Juvenile Law Center
advancing the rights and well-being of children in jeopardy

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Recipient of the 2008 MacArthur Award for Creative and Effective Institutions

Christine Riscilli, Esq., Counsel
Supreme Court of Pennsylvania
Juvenile Court Procedural Rules Committee
Pennsylvania Judicial Center
Via Electronic Mail: juvenilerules@pacourts.us

Re: Rule 152 – Waiver of Counsel

Dear Ms. Riscilli:

On behalf of **Juvenile Law Center and 40 additional local and national organizations and legal experts** we write to provide Comments to Proposed Rule 152 on waiver of counsel for juveniles. We oppose the Proposed Rule. The Rules Committee should instead propose, and the Supreme Court should adopt, a rule that simply prohibits waiver of counsel by juveniles in juvenile court. Only by prohibiting waiver can Pennsylvania protect children's rights to fair proceedings and guarantee that Pennsylvania ends justice by geography.

The undersigned organizations and individuals work with and on behalf of children. Although we commend the Committee for revisiting the issue of waiver of counsel for juveniles in light of Luzerne County, the Proposed Rule fails to address its key objective – ensuring that children's constitutional and statutory right to counsel is actually enforced in the Commonwealth. It is also inconsistent with our knowledge of adolescent development, is unnecessarily complex and will be exceptionally difficult for juveniles to understand and act upon. The proposed rule will also be impossible to administer fairly – for children as well as for court personnel – and will be expensive as well as wasteful of hours of precious court time.

While there may be ways to ameliorate some of the harms that this Proposed Rule will cause, we decline to endorse them. This proposal, which will give the illusion of due process while leading to continued unfairness, should be abandoned.

The Committee should send to the Supreme Court an unequivocal prohibition on waiver of counsel for children.

Introduction

In Luzerne County, juveniles routinely appeared without attorneys. In many instances, these unrepresented youth were adjudicated delinquent and placed in residential care for minor offenses—or for conduct that didn't even rise to the level of a crime. These delinquency sanctions were of indeterminate nature. This indiscriminate use of confinement points to one of the Proposed Rule's fundamentally flawed premises. The Proposed Rule bifurcates offenses as though juvenile court consequences for serious offenses are different than those for minor offenses. But as members of the Rules Committee well know, juveniles can be placed out-of-home for equally long periods of time regardless of whether they are charged with a felony or misdemeanor and regardless of the grading of the offense.

In Luzerne County, when youth without lawyers were placed on probation—a status that would permit appearance without counsel under the Proposed Rule—they had no zealous advocate to negotiate either the conditions of probation or its duration. When these youth struggled with their conditions of probation, former Judge Mark Ciavarella placed them in detention or residential care "for probation violations," despite the fact that the probation conditions may have been ill-suited to the particular child in the first place. Thus, while Ciavarella often set time limits on his initial orders of placement, many youth and parents learned that those placements, like all dispositions, could end up being of indeterminate duration. Youth who were placed in programs that didn't match their needs "failed to adjust" and entered a revolving door that continuously returned them to Ciavarella's courtroom and to more secure placements of increasingly longer duration.

While the Proposed Rule would mandate that juveniles have counsel if they face placement because of probation violations, adding a lawyer *after the fact*—when placement is about to be ordered— profoundly misunderstands the role of juvenile defense attorneys in counseling clients, making recommendations to match services to clients' needs, and forestalling the risk that youth violate their probation in the first place.[1]

In Luzerne County, the absence of counsel also meant that youth could not challenge Ciavarella's repeated violations of other significant rights. For example, Ciavarella failed to ensure that children's admissions (guilty pleas) were knowing and voluntary. He regularly failed to inform youth of their right to a trial, their right to confront and cross-examine witnesses, and the government's burden of proving every element of its case beyond a reasonable doubt. He regularly failed to ask if youth understood they were giving up these rights before pleading guilty. Ciavarella did nothing to confirm that youth understood the acts to which they were pleading guilty. These failures occurred in *all* cases— including the 'minor' cases that the Proposed Rule

would permit to proceed without counsel. The Proposed Rule assumes that the Court, through a colloquy, will be able to divine whether juveniles fully understand the importance of an attorney and the consequences of giving up that right. This view is misplaced, as we discuss more completely below; the Proposed Rule rests on a misunderstanding of adolescent development that will inevitably lead to more abuses like those that occurred in Luzerne County.

In most cases, it appears that Ciavarella adjudicated youth delinquent in a matter of minutes, with no trial or opportunity for the youth to speak on his or her own behalf or to present testimony or evidence related to adjudication or disposition. The Proposed Rule will leave this system in place for 'minor' offenses, which would permit the Court to enter any order of disposition other than out-of-home placement, without having any of the benefits of information that would routinely be provided by competent defense counsel. Once again, the Proposed Rule will replicate Luzerne County's experience, not prevent it.

The Proposed Rule also provides that at the beginning of proceedings—when courts and other juvenile justice professionals will have the *least knowledge and information* about the juvenile—courts are expected to make informed decisions about their capacity to waive counsel.

There is an alternative that is simple and easy to implement. This alternative will promote fairness. It will be cost-effective. It will ensure that juveniles will not be pressured by parents or by shame to "get the proceedings over with." It will erase the stain of Ciavarella's court. This alternative—indeed, the *only* effective response to Luzerne County—is to enforce a juvenile's constitutional right to counsel by prohibiting waiver of that right.[2]

In order to fully implement a child's right to counsel, the right must be unwaivable.

Children have a constitutional right to counsel. Almost 45 years ago, the United States Supreme Court held in *In re Gault* that the Fourteenth Amendment guarantees children facing delinquency charges in juvenile court a right to counsel.[3] Following *Gault*, Pennsylvania's Juvenile Act provides that a juvenile has a right to counsel at all stages of proceedings,[4] including both pre-trial disposition and post-disposition proceedings.[5]

Today, the need for the assistance of counsel in juvenile court is even more important, as greater numbers of youth are at risk of adult prosecution, dispositions have become longer and more punitive, and delinquency adjudications carry collateral consequences that follow the youth into adulthood and, in some cases, for the rest of their lives.[6] Of equal if not greater importance, as the stakes in juvenile court have risen, social science research has confirmed that most youth lack the capacity, on their own, to understand the nature of those stakes and to make intelligent

decisions about how to navigate the increasingly complex dimensions of the modern juvenile court.[7]

Although the United States Supreme Court has held that adult criminal defendants may waive counsel and represent themselves,[8] the Supreme Court has not addressed whether juveniles have a similar right to represent themselves. In 1975, in *Faretta v. California,* the Supreme Court, relying on the Sixth Amendment's provision of "assistance of counsel," held that an adult defendant is the "master" of his or her own defense.[9] In *Faretta,* the record established that the adult defendant was "literate, competent, and understanding" and "voluntarily exercising his informed free will" when he "clearly and unequivocally declared to the trial judge that he wanted to represent himself," even after the judge had warned him that he was making a mistake.[10] The Supreme Court concluded that the trial judge's requirement that appointed counsel represent Faretta denied him his Sixth Amendment right to conduct his own defense.

The *Faretta* right of self representation rested in part on presumptions about adult capacities to exercise autonomy rights and in part on the express language of the Sixth Amendment. Juveniles' right to counsel, however, is based upon the Fourteenth Amendment's guarantee of due process and fundamental fairness.[11]

Gault also acknowledged differences between juveniles and adults which have now been confirmed by research:

> 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.'[12]

Finally, *Gault* recognized a juvenile's right to counsel not because it was a right specifically guaranteed by the Bill of Rights—as was the Fifth Amendment privilege against self-incrimination—but because the right to counsel was essential to due process required of any court proceeding.[13]

The *Gault* Court's analysis thus differed from *Faretta,* both in its recognition of youth differences and the constitutional underpinnings of the right to counsel. The Court's reliance on the Fourteenth Amendment has shaped subsequent case law on the protections necessary to make juvenile delinquency proceedings fundamentally fair. It was this due process analysis that led the Supreme Court in *McKeiver v. Pennsylvania* to decide that juveniles have no constitutional right to a jury trial.[14] The Court held that the Fourteenth Amendment does not operate identically for juveniles as it does for adults. Likewise, the Fourteenth Amendment analysis does not require that juveniles have the same right to waive counsel as adults have under the Sixth Amendment.[15]

Moreover, national standards and best practices support requiring an unwaivable right to counsel for juveniles. Five years *after* the Supreme Court in *Faretta* gave adult defendants a constitutional right to represent themselves, the Institute for Judicial Administration/American Bar Association Juvenile Justice Standards rejected *Faretta*'s application to juveniles.[16] The Standards, which prohibit waiver of counsel, recognize that effective assistance of counsel for juveniles is different; it is the precursor to a juvenile's ability to exercise all other important rights during the course of the juvenile justice process.[17] The IJA/ABA Standards similarly recognized that *Faretta* was distinguishable because an adult defendant's right of self-representation grew out of the Sixth Amendment while the right to counsel in *Gault* stemmed directly from the Due Process Clause of the Fourteenth Amendment.[18]

Furthermore, both the National Juvenile Defender Center and the National Legal Aid and Defender Association call for systems that ban waiver of counsel by juveniles. Their *Ten Core Principles for Providing Quality Delinquency Representation*, a series of recommendations jointly endorsed by both organizations, include an admonition that states ensure that children do not waive appointment of counsel.[19]

Most importantly, the drafters of this Proposed Rule—by making the right to counsel unwaivable under certain circumstances-- concede that Pennsylvania has the constitutional authority to make a juvenile's right to counsel unwaivable. Given this acknowledgement that the State may ban waiver consistent with the Constitution,[20] we now turn to why such a ban also makes common sense.

A prohibition on waiver is consistent with principles of adolescent development.

The United States Supreme Court has repeatedly recognized that Constitutional doctrines are informed and influenced by juvenile status. 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. In light of these findings, the Supreme Court has required that governmental power be calibrated to the developmental characteristics of youth.

For example, the Supreme Court has articulated a legal distinction between minors and adults for the purpose of determining the voluntariness of juvenile confessions during custodial interrogation. The Court observed, almost 50 years ago, that a juvenile "cannot be judged by the more exacting standards of maturity. That which would leave a man cold and unimpressed can overawe and overwhelm a lad in his early teens. This is the period of great instability which the crisis of adolescence produces." The Court further reasoned that a juvenile was "unable to know

how to protect his own interests or how to get the benefits of his constitutional rights."[21]

The Court's protective stance toward youth in confession cases parallels its stance with respect to other juvenile issues. For example, as noted above, in declining to extend the jury trial right to juveniles, the Court specifically noted youths' malleability and developmental status, and sought to promote the well-being of youth by ensuring their ongoing access to rehabilitative, rather than punitive, juvenile justice systems.[22]

Most recently, in *Graham v. Florida*, the Court ruled that the imposition of life sentences without the possibility of parole for youth convicted of non-homicide offenses was unconstitutional under the Eighth Amendment. The Court reasoned that three essential characteristics distinguish youth from adults for culpability purposes: they lack maturity and responsibility, they are vulnerable and more susceptible to peer pressure, and their characters are unformed.[23] The Court added that since *Roper v. Simmons,*[24] "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."[25] The Rules Committee alludes favorably to this body of work in its proposed commentary to Proposed Rule 152.[26]

The reliance on the developmental characteristics of youth by the Rules Committee and the U.S. Supreme Court finds ample support in research. Adolescence has been characterized as a period of "tremendous malleability" and "tremendous plasticity in response to features of the environment."[27] And, research supports the conclusion that juveniles' responses to stress heighten their inability to consider a range of options. Because adolescents have less experience with stressful situations, they have a lesser capacity to respond adeptly to such situations.[28] Adolescents tend to process information in an 'either-or' fashion, particularly in stressful situations. While adults may perceive multiple options in a particular circumstance, adolescents may only perceive one.[29] The Supreme Court also has recognized that juveniles' limited understanding of the criminal justice system and the roles of the actors within it differentiate them from adults.[30] The increased susceptibility of juveniles and their decreased comprehension of their rights create a greater need for an unwaivable right to counsel.

Waiver of counsel will lead to inappropriate admissions of delinquency.

In *Faretta*, the United States Supreme Court held that adults had a constitutional right to represent themselves in criminal proceedings. Waiver of counsel by youth, however, is almost never a signal that youth want to act as their own lawyers in *trying* the case. This isn't a youth court where kids get to play roles. Rather, waiver of counsel is almost always a precursor to an

admission (or guilty plea). The literature of adolescent development has taught us that youth are unlikely to understand substantive criminal law. They won't appreciate, for example, that a lawyer might make the case for "simple," rather than "aggravated" assault. In Ciavarella's court, youth routinely answered "yes" when asked, "Did you do this?"

As we saw in Luzerne County, failing to provide an unwaivable right to counsel was tied to the inevitable admission (guilty plea) that followed. This is problematic and unfair for several reasons. As the research has taught us, as a result of immaturity or anxiety, unrepresented youth will inevitably feel pressure to get their cases "over with." Those pressures will lead many to precipitously enter an admission 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.[31] Indeed, the stories from Luzerne County include examples of prosecutors advising youth and their families prior to trial. Such advice doesn't have to come from malign motives. Even the best juvenile court stakeholders feel pressure to clear cases from their calendars.

Youth may be further pressured by family members to waive counsel in order to avoid further delay and processing time in court. These pressures may occur even if parents are not paying for lawyers; as we saw in Luzerne, many parents had the mistaken idea that proceeding without lawyers would lead to better results.

Youth are also unlikely to appreciate short and long term consequences of admitting offenses, such as potential incarceration or a criminal history record. Youth 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. Youth are particularly unlikely to be aware of an adjudication's collateral consequences, including the impact on their education, financial aid, future employment or access to public housing. Ironically, at a time when the United States Supreme Court in *Padilla v. Kentucky*[32] recently imposed on defense counsel comprehensive obligations related to informing their clients about collateral consequences of convictions, including immigration consequences, this Proposed Rule would leave it to a judge to fulfill that role. This is an awkward and difficult role for a judge to assume.

In the very rare circumstances where a child does seek to represent himself at a trial, it is an absolute certainty that he or she will lack the skills and knowledge necessary to do so effectively. Attorneys in juvenile court require specialized knowledge about the juvenile justice system. For example, a distinct body of case law has developed around motions to suppress, juvenile competency, *mens rea* and culpability, in addition to the standard case law.[33] The

attorneys must know nomenclature unheard of in adult court and they must be familiar with the wide array of services available to juvenile offenders.[34] One commentator has noted that the representation of juvenile offenders requires specialized skills and knowledge that counsel accustomed to dealing with adult defendants may not possess.[35] A juvenile representing himself or herself would be that much more ineffective.

Without counsel, juveniles cannot effectively exercise other constitutional and statutory rights.

The right to counsel is not merely a procedural right. It has an enormous impact on the exercise of a range of substantive rights. At each stage of the juvenile justice process juveniles must make decisions about whether to move to suppress certain evidence, whether to proceed to trial or enter an admission, what type of trial strategy to pursue, whether to move for a finding of incompetency or diversion to the mental health or dependency system, what type of disposition best meets the goals and purposes of the juvenile act, etc. Good lawyers take the range of future possibilities into account when preparing for each stage in the process. For this reason, although we permit juveniles to assert or waive certain other rights in juvenile court —such as the right to a trial or the right against self-incrimination—the assertion or waiver of these other fundamental rights is made only *after* the juvenile has the opportunity to consult with counsel to assess the ramifications of each decision. It is only after he or she receives the advice of counsel that such decisions are knowing, intelligent, and voluntary.

Counsel's involvement during the pretrial phase of a juvenile case is also critical to obtaining a favorable outcome for her client.[36] To ensure that a child is fully aware of the importance of counsel, the National Council of Juvenile and Family Court Judges recommends that when a child is served with a summons, information should also be provided to the child and his or her family as to why counsel for the youth is important, and what the child's options are for obtaining legal representation prior to the adjudication hearing.[37]

With counsel, juveniles are ensured fair hearings. Counsel can advise about pre-trial motions to suppress statements or evidence, issues that few teens will even be aware of. Counsel provides guidance about plea agreements and their consequences—both direct and collateral. At hearings, counsel can adequately confront and cross-examine witnesses. The attorneys can also provide a juvenile guidance on whether to pursue appellate remedies and advice on when and how to expunge his juvenile record. Without counsel, the risk of unfairness increases dramatically.

The colloquy proposed in the draft Rule will fail to inform the court whether a juvenile's waiver is knowing, intelligent, and voluntary.

In Part B and in the Comment, the Proposed Rule lists information that the judge should gather from the juvenile in order to make the determination that a waiver is knowing, intelligent and voluntary. The proposed use of a colloquy is deficient for many reasons.

First, under the Proposed Rule the judge would ask youth for information that they will not be able to produce—such as information about their mental health status. The judge is instructed to ask about "any current alcohol or drug issues that may impair the juvenile's decision-making skills," as though a youth who is so impaired will be able to give a thoughtful response to the inquiry, or will even acknowledge the use of drugs or alcohol. These questions obviously may also elicit incriminating responses that may be used against the child in subsequent proceedings.

As the proposed comment to the draft rule correctly states:

> [T]here are an overwhelming number of articles, research, and statistics that conclude most juveniles, especially those under the age of fourteen, may not have the capacity to understand fully the waiver of a constitutional right.

Studies have confirmed that juveniles lack the ability to understand their rights at various stages of the juvenile court process. Thus, issues of capacity on crucial and complex legal issues are normally dealt with through a forensic evaluation that addresses the legal question to be addressed by the court. The juvenile court is then in a position to take testimony and judge the thoroughness and power of the evaluation, as well as the qualifications of the psychologist doing the evaluation. Judges, however, are not forensic psychologists; they are ill-equipped to identify and evaluate the many factors that would be addressed by a thoughtful forensic evaluation. While judges must make a *legal* judgment about capacity, this judgment must be based on expert testimony, not on judges' under-informed inquiry.

In addition, in almost every county judges rotate in and out of juvenile court. While experienced judges may have the skills and experience to glean some necessary developmental information from the colloquy, inexperienced judges will not. And no judge through a colloquy will be able to get information from a juvenile—such as IQ or scope of disability—that can only be gathered from a forensic evaluation.[38]

In addition to the problem of professional boundaries, there are institutional pressures that over time are likely to make the colloquy less probing and more perfunctory. We do not impugn the approach of any judge. However, we note that juvenile court caseloads vary widely. Every county experiences periods when pressure is put on court staff to move cases. Judges who

try to get through busy schedules will be under inevitable pressure to do *pro forma* colloquies. In our experience, appellate courts look to see whether colloquies are done, not whether courts should have asked more, or probed deeper, or noticed signals that an experienced evaluator would detect. Thus, if a colloquy is perfunctorily done, it will be effectively unreviewable. Judges under caseload pressure are unlikely to fulfill the rigid guidelines recommended in the Comment, which suggest that the judge must have a dialogue with the juvenile to understand fully whether he or she understands the consequences of proceeding without counsel.

The Comment also states that the judge must first ask the juvenile why he or she wants to waive counsel. It is difficult to imagine what an acceptable response would be to this question. The Comment recommends that the judge elicit from the juvenile whether he or she understands the requirements necessary for acting as one's own lawyer; this presumes the youth actually understands the role a lawyer would play in juvenile court. This requirement is likely to be time-consuming and complicated, depending on whether the juvenile intends to try the case or plead guilty. If the former, few, if any, youth know the rules of evidence and procedure such that they could adequately and intelligently represent themselves. If the latter, the decision to waive counsel would be inextricably entwined with the decision to admit to an offense. Each of these decisions is fraught with overlapping, but different, risks.

Moreover, this byzantine process must be repeated at every stage at which a juvenile seeks to waive counsel. At some point, many judges will weary of the process and short-circuit it, conducting a far less thorough and probing inquiry than that to which the Proposed Rule aspires.

Thus, the colloquy envisioned by the Proposed Rule will not be useful. The colloquy will give the *illusion* of thoroughness, while leaving in peril the constitutional rights—and futures—of too many juveniles.

To address this inherent weakness in the Proposed Rule, perhaps a separate competency hearing at this stage, following a forensic evaluation targeted to the waiver issue, would assure that a youth's decision is knowing, voluntary and intelligent. However, such a hearing would be time-consuming and inefficient. A prohibition on waiver will be more effective. A complete prohibition of children waiving counsel errs on the side of research that shows how difficult it is for teens to make a knowing, intelligent and voluntary waiver, eliminates constitutional vagaries, and promotes efficiency.

The Proposed Rule sets forth a complicated process by which attorneys and probation officers must anticipate the judge's decision or risk a new trial.

The Proposed Rule prohibits waiver of counsel when the juvenile is at risk of out-of-home placement or is charged with a serious offense that could affect his future prior record score.

We note at the outset that the distinctions in the Proposed Rule on when waiver can occur have a surface appeal, but are in fact incoherent. This is because a court can, after notice, change or extend a disposition at any time. Early decisions have an enormous impact on what happens later. As we discussed above, admitting to a misdemeanor without counsel in juvenile court can lead to an out-of-home placement of long duration. Juvenile Law Center saw that happen time and again to Luzerne County clients. For example, one youth was adjudicated delinquent for receipt of stolen property when he purchased a scooter from his cousin that he was unaware had been stolen, and was subsequently sent to placement for three months. After several failures to adjust, he ultimately served two years in juvenile placement. He had waived counsel prior to his adjudicatory hearing. The risk of placement for any adjudication is written into the text of the Juvenile Act; experienced juvenile justice professionals see this risk play out every day across the Commonwealth.

Moreover, judges have the inherent power to order a disposition that is different from that recommended by a juvenile probation officer or district attorney. If out-of-home placement is ordered after a juvenile waives counsel, the Proposed Rule would allow the juvenile to ask for a new hearing. This is obviously a waste of time and resources. Holding a *de novo* adjudicatory hearing before another judge will be duplicative and not in the interest of judicial economy. Additionally, the burden is entirely on the *unrepresented* juvenile, who will have no attorney to advise him or her to ask the court for a new hearing. Standby counsel, if there is one, would presumably fill this function, but such counsel will have had no history with the juvenile when suddenly thrust into the position of providing advice.

In addition, the disposition may be delayed to allow newly-appointed counsel to learn about the client and develop a disposition strategy, but under those circumstances the likelihood increases that the judge will choose to detain the youth in the interim. After all, the judge has already determined, with no evidence presented by the *unrepresented* juvenile, that the youth should not be at home after disposition. Finally, by signaling his or her dispositional intent, the judge will increase the risk of flight, thereby creating a new *post hoc* justification for ordering detention.

Standby counsel, even if mandatory, would lead to a mockery of justice.

The Proposed Rule allows for discretionary appointment of "standby" counsel. Even if the appointment of such counsel was mandatory, it would not provide youth with effective assistance of counsel. Standby counsel will have had no attorney-client relationship with a youth. They know nothing about their new "client." Yet the Proposed Rule inexplicably expects them to provide a juvenile offender they have just met with enough information to make a knowing, intelligent and voluntary decision about going forward without a lawyer.

Standby counsel cannot adequately provide the juvenile with direction—their knowledge of the juvenile will be no greater than any other stranger. Lawyers cannot give professionally responsible advice unless they have an established lawyer-client relationship, done an investigation of the case, learned the client's history and capacities, and gained the client's trust.[39] Indeed, to what degree are conversations between the juvenile and standby counsel even protected as privileged communications? Standby counsel is an inadequate substitute for counsel, both legally and practically.

A system of standby counsel increases costs, in money and time. Someone will have to pay for such counsel, who will have to be available at every proceeding regardless of appointment. If standby counsel is then used, proceedings will be delayed while youth consult counsel.

A ban on juvenile waiver is consistent with an attorney's duty to be "client directed."

Some lawyers are mistakenly concerned that a ban on waiver would undermine the philosophy of juvenile defense representation, i.e., that lawyers are to be "client directed."[40]

There is a powerful body of law and standards that make clear that lawyers for juveniles should be "client directed." This means that after counseling from a lawyer who has established a lawyer-client relationship, a client can direct the lawyer on several key issues. The client controls whether to plead and whether to take the witness stand. In states which provide jury trials for juveniles, the client directs whether to ask for a jury.[41] The juvenile client also directs the lawyer regarding disposition—informing the lawyer of where he wants to live and what type of facility he would like to be placed in if placement is ordered.[42] However, all of the "client-directed" decisions are made only after a lawyer-client relationship has been established. There is nothing about the "client-directed" aspects of professional responsibility that should lead the Rules Committee to conclude that a teen who has *not* been so counseled by a lawyer should be able to waive counsel.[43] And consultation, at a minimum, must include an investigation, an assessment of the juvenile's history and capacity, and the development of a trusting relationship. (Moreover,

the idea that a client who *has* been involved in a lawyer-client relationship will, at some stage of the juvenile court process, suddenly make an informed decision to proceed *pro se* is too farfetched to be a basis for state-wide rule making.)

A related misconception is that because clients have the capacity to direct their lawyers, they also have the capacity to waive counsel. This is a common error—some people believe that because youth have the capacities for some tasks, there is an "equivalence" with other tasks. But society draws lines all the time around age, capacity, and the task at hand. Line drawing depends, among many considerations, on the right involved, the consequences of waiving the right, the costs and benefits of where lines are drawn, whether the line drawing is about a *decision* or about *conduct*, whether society has the ability to make informed decisions about who falls above or below a line, and whether individualized determinations are worth the costs.

Thus, we don't execute a teen who was 17 years, 11 months old, in part because we don't have the wisdom to know enough about any individual youth's characteristics, culpability and capacity for reform.[44] There will be some 14-year-olds capable of driving, but we don't let them. Thus, a state may say that teens at age 16 can drive, while still prohibiting them from driving with other teens in the car. Context, rights, and consequences matter.

As we have demonstrated throughout these comments, waiver by a juvenile is a mix of *decision* and *conduct*. It is about a knowing, intelligent and voluntary waiver of a fundamental right; and it is about the guilty plea or trial of a case that follows. This mix is so complex that the Rules Committee should find it straightforward and simple to draw a line at age 18, on waiver of counsel, as the IJA/ABA Standards did in 1980.[45] As the right to counsel is the precursor for ensuring that all rights are exercised throughout the juvenile court process, the line prohibiting waiver is appropriately drawn at 18.

Adopting Proposed Rule 152 will be more expensive than simply prohibiting waiver.

There is no evidence that prohibiting waiver of counsel will result in more costs to taxpayers. Indeed, the opposite is likely to be true—providing an unwaivable right to counsel will save money.

Most youth in Pennsylvania appear with counsel. Most counties in Pennsylvania assume indigence for juveniles and immediately assign them counsel without requesting any family financial information. Proposed Rule 151 similarly presumes indigence for purposes of appointing counsel. In a recent survey conducted by Juvenile Law Center, most counties indicated that unless a child appears with private counsel, he is automatically assumed indigent and provided with appointed counsel. Given that in 2009 roughly 99 percent of Pennsylvania

youth appeared with counsel[46]—many of whom are appointed—the concern that it would be a significant financial burden to assume indigence and appoint counsel to all youth who appeared in juvenile court is without merit.

Furthermore, the Proposed Rule would create a system that is more complicated and less efficient than simply providing counsel for every juvenile who appears in juvenile court. The Proposed Rule allows for appointment of standby counsel—which is an expense. Counties will have to retain standby counsel to be on call. If needed, standby counsel will either proceed without knowing anything about the client, or will ask for a delay. If a youth proceeds without any counsel, the court will have to go through a colloquy at every stage of the proceeding, using a colloquy that will inevitably be inadequate to the task. Standby counsel will also have to available at each of these stages. Courts will detain more youth if there are delays for youth to obtain counsel, or courts will be without information that counsel can provide that may *avoid* the need for detention or placement. It is hard to imagine a greater misuse of time and money.

Conclusion

The Proposed Rule flies in the face of everything the State has learned from the Luzerne County juvenile court scandal. It will decrease fairness and indeed only increase the likelihood that we will see a repetition of what happened in Luzerne County. Surely the highly respected juvenile court judges of Pennsylvania should not have to spend their time addressing waiver, standby counsel, and the many other collateral considerations that the Proposed Rule will create. And the Proposed Rule is a prescription for wasting colossal amounts of time and money.

We propose instead that the Rules Committee adopt the following changes to Rule 152. These changes will give the Commonwealth a rule that has the virtues of simplicity, cost-effectiveness, and fairness. It will guarantee that children's Constitutional right to counsel in delinquency proceedings is fully and effectively enforced.

Rule 152. Waiver of Counsel.

A. **Waiver ~~Requirements~~ Prohibited.** A juvenile may not waive the right to counsel at any hearing. ~~unless:~~

~~**1.** the waiver is knowingly, intelligently, and voluntarily made; and~~

~~**2.** the court conducts a colloquy with the juvenile on the record.~~

~~B. **Stand-by counsel.** The court may assign stand-by counsel if the juvenile waives counsel at any proceeding or stage of a proceeding.~~

~~C.~~ **~~Notice and revocation of waiver.~~** ~~If a juvenile waives counsel for any proceeding, the waiver only applies to that proceeding, and the juvenile may revoke the waiver of counsel at any time. At any subsequent proceeding, the juvenile shall be informed of the right to counsel.~~

Sincerely,

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[1] *See* Juvenile Law Center, American Bar Association Juvenile Justice Center, and Youth Law Center, *A Call for Justice: An Assessment of Access to Counsel and Quality Representation in Delinquency Proceedings* (1995) *available at* http://www.njdc.info/pdf/cfjfull.pdf.

[2] Senator Lisa Baker (R. Luzerne) has recently introduced Senate Bill 815, which would prohibit waiver for juveniles.

[3] *In re Gault*, 387 U.S. 1, 36 (1967).

[4] 42 Pa.C.S. § 6337.

[5] *See In re Davis*, 546 A.2d 1149, 1152 (Pa. Super. Ct. 1988).

[6] Pennsylvania Juvenile Indigent Defense Action Network, "The Pennsylvania Juvenile Collateral Consequences Checklist" (May 2010).

[7] *See* Grisso and Schwartz, YOUTH ON TRIAL (2000).

[8] *Faretta v. California*, 422 U.S. 806 (1975).

[9] *Faretta v. California*, 422 U.S. 806, 820 (1975).

[10] *Faretta v. California*, 422 U.S. 806, 835-36 (1975).

[11] *In re Gault*, 387 U.S. 1, 41 (1967) holding "…that the Due Process Clause of the Fourteenth Amendment requires that in respect of proceedings to determine delinquency which may result in commitment to an institution in which the juvenile's freedom is curtailed, the child and his parents must be notified of the child's right to be represented by counsel retained by them, or if they are unable to afford counsel, that counsel will be appointed to represent the child."

[12] *In re Gault*, 387 U.S. 1, 36 (1967), footnotes omitted.

[13] *In re Gault*, 387 U.S. 1 (1967); *See also* Mary Berkheiser, The Fiction of Juvenile Right to Counsel: Waiver in the Juvenile Courts, 54 Fla. L. Rev. 577 (2002).

[14] *McKeiver v Pennsylvania*, 403 U.S. 528 (1971).

[15] The role of defense counsel for juveniles, however, is not only the same as that for adults, but includes more obligations. *See* American Bar Association Juvenile Justice Center and Juvenile Law Center, with National Juvenile Defender Center and Northeast Juvenile defender Center, PENNSYLVANIA: AN ASSESSMENT OF ACCESS TO COUNSEL AND QUALITY OF REPRESENTATION IN DELINQUENCY PROCEEDINGS (2003).

[16] Institute of Judicial Administration/ American Bar Association Juvenile Justice Standards (1980). The IJA/ABA Standards insist that the "court should not begin adjudication proceedings unless the respondent is represented by an attorney who is present in court" and the commentary explains that this means "that the right to counsel [is] unwaivable." Standard 1.2 of Adjudicatory Proceedings. Standard 6.1.A. of the Standards Relating to Pretrial Proceedings is even more explicit with its insistence that "a juvenile's right to counsel may not be waived," *even though other rights may be waived under certain circumstances.*

[17] *See* Institute of Judicial Administration/ American Bar Association Juvenile Justice Standards: Standards Relating to Pretrial Court Proceedings, Commentary to Standard 6.1, at 99(1980).

[18] *See* Institute of Judicial Administration/ American Bar Association Juvenile Justice Standards: Standards Relating to Adjudication, Commentary to Standard 1.2, at 15(1980).

[19] NJDC, Ten Core Principles, *available at* www.njdc.info. Principle #1 begins: "The indigent defense delivery system should ensure that children do not waive appointment of counsel."

[20] Currently, Texas, Iowa and Illinois prohibit the waiver of counsel. See Juvenile Law Center, LESSONS FROM LUZERNE COUNTY: PROMOTING FAIRNESS, TRANSPARENCY AND ACCOUNTABILITY, at 8 (2010).

[21] *In re Gault*, 387 U.S. 1, 45 (1967) quoting *Haley v. Ohio*, 332 U.S. 596, 599-600 (1967).

[22] *See McKeiver v Pennsylvania*, 403 U.S. 528, 539-40 (1971); *Gault*, 387 U.S. at 15-16. *See also* Barry C. Feld, *Bad Kids: Race and the Transformation of the Juvenile Court* 92 (1999) (noting that the malleability of youth is central to the rehabilitative model of the juvenile court).

[23] *Graham v. Florida*, 130 S. Ct. 2026-27 (2010). *See also Roper v. Simmons*, 543 U.S. 551, 570 (2005).

[24] 543 U.S. 551 (2005). *Roper* ended the juvenile death penalty in the United States.

[25] *Graham v. Florida*, 130 S. Ct. 2027 (2010).

[26] Comment to Proposed Rule 152 (noting that there is a body of research that demonstrates juveniles do not understand their rights).
[27] *See* Laurence Steinberg & Robert G. Schwartz, *Developmental Psychology Goes to Court* in YOUTH ON TRIAL: A DEVELOPMENTAL PERSPECTIVE ON JUVENILE JUSTICE 9, 23 (Thomas Grisso and Robert Schwartz eds., 2000).
[28] Laurence Steinberg & Robert G. Schwartz, *Developmental Psychology Goes to Court* in YOUTH ON TRIAL: A DEVELOPMENTAL PERSPECTIVE ON JUVENILE JUSTICE 9, 26 (Thomas Grisso and Robert Schwartz eds. 2000).
[29] Marty Beyer, *Immaturity, Culpability & Competency in Juveniles: A Study of 17 Cases*, 15 Crim. Just. 27, 27 (Summer 2000); Marty Beyer, *Recognizing the Child in the Delinquent*, 7 Ky. Child Rts. J. 16, 17-18 (Summer 1999).
[30] *Graham v. Florida*, 130 S. Ct. 2026 (2010) (noting that juveniles' limited understanding puts them at a "significant disadvantage in criminal proceedings"); *In re Gault*, 387 U.S. 1, 45 (1967) (finding that confessions of juveniles require "special caution").
[31] *See Fare v Michael C.*, 442 U.S. 707 (1979).
[32] 130 S. Ct. 1473 (2010).
[33] Sue Burrell, "Juvenile Delinquency: The Case for Specialty Training." California Daily Journal, January 14, 2010.
[34] *Id.*
[35] Joanna S. Markman, *In re Gault: a Retrospective in 2007: Is it Working? Can it Work?*, 9 Barry L. Rev. 123, 135 (2007) quoting Marvin R. Ventrell, Essay, *Rights & Duties: An Overview of the Attorney-Child Client Relationship*, 26 LOY. U. CHI. L.J. 259, 272-73 (1995).
[36] *A Call for Justice* at 32.
[37] *Juvenile Delinquency Guidelines* at 74.
[38] See Thomas Grisso, *Forensic Evaluation of Juveniles* (1998).
[39] *See* National Juvenile Defender Center and National Legal Aid and Defender Association, "Ten Core Principles for Providing Quality Delinquency Representation Through Indigent Defense Delivery Systems" (2005).
[40] *See* National Juvenile Defender Center and National Legal Aid and Defender Association, "Ten Core Principles for Providing Quality Delinquency Representation Through Indigent Defense Delivery Systems" (2005).
[41] *See* American Bar Association Model Rule of Professional Conduct 1.2: "(a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify."
[42] "Ten Core Principles for Providing Quality Delinquency Representation Through Indigent Defense Delivery Systems," *supra.*
[43] The prior section demonstrates why having such a consultation with standby counsel fails to solve this problem.
[44] *Roper v. Simmons*, 543 U.S. 551 (2005).
[45] Institute of Judicial Administration/ American Bar Association Juvenile Justice Standards (1980).
[46] Juvenile Court Judges' Commission, *2009 Pennsylvania Juvenile Court Dispositions.*