggravated murder, murder, or mandatory sex offender registrants</li> </ul>  |
| <b>Future Court Involvement</b> | <ul style="list-style-type: none"> <li>▪ The court will consider juvenile adjudications in subsequent adult sentencing in determining likelihood of recidivism<sup>10</sup></li> <li>▪ The Sixth Circuit allows delinquency adjudications to be used under <i>Apprendi</i> to increase adult sentencing</li> </ul>  |
|                                 | Using delinquency records in civil trials/cases   |
| <b>Other Impacts</b>            | Becoming a foster/adoptive parent   |
|                                 | Carrying, owning, or using a weapon/firearm   |
|                                 | Halting the naturalization process  |

<sup>2</sup> For an expansive list of Ohio’s collateral consequences, see Kimberly R. Mossoney & Cara A. Roecker, *Ohio Collateral Consequences Project: Executive Summary*, 363 U. TOL. L. REV. 611 (2005).

<sup>3</sup> OHIO REV. CODE ANN. § 2151.357(D).

<sup>4</sup> 42 U.S.C. § 13663(a).

<sup>5</sup> 42 U.S.C. § 1437n(f); 24 C.F.R. § 966.4(I)(iii)(A).

<sup>6</sup> 42 U.S.C. § 13661(a); 42 U.S.C. § 13361(b); 24 C.F.R. § 982.553.

<sup>7</sup> 42 U.S.C. § 1437d(I)(6); 42 U.S.C § 1437f(d)(1)(B)(iii); 42 U.S.C. § 13662; 42 U.S.C. § 1437f(d)(1)(B)(v); 24 C.F.R. § 966.4(f)(12)(i).

<sup>8</sup> OHIO REV. CODE ANN. § 2151.354(A)(3); § 2151.87(F).

<sup>9</sup> OHIO REV. CODE ANN. § 2152.82(A); §2152.83(A).

<sup>10</sup> OHIO REV. CODE ANN. § 2929.12(D).

Ohio's Civil Impacts of Criminal Convictions (CIVICC) website,<sup>11</sup> compiled by the Ohio Justice and Policy Center and maintained by the Ohio Public Defender, provides a listing of the collateral consequences of *adult* convictions, but there is some concern that juveniles may face some of these adult consequences as well.

Examples:

- Aggravated burglary – 281 impacts
- Aggravated robbery – 281 impacts
- Robbery – 279 impacts
- Burglary – 278 impacts
- Theft – 269 impacts
- Breaking & entering – 268 impacts
- Felony RSP – 268 impacts
- Felony assault – 250 impacts

Additionally, any juvenile record, although sealed, may be used as part of a background investigation if a juvenile later applies for a position in law enforcement, with the department of corrections, or work involving contact with children.<sup>12</sup>

Sealing vs. Expungement (R.C. 2151.355):

- Sealing : File is removed from the court's main section of files and it is placed in a separate location
- Expungement : File is destroyed/deleted

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<sup>11</sup> See CIVIL IMPACTS OF CRIMINAL CONVICTIONS UNDER OHIO LAW, <http://opd.ohio.gov/civicc/> (last visited July 6, 2012).

<sup>12</sup> OHIO REV. CODE ANN. § 2151.358(D)(4)(f).

IN THE [County] COUNTY, OHIO COMMON PLEAS COURT  
JUVENILE DIVISION

IN THE MATTER OF: )  
 )  
[Child's Name] ) COMPLAINT NO.:  
A Child. )  
\_\_\_\_\_ )

**I GIVE UP MY RIGHT TO HAVE A LAWYER HELP ME**

1. **It has been explained to me** that a lawyer is a professional person who is trained in the law and that if a lawyer is appointed to represent me, his or her job is to represent my interests before the juvenile court.  
\_\_\_\_\_ Initials
  
2. **It has been explained to me** that if I have a lawyer, that person will help me in several ways. By giving up my right to a lawyer, it has been explained to me that:
  - a. I will not have a lawyer to explain the charges which have been filed against me in the complaint for delinquency.  
\_\_\_\_\_ Initials
  - b. I will not have a lawyer to give me advice on my rights and responsibilities in this case.  
\_\_\_\_\_ Initials
  - c. I will not have a lawyer to advise me as to what my legal defenses may be.  
\_\_\_\_\_ Initials
  - d. I will not have a lawyer to advise me as to whether I should fight the charges.  
\_\_\_\_\_ Initials
  - e. I will not have a lawyer to help me prepare my case for a hearing or trial if I decide to fight the charges.  
\_\_\_\_\_ Initials
  - f. I will not have a lawyer to help me bring any witnesses to court.  
\_\_\_\_\_ Initials
  - g. I will not have a lawyer to give me advice on what I should do regarding my case.  
\_\_\_\_\_ Initials

3. **It has been explained to me** the possible collateral consequences of the entrance of plea to the charges which have been filed against me in the complaint for delinquency and the possible court costs, the cost of supervision, and the cost of commitment.

\_\_\_\_\_ Initials

4. **It has been explained to me** that I have a right to be represented by a lawyer at any time and that if I or my parents cannot afford to hire a lawyer, the judge will appoint one for me. In signing this paper, I understand that I choose not to have a lawyer represent me at this time.

\_\_\_\_\_ Initials

5. **It has been explained to me** that I keep the right to have a lawyer. After I sign this paper, I can ask the judge at any time to appoint a lawyer for me even if I have not asked for one before.

\_\_\_\_\_ Initials

6. **One of the following people has explained** to me my right to be represented by a lawyer and what may happen if I waive my right to a lawyer (check one):

\_\_\_\_\_ A lawyer

\_\_\_\_\_ The judge/court

\_\_\_\_\_ Other (specify: \_\_\_\_\_ )

\_\_\_\_\_ Initials

7. I have had the opportunity to ask questions and have my questions answered to my satisfaction.

\_\_\_\_\_ Initials

8. **I certify that I have received this document and all of the above statements regarding my right to a lawyer have been explained to me. Despite the disadvantages of self-representation, in accordance with Ohio Rule of Juvenile Procedure 3, I give up my right to be represented by a lawyer at this time.**

SIGNED this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_.

\_\_\_\_\_  
CHILD'S SIGNATURE

\_\_\_\_\_  
CHILD'S PRINTED NAME

## **BEYOND THE JUDGE'S COLLOQUY:** ***A Rationale for a Meaningful Consultation with a Child***

Since 1996, the Institute of Judicial Administration and American Bar Association standards for juvenile justice have maintained that waiver should not be allowed in any juvenile proceeding, but instead that counsel in juvenile proceedings should be mandatory.<sup>13</sup> The new Juvenile Rule 3 is the least restrictive approach to waiver, only satisfying constitutional due process minimums for juveniles. It does not meet the IJA standards.

In addition to the “new” requirement that the court inform the juvenile of the right to counsel and the disadvantages of self-representation, Ohio requires the court to explain to a juvenile the direct consequences of a plea agreement through a colloquy.<sup>14</sup> However, Ohio judges are not required to state *all* potential consequences.

Because courts are only required to inform juveniles of direct consequences, juveniles are left to independently make an analytical leap to discover what collateral consequences might also result from waiving the right to counsel or from entering a plea. However, recent research on adolescent brain development shows that juveniles have a limited ability to foresee long-term or collateral consequences of their immediate decisions.

The United States Supreme Court has used this brain science research in several decisions involving consequences for juvenile offenders.<sup>15</sup> In *Roper v. Simmons*, the Court relied on three significant gaps between the cerebral processes of juveniles and adults:

First, as any parent knows and as the scientific and sociological studies ... tend to confirm, ‘a lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young. These qualities often result in impetuous and ill-considered actions and decisions.’ ... ‘[A]dolescents are overrepresented statistically in virtually every category of reckless behavior.’ ... [S]econd ... juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure. ... [J]uveniles have less control, or less experience with control, over their own environment. ... [T]hird ... the character of a juvenile is not as

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<sup>13</sup> See INSTITUTE OF JUDICIAL ADMINISTRATION OF THE AMERICAN BAR ASSOCIATION, JUVENILE JUSTICE STANDARDS ANNOTATED: A BALANCED APPROACH 253-62 (Robert E. Shepherd, Jr. ed., 1996).

<sup>14</sup> Ohio Juv. R. 29(D).

<sup>15</sup> See *Roper v. Simmons*, 543 U.S. 551 (2005); *Graham v. Florida*, 130 S.Ct. 2011 (2010).

well formed as that of an adult. The personality traits of juveniles are more transitory, less fixed.

543 U.S. 551, 569-70 (2005). Five years later in *Graham*, the Court expanded on its recognitions in *Roper* that:

...[D]evelopments 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... '[T]he same characteristics that render juveniles less culpable than adults' – their immaturity, recklessness, and impetuosity – make them less likely to consider potential punishment.

130 S.Ct. 2011, 2026 (2010) (quoting *Roper*, 543 U.S. at 571).

Most recently, the Court in *Miller v. Alabama*, 567 U.S. \_\_\_\_ (2012), again relied on physiological differences in the decision-making processes of children versus adults, and noted that “[i]ndeed, it is the odd legal rule that does *not* have some form of exception for children.” 567 U.S. at 19.

These principles regarding juveniles and their diminished abilities to make well-thought-out decisions on their own should carry over to the decision to waive counsel. Therefore, whether it is an attorney appointed to consult with the child about the disadvantages of self-representation under Juvenile Rule 3(C), or if, under Juvenile Rule 3(B), the juvenile judges will be the party responsible for warning of the “dangers of self-representation,” the dialogue with the child should be expansive enough so that the juvenile is not left to examine her own environment and critically analyze the collateral consequences of waiving her attorney or entering a plea on her own. The child must be made fully aware of all collateral consequences through an exhaustive consultation, taking into consideration the differences in brain development and thought processing between adults and children.

## **Examples of Why Children Need a Meaningful Consultation**

A thirteen-year-old was charged with delinquency for breaking into her mother's bedroom and taking money. She admitted to the charges after waiving an attorney and was sentenced to probation for an indefinite period of time. A year later, she left her residence overnight without permission and her probation officer took her to court. She was not scheduled to go to court and was not asked if she wanted counsel. She was committed to DYS for at least 6 months.

A seventeen-year-old represented himself during a burglary trial. He lost his case and was sentenced to 1-4 years. On appeal, his adjudication was reversed and he was given a new trial. The charges were eventually dropped, but not before Ohio taxpayers paid over \$50,000 in legal expenses.

A fifteen-year-old was on trial for possessing drugs after submitting to a urine test. She proceeded without a lawyer only after her mother failed to fill out the court appointed counsel form in time. Her mother urged her to plead guilty so "That way we'll be done." She was sentenced to 6 months-6 years in DYS and received no drug or alcohol treatment.

A seventeen-year-old honor student was arrested for stealing a flag from a neighbor's yard. He told officers that he could not talk without an attorney. He was taken to the detention facility and held overnight. The next day he admitted to the charges thinking he would be released. They held him for two weeks. He was never given an attorney. Once his mother hired an attorney, he admitted to one count of theft and served no more time in detention.

A fifteen-year-old asked for an attorney at arraignment, but the court never appointed one or asked about the issue again. At adjudication, he was found delinquent on drug-related charges. The Ohio Court of Appeals overturned the adjudication, but only after he spent 183 days in detention and cost taxpayers \$33,719.

## **Significant Ohio Case Law Supporting Representation for Children**

*In re C.S.*, 115 Ohio St.3d 267, 2007-Ohio-4919, 874 N.E.2d 117. Held that: (1) In a delinquency proceeding, a juvenile may waive his constitutional right to counsel, subject to certain standards, if he is counseled and advised by his parent, custodian, or guardian; (2) If the juvenile is not counseled by his parent, guardian, or custodian and has not consulted with an attorney, he may not waive his right to counsel; (3) A judge must appoint counsel for a juvenile if there is a conflict between the juvenile and his parent, custodian, or guardian on the question of whether counsel should be waived; (4) A totality-of-the-circumstances analysis is the proper test to be used in ascertaining whether there has been a valid waiver of counsel by a juvenile; (5) The judge must consider a number of factors and circumstances, including the age, intelligence, and education of the juvenile; the juvenile's background and experience generally and in the court system specifically; the presence or absence of the juvenile's parent, guardian, or custodian; the language used by the court in describing the juvenile's rights; the juvenile's conduct; the juvenile's emotional stability; and the complexity of the proceedings; and (6) The waiver of the right to counsel must be made in open court, recorded, and in writing. Also, the court clarified that a parent has no authority to waive the juvenile's right to counsel. The minor signed a 7-page waiver, but the court reversed the adjudication because the waiver did not comply with Juv. R. 29 or R.C. 2151.352—the minor never consulted a parent or guardian prior to waiving right to counsel.

*In re Andrew*, 119 Ohio St.3d 466, 2008-Ohio-4791, 895 N.E.2d 166. The appeals court ruled that R.C. 2151.352 did not apply since the defendant was in juvenile court but over the age of 18. Therefore, the standards should be lower to prove a knowing, voluntary, and intelligent waiver. However, the Ohio Supreme Court reversed this because the rule applies to all defendants under the jurisdiction of juvenile court. Because the defendant did not consult with a parent, guardian, or lawyer, his waiver was not valid. The Supreme Court reversed and remanded.

*In re L.A.B.*, 121 Ohio St.3d 112, 2009-Ohio-354, 902 N.E.2d 471. Defendant waived his right to counsel during a probation violation hearing. Since the violation could result in a finding that the juvenile violated a court order, the court found that the probation hearing qualified as an adjudicatory hearing. The quick change from a probation hearing to a dispositional hearing meant waiver had to be reiterated because a new proceeding had begun. The case was reversed and remanded.

## **Other Ohio Case Law Involving Waiver Since 2006**

The following is an annotated list of other Ohio cases involving juvenile waiver since 2006:

*In re Lobr*, 7th Dist. No. 06, 2007-Ohio-1130. According to the record it appeared as though the defendant thought he could only get counsel for a full evidentiary hearing, but not if he simply wanted to plead guilty. The court did not closely scrutinize the waiver before allowing the defendant to proceed without counsel. Although aware of the charges, he was not informed that by admitting the charges he was waiving other rights such as cross-examination, appeal, right to remain silent, call witnesses, or the potential penalties. The case was reversed and remanded.

*In re M.T.*, 12th Dist. No. 2006-04-018, 2007-Ohio-2446. The defendant and his mother filled out but did not accurately complete a “rights form” prior to arraignment. At adjudication, the court did not review the form and accepted the defendant’s admission. On appeal, the court found that the right to counsel was violated. No valid waiver was obtained at either adjudication or disposition, nor was any counsel appointed.

*In re Puckett*, 5th Dist. No. 2006-CA-74, 2006-CA-75, 2007-Ohio-3927. The trial court did not inform the 12-year-old defendant of the nature of the charges, his right to obtain counsel at any stage, or any other right of the defendant. Also, the dangers of self-representation were not defined. The social and criminal history of the defendant also suggested that counsel would be necessary. Strict scrutiny was not employed to determine if the waiver was knowing, voluntary, or intelligent.

*In re Ramon*, 3d Dist. No. 4-07-03, 2007-Ohio-5768. Defendant was denied his right to counsel because there was no recorded finding that the waiver was knowing, voluntary, and intelligent. It only contained an affirmation that the defendant wished to proceed without counsel. The trial court also told the defendant that he can only get a lawyer appointed if his parents were unemployed; there was no mention of the defendant’s own indigence. The court reversed and remanded.

*In re Bucholtz*, 179 Ohio App.3d 249, 2008-Ohio-5826, 901 N.E.2d 305. Without counsel, the defendant admitted to violating his parole. Although the record indicated that there was substantial compliance with Juv. R. 29 that the waiver was voluntary, knowing, and intelligent, the court was required to reverse because of *In re Andrew*. The defendant did not appear in court with a parent, guardian, custodian, or legal counsel, nor did he consult with one. The case was reversed and remanded.

*In re Haggard*, 3d Dist. Nos. 2-08-20, 2-08-21, 2-08-22, 2-08-23, 2009-Ohio-3821. The court found that the minor validly waived his right to counsel at a probation violation hearing. But there was no recorded finding that waiver was made at the dispositional hearing immediately following the probation violation hearing. The court reversed the dispositional hearing and remanded for a new hearing with reiteration of the right to counsel.

*In re Brandon M.*, 2d Dist. No. 2009-CA-48, 2009-Ohio-6579. The trial court found a valid waiver despite an on-the-record statement by the defendant stating that he did not consult his parents. Additionally, both the defendant and his parents declined an opportunity to confer when offered by the court. The trial court also failed to ask if the defendant understood the charges against him. The appeals court reversed and remanded.

*In re I.S.P.*, 4th Dist. No. 09-CA-37, 2010-Ohio-410. The defendant was charged with numerous probation violations. At all of his hearings at which his mother was present, the court advised the defendant and his mother of the right to counsel. The court then made a recorded finding that showed the waiver was voluntary, knowing, and intelligent. The defendant was familiar with the juvenile court system and the trial court engaged the child to ensure he understood his rights and the charges. The trial judgment was affirmed.

*In re C.S.*, 7th Dist. No. 09-CO-7, 2010 Ohio 867. Defendant, a minor, waived counsel and admitted to delinquency and resisting arrest. The minor was not given the opportunity to consult with her parents. Additionally, there was no record of waiver at the dispositional hearing. Waiver at one stage does not mean waiver at all stages. The court reversed and remanded.

*In re Predmore*, 187 Ohio App.3d 100, 2010-Ohio-1626, 931 N.E.2d 181. Defendant asserted his right to counsel for several charges. However, the court failed to appoint counsel for a petty theft charge assuming the defendant knew his rights from the previous charges. The defendant alleged that he was not informed of his rights nor had he waived them. The petty theft charge was reversed and remanded because there was no waiver of counsel.

*In re D.L.*, 189 Ohio App.3d 154, 2010-Ohio-1888, 937 N.E.2d 1042. At a hearing regarding a civil protection order complaint, the magistrate allowed the father of the juvenile defendant to cross-examine the juvenile and the father of the other child. The juvenile's father had indicated that he wanted to proceed without counsel. This was an unauthorized practice of law. The juvenile was without counsel when the civil protection order was granted. This was

improper since the order could lead to criminal violations and the implications of the order were not explained to the juvenile. The case was reversed and remanded.

*In re A.R.*, 8th Dist. Nos. 96443, 96758, 2012-Ohio-258. The trial court informed the defendant that he has the right to counsel and if he could not afford a lawyer one would be appointed for him. However, the court did not engage with the defendant to explain this right to him or the implications of his waiver. The defendant's mother pressured him to admit to the charges so she would not have to take another day off of work. Using the totality-of-the-circumstances test, the court determined that neither the mother nor child appreciated the gravity of the charges. The case was reversed and remanded.

## **Additional Resources**

American Bar Association, *Think Before You Plea: Juvenile Collateral Consequences in the United States*, Ohio data available at <http://www.beforeyouplea.com/oh>.

American Civil Liberties Union of Ohio, <http://www.acluohio.org/>.

Ashley Nellis, *Addressing the Collateral Consequences of Convictions for Young Offenders*, THE CHAMPION, July/August 2011, at 20, available at <http://sentencingproject.org/doc/publications/Collateral%20Consequences%20NACDL%202011.pdf>.

Children's Law Center, Inc., <http://www.childrenslawky.org>.

INSTITUTE OF JUDICIAL ADMINISTRATION OF THE AMERICAN BAR ASSOCIATION, JUVENILE JUSTICE STANDARDS ANNOTATED: A BALANCED APPROACH 253-62 (Robert E. Shepherd, Jr. ed., 1996), available at <https://www.ncjrs.gov/pdffiles1/ojdp/166773.pdf>.

National Juvenile Defender Center, <http://www.njdc.info/>.

Office of the Ohio Public Defender, <http://www.opd.ohio.gov/>.

Ohio Criminal Sentencing Commission,  
<http://www.supremecourt.ohio.gov/Boards/Sentencing/default.asp>.

Ohio Justice and Policy Center, <http://www.ohiojpc.org/main.html>.