Supreme Court of New Jersey
Docket No. 63,589

State of New Jersey, **Plaintiff-Respondent** **In the Interest of P.M.P.** **Defendant-Petitioner**	FAMILY ACTION On Leave to Appeal from a Published Appellate Division Opinion Sat Below: Hon. Anthony J. Parillo, J.A.D. Hon. Marie E. Lihotz, J.A.D. Hon. Carmen Messano, J.A.D.

BRIEF OF AMICI CURIAE
RUTGERS URBAN LEGAL CLINIC, RUTGERS SCHOOL OF LAW—NEWARK
NATIONAL JUVENILE DEFENDER CENTER
AMERICAN CIVIL LIBERTIES UNION OF NEW JERSEY
CHILDREN'S JUSTICE CENTER, RUTGERS SCHOOL OF LAW—CAMDEN
NORTHEAST JUVENILE DEFENDER CENTER

Laura Cohen, Esq.
Urban Legal Clinic
Rutgers School of Law—Newark
123 Washington Street
Newark, New Jersey 07102
(973) 353-5576

On the Brief:
Robin Walker Sterling, Special Counsel
National Juvenile Defender Center

Matthew Coleman, Clinical Law Student

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STATEMENT OF INTEREST

Amici curiae are advocacy groups committed to protecting the constitutional rights of young people. Rutgers Urban Legal Clinic, Rutgers School of Law—Newark (ULC); National Juvenile Defender Center (NJDC); American Civil Liberties Union of New Jersey (ACLU-NJ); Children's Justice Center, Rutgers School of Law—Camden (CJC); and Northeast Juvenile Defender Center (NEJDC) (collectively "Amici") sought to submit this brief of the significance of the questions presented to this Court, the important role the decision will play in protecting the integrity of our system of juvenile justice, and the potential of the case to influence other jurisdictions to adopt a similar approach. As advocates for young people and concerned citizens, Amici have a substantial interest in ensuring that the moment of attachment of the right to counsel for youth is properly defined and honored by law enforcement and the judiciary.

STATEMENT OF IDENTITY OF AMICI CURIAE

RUTGERS URBAN LEGAL CLINIC, RUTGERS SCHOOL OF LAW—NEWARK (ULC): The ULC is a clinical program of Rutgers Law School – Newark, established more than thirty years ago to assist low-income clients with legal problems that are caused or exacerbated by urban poverty. The Clinic's Criminal and Juvenile Justice section, taught by clinical professor Laura Cohen, provides legal representation to individual clients and

undertakes public policy research and community education projects in both the juvenile and criminal justice arenas. In recent years, ULC students and faculty have worked with the New Jersey Office of the Public Defender, the New Jersey Institute for Social Justice, the Essex County Juvenile Detention Center, Covenant House – New Jersey, staff of the New Jersey State Legislature, and a host of out-of-state organizations on a range of juvenile justice practice and policy issues.

NATIONAL JUVENILE DEFENDER CENTER (NJDC): The mission of the National Juvenile Defender Center is to ensure excellence in juvenile defense and promote justice for all children. In service to that mission, NJDC provides support to public defenders, appointed counsel, law school clinical programs and non-profit law centers to ensure quality representation in urban, suburban, rural and tribal areas. NJDC offers a wide range of integrated services to juvenile defenders, including training, technical assistance, advocacy, networking, collaboration, capacity building and coordination.

NJDC has particular expertise in adolescent development and its implications for juvenile justice policies and practices. As part of its work for the MacArthur Foundation's Models for Change Juvenile Justice Systems Reform Initiative, NJDC has developed, tested, and disseminated the Juvenile Court Curriculum, which features intensive examination of adolescent

development research. NJDC also offers Curriculum-based training on adolescent development to all professionals who work in the juvenile justice system, including defense attorneys, prosecutors, judges, and probation officers. NJDC continually updates the curriculum materials with new information and research from experts in the field.

AMERICAN CIVIL LIBERTIES UNION OF NEW JERSEY (ACLU-NJ): The ACLU-NJ is a private, non-profit, non-partisan membership organization dedicated to the principle of individual liberty embodied in the Constitution. Founded in 1960, the ACLU-NJ has approximately 15,000 members in New Jersey. The ACLU-NJ is the state affiliate of the American Civil Liberties Union, which was founded in 1920 for identical purposes, and is composed of nearly 500,000 members nationwide.

The ACLU-NJ is a strong supporter and protector of the due process rights of individuals in the criminal justice system and the rights of juveniles generally. The ACLU-NJ specifically recognizes that juveniles are at a special disadvantage, as limited life experience and ignorance of their basic rights make it difficult for youthful offenders to protect their own interests. In addition to litigation on behalf of juveniles generally (see, e.g., Joye v. Hunterdon Central Regional High Sch. Bd. of Educ., 176 N.J. 568 (July 7, 2003) (challenging random student drug testing); see also Betancourt v. West New

York, 338 N.J. Super. 415 (App. Div 2001) (challenging juvenile curfew ordinance)), the ACLU-NJ takes an active role in juvenile justice, visiting juvenile detention centers throughout the state, conducting know your rights workshops for young people, and actively challenging policies and practices in public schools that channel children out of schools and into the juvenile and criminal justice systems. The ACLU-NJ is also the local affiliate of the national American Civil Liberties Union, which brought the case In Re Gault, 387 U.S. 1, 87 S. Ct. 1428, 18 L. Ed. 2d 527 (1967), before the U.S. Supreme Court, leading to the landmark victory which secured the right to counsel for children facing the equivalent of criminal charges.

CHILDREN'S JUSTICE CLINIC, RUTGERS SCHOOL OF LAW—CAMDEN (CJC): The CJC provides individual representation to Camden youth facing juvenile delinquency charges. Clinical Professor Sandra Simmons, who teaches the clinic along with John C. Lore III, helps clinic students to address the underlying causes of delinquency involvement, in an effort to extricate them from destructive behavioral patterns.

NORTHEAST JUVENILE DEFENDER CENTER (NEJDC): The NEJDC, a regional affiliate of the NJDC, provides support, technical assistance, and training to juvenile defenders in New Jersey, New York, Pennsylvania, and Delaware. In the past five years,

the NEJDC co-sponsored three statewide training programs for juvenile defense attorneys in New Jersey; co-sponsored similar programs in other states within the region; provided back-up assistance to numerous juvenile defense attorneys; and co-published a statewide assessment of indigent juvenile defense services in Pennsylvania.

PRELIMINARY STATEMENT

Among the panoply of rights and protections accorded young people charged with juvenile delinquency, none is as crucial to ensuring fundamental fairness as the right to counsel. In fact, vigorous defense representation stands at the very center of the modern conception of due process for children. As the United States Supreme Court recognized in In re Gault, "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."

As early as 1948, nearly twenty years before Gault, the United States Supreme Court recognized in Haley v. Ohio that youths' immaturity compelled special protection from police interrogation. Extensive psychological and neurobiological research over the last fifteen years has confirmed the Court's intuition and established that youth are, indeed, different from adults. Their developmental immaturity and experiential deficits

render them particularly vulnerable to coercion and manipulation in police questioning (and, therefore, to wrongful convictions) and far more likely to waive fundamental rights than adults charged with similar offenses. These differences give context to and underscore the critical importance of effective defense representation at every stage of a delinquency case.

Recent case law and legislative trends have tended to consider the rights of young people through this lens of adolescent development. The United States Supreme Court, for example, in Roper v. Simmons relied upon data indicating that adolescents are more prone to reckless behavior than adults and less responsible for that behavior, in striking down the juvenile death penalty.

Other courts and legislatures have considered the same developmental data as the Roper Court in mandating early attachment of the right to counsel for young people. State courts examining the question of the right to counsel generally view the commencement of a juvenile complaint or petition as the moment of attachment. In recent years, states like Ohio and North Carolina have tightened their juvenile codes to incorporate a more impregnable right to counsel, and one that cannot easily be waived. In addition, juvenile justice practice standards, guidelines, and reform efforts uniformly demand

attachment of the right to counsel at the earliest point of juvenile court involvement.

The need for constitutional protections for juveniles facing delinquency adjudications has never been more important than at this moment. With increasing alacrity, juveniles are waived up to adult court. In an alarming trend, the rehabilitative focus of the juvenile system has shifted toward the disciplinary and punitive focus of adult sentencing. The consequences of a delinquency adjudication approach, parallel, and sometimes exceed the consequences of an adult conviction for the same crime. Sex offender registration laws subject young people to the same reporting requirements and life-long stigmas as adults. To suggest, as the Appellate Division did below, that the rehabilitative goals of the juvenile court render the need for early access to defense representation less acute than it is for adults is to turn a blind eye to the life-long impact of delinquency adjudications on our most vulnerable citizens.

The time has come for a judicial re-affirmation of the central importance of the juvenile right to counsel, one that recognizes and embraces the unique developmental status of young people and the unique goals of the juvenile justice system. This case presents the Court with an opportunity to ensure that New Jersey's young people enjoy the full breadth of procedural protections envisioned by Gault. Amici curiae thus respectfully

urge this Court to interpret the right to counsel robustly, and to hold that this right attaches, at the latest, when a delinquency petition is filed or court involvement in some other way commences. We further urge, although this issue is not squarely before the Court, that it consider extending similar protections to all juveniles facing custodial interrogation.

PROCEDURAL HISTORY

Amici adopt and incorporate by reference the Procedural History section set forth in the Brief for the Appellant, previously filed with the Court by Yvonne Smith Segars, Public Defender, by Amira R. Scurato, Assistant Deputy Public Defender.

STATEMENT OF FACTS

Amici adopt and incorporate by reference the Statement of Facts section set forth in the Brief for the Appellant, previously filed with the Court by Yvonne Smith Segars, Public Defender, by Amira R. Scurato, Assistant Deputy Public Defender

LEGAL ARGUMENT

I. RECENT ADVANCES IN ADOLESCENT BRAIN DEVELOPMENT STRONGLY INDICATE THAT THIS COURT SHOULD ADOPT ADDITIONAL SAFEGUARDS TO PROTECT THE DUE PROCESS RIGHTS OF CHILDREN WHO ARE ACCUSED OF JUVENILE DELINQUENCY.

Because of magnetic resonance imaging (MRI) and functional magnetic resonance imaging (fMRI) examinations, recent technological advances that allow scientists to study living

brains, we have made enormous strides in the study of adolescent brain development in the last decade.[1] Common sense experience has provided limitless anecdotal evidence that children do not think like, act like, or make decisions like adults. Neuroscience has verified that, because of the way in which their brains develop, children physically cannot think like, act like, or make decisions like adults. This acknowledgment that children's brains are evolving has been recognized in state statutes, see, e.g., New Jersey statutes limiting minors' right to marry, N.J.S.A. § 37:1-6, to drink alcohol, N.J.S.A. § 2C:33-15(a), to drive a car, N.J.S.A. § 39:3-11.1., and to enter into contracts, N.J.S.A. 17B:24-2; in state case law, see, e.g., Carter v. Jays Motors, 65 A.2d 628 (App. Div. 1949) (agreements with minors relating to personal property such as executory or executed agreements for sale, exchange or purchase of property or mortgages are voidable); and in United States Supreme Court

[1] Previously, researchers had to rely on x-ray images of the brain, and so were limited in the type and number of images they could collect because the x-rays exposed research subjects to unacceptable risks from radiation exposure, or on the study of cadaver brains. See Jay N. Giedd, Structural Magnetic Resonance Imaging of the Adolescent Brain, 1021 Annals N.Y. Acad. Sci. 77, 77 (2004). Because adolescents have relatively low mortality rates, the supply of adolescent cadaver brains was too low to provide a basis for sound scientific conclusions about whether or how the brain changed during adolescence. See Elizabeth R. Sowell et al., In Vivo Evidence for Post-Adolescent Brain Maturation in Frontal and Striatal Regions, 2 Nature Neuroscience 859, 859 (1999). The additional limitation of x-rays and cadaver brains was, of course, that neither of them allowed scientists to study brains as they worked. Id.

decisions, including Thompson v. Oklahoma, 487 U.S. 815, 835, 108 S. Ct. 2687, 2698, 101 L. Ed. 2d 702, 718,(1998)(observing that "[i]nexperience, less education, and less intelligence make the teenager less able to evaluate the consequences of his or her conduct while at the same time he or she is much more apt to be motivated by mere emotion or peer pressure than is an adult), Eddings v. Oklahoma, 455 U.S. 104, 115-116, 102 S. Ct. 869, 878, 71 L. Ed. 2d 1, 11-12 (1982)(reaffirming that "youth is more than a chronological fact. . . . Our history is replete with laws and judicial recognition that minors, especially in their earlier years, generally are less mature and responsible than adults"), and, most recently, in Roper v. Simmons, 543 U.S. 551, 572-573, 125 S. Ct. 1183, 1197, 161 L. Ed. 2d 1, 24 (2005) (holding that "[t]he differences between juvenile and adult offenders are . . . too marked and well understood to risk allowing a youthful person to receive the death penalty despite insufficient culpability.") A brief review of the limitations that the realities of adolescent brain development place on a juvenile's ability to understand her constitutional rights and the implications of waiving them, as well as an analysis of the United States Supreme Court's incorporation of adolescent brain science in Roper, thus are relevant to this Court's consideration of the case at bar.

A. BECAUSE THE EXECUTIVE FUNCTIONING SECTION OF THE BRAIN DEVELOPS LAST, AND JUVENILES RELY ON THEIR EMOTIONAL CENTER TO MAKE DECISIONS, JUVENILES SIMPLY CANNOT THINK, REACT, OR PROCESS COMPLEX INFORMATION AND SITUATIONS LIKE ADULTS.

It is by now well-established that different regions of the brain control different human functions. See Inside the Teenage Brain, Frontline, available at http://www.pbs.org/wgbh/pages/frontline/shows/teenbrain/view (last visited April 14, 2009). The brain is divided into two hemispheres, the left and the right, and each hemisphere is composed of lobes. See Kenneth King, Waiving Childhood Goodbye: How Juvenile Courts Fail to Protect Children from Unknowing, Unintelligent, and Involuntary Waivers of Miranda Rights, 2006 Wis. L. Rev. 431, 436 n. 23 (2006). The left hemisphere controls the right side of the body, and processes language, mathematics, and logical thought. Ibid. The right hemisphere controls the left side of the body, and processes visual skills, including the perception of spatial relationships. The lobes that govern memory and attention reside in both hemispheres. The frontal lobe of the brain, located just below the forehead, is responsible for higher-order processes including reasoning, decision-making, judgment, and executive functions. Ibid. The parietal lobe, on the top of the brain, is responsible for spatial orientation and map interpretation; the occipital lobe, to the rear of the

brain, is responsible for vision; and temporal lobes on either side of the head are responsible for hearing, language, memory storage, and emotion. Ibid. The cerebellum, which coordinates motor control, sits at the base of the brain. The amygdala is located just above the cerebellum. If the frontal lobes are the reasoning, stop-and-reflect, centers of the brain, the amygdala, in contrast, is the split second, heat-of-the-moment, fight-or-flight, survival decision-making center. Id. at 442. Finally, the corpus callosum ferries information signals between the two hemispheres. Id. at 439.[2]

All regions of the brain are made up of gray matter, white matter, and liquid. Gray matter is the part of the brain that does the mind's work, storing learned knowledge, interpreting the senses, processing information, making logical connections, conceiving of the hypothetical, and everything else the human brain does. White matter, or myelin, is the fatty sheathing of neurons that allows for the efficient transmission of information to and within the brain, including between the hemispheres and the different regions of the brain. Ibid.

Neuroscientists now know that each region of the brain matures at a different rate, starting with the back and moving towards the front. Brain development is not complete until the

[2] For an interactive depiction of the anatomy of a teen brain, see http://www.pbs.org/wgbh/pages/frontline/shows/teenbrain/work/anatomy.html (last visited April 14, 2009).

mid-twenties,[3] with the frontal lobes, the parietal lobes, and the temporal lobes, all of which are required for abstract

[3] The pre-frontal cortex of the brain, responsible for "executive" functions of planning and abstract thinking, is not fully developed until one's early to mid-twenties. Francine M. Benes, The Development of Prefrontal Cortex: The Maturation of Neurotransmitter Systems and Their Interactions, in Handbook of Cognitive Neuroscience 79, 79-89 (Charles A. Nelson & Monica Luciana eds., 2001) (concluding that the development of the prefrontal cortex "includes the early adult period and possibly even beyond") See also Brain Immaturity Could Explain Teen Crash Rate, The Wash. Post, Feb. 1, 2005 at A-1 (explaining that "an international effort led by [the] NIH's Institute of Mental Health and UCLA's Laboratory of Neuro-Imaging" has demonstrated that "the point of intellectual maturity, the 'age of reason'" does not occur until age 25); Ruben C. Gur, Brain Maturation and the Execution of Juveniles: Some reflections on science and the law, The Penn. Gazette (January/February 2005) at 14 ("some brain regions do not reach maturity in humans until adulthood . . . [as has] . .been confirmed by more recent neuroimaging studies"); Jeffrey Fagan, Atkins, Adolescence, and the Maturity Heuristic: Rationales for a Categorical Exemption for Juveniles from Capital Punishment, 33 N.M. L. Rev. 207, 238-39 (2003) (summarizing recent research reporting that "functions and regions of the brain regulating long-term planning, regulation of emotion, impulse control, and the evaluation of risk and reward... continue to mature over the course of adolescence, and perhaps beyond age twenty and well into young adulthood"); Ronald E. Dahl, Affect Regulation, Brain Development, and Behavioral/Emotional Health in Adolescence, 6 CNS Spectrums 60, 69 (2001) ("Regions in the PFC [prefrontal cortex] that underpin higher cognitive-executive functions mature slowly, showing functional changes that continue well into late adolescence/adulthood."). See also Richard Restak, M.D., The Secret Life of The Brain 76 (The Dana Press and The John Henry Press, 2001) ("the prefrontal lobes aren't fully mature until the 20's or even later"); Barry Feld, Competence, Culpability, and Punishment: Implications of Atkins for Sentencing and Executing Adolescents, 32 Hofstra L. Rev. 463, 515 ("[ne]urobiological evidence suggests that the human brain does not achieve physiological maturity until the early twenties and that adolescents simply do not have the same physiologic capability as adults to make mature decisions or to control impulsive behavior"); Lucy C. Ferguson, The Implications of

reasoning, maturing last. See Abigail A. Baird and Jonathan A. Fugelsang, The Emergence of Consequential Thought: Evidence from Neuroscience, 359 Phil. Transactions Royal Soc'y B: Biological Scis. 1797, 1798 (2004). Before that time, the brain is undergoing a process called myelination, in which the neural fibers in the brain, called axons, are coated with the white fatty substance myelin. The same way insulation on a wire helps makes the wire conduct energy more efficiently, as myelin thickens, it facilitates communication between various parts of the brain and increases the speed at which information is processed. See Roper v. Simmons, Brief of Amicus Curiae, American Medical Association, American Psychiatric Association, American Society for Adolescent Psychiatry, American Academy of Child and Adolescent Psychiatry, American Academy of Psychiatry and the Law, National Association of Social Workers, Missouri Chapter of the National Association of Social Workers, and

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Developmental Cognitive Research On 'Evolving Standards of Decency' and the Imposition of the Death Penalty on Juveniles, 54 Am.U. L. Rev. 441,442 ("Since 2000, numerous brain-scan studies have established that the human brain does not fully mature until an individual is in his or her early to mid-twenties"); Kristina Dell and Claudia Wallis, What Makes Teens Tick, TIME (September 26, 2008), available at http://www.time.com/time/magazine/article/0,9171,994126-2,00.html (last visited April 14, 2009) (quoting Dr. Jay Giedd, chief of brain imaging in the child psychiatry branch at the National Institute of Mental Health as saying, "[w]hen we started," says Giedd, "we thought we'd follow kids until about 18 or 20. If we had to pick a number, we'd probably go to age 25.")

National mental Health Association (July 19, 2004) at 11-23 (available at http://www.abanet.org/crimjust/juvjus/simmons /ama.pdf). A faster processing speed means that the developing brain can handle increasingly complex cognitive operations that might require the careful integration and application of information from several different sources and regions of the brain.

During this same period, the brain is undergoing a complementary process called pruning, in which the amount of gray matter in the brain is thinned. Reducing the amount of gray matter allows the reasoning areas of the brain to develop and function fully, just as pruning weak branches from a tree allows stronger branches to flourish. While gray matter is thinned at a rate of about 0.7% each year, tapering off in the early 20's, myelin sheaths thicken with each passing year through a person's 40's. In short, as a child matures, "[t]he brain becomes a more efficient machine, but there is a trade-off: it is probably losing some of its raw potential for learning and its ability to recover from trauma." See Claudia Wallis, What Makes Teens Tick, TIME (September 26, 2008) available at http://www.time.com/time/magazine/article/

0,9171,994126-2,00.html (last visited April 16, 2009).[4]

According to this research, adolescents do not think like adults because they physically cannot. To analogize: although caterpillars grow into butterflies, caterpillars simply cannot fly: they do not have wings or any of the other physical characteristics necessary to perform that function, though they are born with the capability to acquire those things necessary to enable them to fly as they mature. In the same way, until their brains have fully developed, juveniles simply do not have the brain capabilities that adults have. Just as it would be unreasonable to expect a caterpillar to fly, it is unreasonable to expect a juvenile to process concepts, respond to stressful situations, or make decisions like adults do.[5]

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[4] For a graphic explanation of the pruning process, see http://img.timeinc.net/time/covers/1101040510/neurons/images/graphic3.jpg (May 10, 2003) (last visited April 16, 2009).

[5] It is crucial to note that the developmental characteristics and neuroscience research findings described here overstate the capabilities of children in the nation's juvenile justice systems, as these findings are based on studies of healthy children, while the vast majority of children in the nation's delinquency courts are not healthy. For example, According to a 1994 Office of Juvenile Justice and Delinquency Prevention study of juveniles' response to health screenings conducted at the admission of juvenile facilities, 73% of juveniles reported having mental health problems and 57% reported having prior mental health treatment or hospitalization. http://www1.nmha.org/children/prevent/stats.cfm (last visted April 16, 2009). Many children suffer from dual diagnoses, like a substance-abuse disorder and a mental health diagnosis, multiple addictions, or multiple mental health diagnoses. In addition, while about seven percent of all public school students have learning disabilities, estimates of children in detention with learning

B. NEW JERSEY MUST NOT IGNORE THE WELL-ESTABLISHED DEVELOPMENTAL DIFFERENCES BETWEEN JUVENILE AND ADULT OFFENDERS IN ITS CONSIDERATION OF THE PROCESS DUE CHILDREN FACING DELINQUENCY PROSECUTION.

It is beyond cavil that juveniles and adults have developmental differences substantial enough to mandate differential treatment in a myriad of legal contexts. In Roper v. Simmons, 543 U.S. 551 (2005), a sentencing case that relied on developmental research to strike down the juvenile death penalty as a violation of the Eighth Amendment's cruel and unusual punishments clause,[6] the Court concluded that "the

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disabilities range from 12-70%. Most compellingly, there is a tremendous overlap between the delinquency and dependency systems. In numerous studies, delinquent and criminal populations have strikingly higher rates of childhood abuse and neglect than do members of the general population. Being abused or neglected as a child increased the likelihood of arrest as a juvenile by 59% and as an adult by 28%, and abused and neglected cases were younger at first arrest, committed nearly twice as many offenses, and were arrested more frequently. See generally C.S. Widom and M.G. Maxfield, An Update On the "Cycle of Violence," National Institute of Justice: Research in Brief. Washington, D.C.: U.S. Department of Justice, Office of Justice Programs (2001); Dorothy Roberts, Criminal Justice and Black Families: the Collateral Damage of Over-Enforcement, 34 U.C. Davis L. Rev. 1005 (2001); Claudette Brown, Crossing Over: From Child Welfare to Juvenile Justice, 35 Maryland Bar Journal 18 (2003).

[6] The Court had considered the juvenile death penalty twice before Roper, which reversed the Court's ruling in Stanford v. Kentucky, 492 U.S. 361, 109 S.Ct. 2969, 106 L.Ed.2d 306 (1989), and upheld the constitutionality of the death penalty for 16 and 17

differences between juvenile and adult offenders are too marked and too well understood to risk allowing a youthful person to receive the death penalty despite insufficient culpability." Roper, 543 U.S. at 572-73. See also Atkins v. Virginia, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002). Specifically, the Roper Court found that juveniles are less culpable than the average adult offender for three reasons: (1) juveniles lack maturity and responsibility, (2) juveniles are more vulnerable and susceptible to outside influences, particularly negative peer influences, and (3) compared to adults, juveniles are not as well formed in character and personality, and have a much greater potential for rehabilitation. Id. at 569-570. Although the Court recognized these distinctive characteristics of adolescence in the context of considering a challenge to the juvenile death penalty, the research findings apply generally to all adolescents under the age of eighteen.

With respect to its first finding, that juveniles lack maturity and responsibility, the Court noted that "adolescents are overrepresented statistically in virtually every category of reckless behavior." Id. at 569 (citing Jeffrey Arnett, Reckless

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year olds. Stanford abrogated the Court's ruling just one year earlier in Thompson v. Oklahoma, 487 U.S. 815 (1988), which held that juveniles under 16 could not be sentenced to death under the Eighth Amendment. It is important to note that, despite these precedents and the considerable inertia of stare decisis, the Roper Court was so persuaded by recent brain development research and other factors that it reversed itself.

Behavior in Adolescence: A Developmental Perspective, 12 Developmental Review 339 (1992)). Further, the Court recognized that "the age of 18 is the point where society draws the line for many purposes between childhood and adulthood." Roper, 543 U.S. at 574. In fact, the Court appended an extensive list of state and federal statutes that categorically bar youth under 18 from participating in adult activities, including voting, serving on juries, enlisting in the military or marrying without parental consent.[7] Id. at 578-86.

The Court's second finding, that "juveniles are more vulnerable or susceptible to negative influences and outside pressures including peer pressure," Roper, 543 U.S. at 569, was well-supported by research as well as common sense. "[Y]outh is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage." Roper, 543 U.S. at 569 (citing Eddings v. Oklahoma, 455 U.S. 110, 115 (1982)); see Laurence Steinberg and Elizabeth S. Scott, Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty, 58 Am. Psychologist 1009, 1014 (2003).

[7] New Jersey civil law likewise sets age requirements for youth participation in many spheres of adult life. For example, individuals younger than eighteen in New Jersey cannot marry without parental consent, N.J.S.A. 37:1-6; youths under 21 years old may not drink or purchase alcohol, N.J.S.A. 2C:33-15; and youths younger than 16 years old may not drive under any circumstances, N.J.S.A. 39:3-11.1.

Finally, the Court noted that juveniles are not as well formed in character and personality as adults. Roper, 543 U.S. at 570 (citing Erik Erikson, Identity: Youth and Crisis (1968)). The relevance of youth as a mitigating factor "derives from the fact that the signature qualities of youth are transient; as individuals mature, the impetuousness and recklessness that may dominate in younger years can subside." Ibid. (citing Johnson v. Texas, 509 U.S. 350, 368, 113 S.Ct. 2658, 125 L.Ed.2d 290 (1993)); see Steinberg and Scott, Less Guilty by Reason of Adolescence, supra, at 1014). The Court acknowledged that even experts in psychology struggle to differentiate between "transient immaturity" and "irreparable corruption" in juvenile offenders. Roper, 543 U.S. at 573. As a result, psychologists are forbidden from diagnosing youth with "antisocial personality disorder" because it is difficult to ascertain whether the behaviors that characterize the disorder as observed in adolescents are of a temporary, or permanent nature. Ibid. (citing American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders 701-706 (4th ed. text rev. 2000)); see Hervey Checkley, The Mask of Sanity 270 (5th 3d. 1976); John F. Edens et al., Assessment of "Juvenile Psychopathy" and its Association with Violence: A Critical Review, 19 Behav. Sci. & L. 53, 77 (2001). In fact, the vast

majority of offenders age out of delinquent behavior and go on to lead productive, law-abiding lives.

It is crucial to note that, although the Court saw fit to impose a bright-line rule with respect to the application of the death penalty, it still recognized that, despite the brain science, the justice system might one day encounter a juvenile so "psychological[ly] matur[e], and . . . [of] sufficient depravity, to merit a sentence of death." Roper, 543 U.S. at 572. The Court indicated, however, that it could not countenance the "unacceptable likelihood [that] exists that the brutality or cold-blooded nature of any particular crime would overpower mitigating arguments . . . even where the juvenile offender's objective immaturity, vulnerability, and lack of true depravity should require a sentence less severe than death." Id. at 573. The Court thereby rejected the state's arguments that jurors make individualized determination of which juveniles should be spared and which should be sentenced to death.

The same principles of adolescent development upon which the Roper Court relied support attachment of the Sixth Amendment right to counsel at the moment a delinquency petition is filed and, further, a per se rule prohibiting a juvenile from waiving Miranda rights during custodial interrogation without first consulting an attorney. To paraphrase the Court, in light of recent advances in adolescent cognitive development, "when we

allow judges to indulge in a case-by-case totality analysis and assign whatever weight they see fit to their chosen totality factors, we create an unacceptable risk that a child who does not understand his or her Miranda rights or the relevant circumstances will be found to have made a knowing, intelligent, and voluntary waiver nonetheless." King, Waiving Childhood Goodbye, supra, at 477. Simply put, Roper, and the developmental research on which it rests, compel the adoption of a due process analysis that requires bright line rules for the protection of juveniles who are formally charged or facing interrogation.

II. PURSUANT TO CASE LAW, LEGISLATION, COURT RULES, AND PRACTICE STANDARDS FROM AROUND THE COUNTRY, THE SIXTH AMENDMENT RIGHT TO COUNSEL FOR JUVENILES ATTACHES AT THE LATEST WHEN A DELINQUENCY PETITION OR COMPLAINT IS FILED.

The long-recognized and scientifically-validated vulnerability of young people to coercive and manipulative interrogation techniques, as well as the increasingly severe collateral consequences of juvenile delinquency proceedings,[8] render the need for early attachment of the Sixth Amendment right to counsel all the more acute.[9] As Justice Fortas famously

[8] These range from waiver to the adult system to open juvenile records to expulsion from public housing, among others. Because this issue has been well-briefed by Amicus Curiae New Jersey Association of Criminal Defense Lawyers, we will not address it in detail here.

[9] It should be noted that, in Gault, the Supreme Court declined to apply directly to juveniles the Bill of Rights guarantees accorded adults. Instead, it held that the standard for

recognized in In re Gault, "The condition of being a boy does not justify a kangaroo court." Gault, 387 U.S. at 28, 87 S. Ct. at 1444, 18 L. Ed at 546. In extending the right to counsel to children, the Gault Court observed that juveniles need "'the guiding hand of counsel at every step in the proceedings against [them].'"[10] That the Court envisioned the child's right to counsel as a right to meaningful and effective assistance of counsel is evident in its description of why juveniles need legal representation: "to cope with problems of law, to make

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evaluating due process claims in the delinquency context is "fundamental fairness," and then determined that the right to counsel to be an essential component of fundamentally fair delinquency proceedings. Nevertheless, courts considering juvenile right to counsel claims have almost uniformly cast the analysis in Sixth Amendment terms. See Marsha Levick and Neha Desai, Still Waiting: The Elusive Quest to Ensure Juveniles a Constitutional Right to Counsel at All Stages of the Juvenile Court Process, 60 Rutgers. L. Rev. 175, 183 n. 38 (2007). Similarly, this brief refers to the Sixth Amendment in order to distinguish the concerns at work in the post-petition posture from those at the pre-filing, Miranda context.

[10] 387 U.S. at 36. It is notable that the Court grounded the extension of the right to counsel in two Sixth Amendment cases: Gideon v. Wainwright, 372 U.S. 335 83 S.Ct. 792, L.Ed.2d 799 (1963), and Powell v. State of Alabama, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158 (1932), In Powell, the Court reversed the convictions of three African American men who were charged and convicted of rape, then a capital crime, because the Court determined that they had not received effective assistance of counsel. Unlike Gideon, in which the defendant represented himself, the Powell defendants had been assigned attorneys; in fact, the court had assigned every attorney in the courtroom. However, the Court found that the mere presence of counsel does not amount to exercise of the right to counsel. Instead, the Powell Court found that those defendants were entitled to counsel who would offer zealous representation, and on whose judgment they could rely.

skilled inquiry into facts, to insist upon regularity of the proceedings, and to ascertain whether he has a defense and to prepare and submit it." Id. at 36.

The practical effect of the Appellate Division's holding below is that P.M.P. and other similarly-situated young people are denied the essential assistance of counsel at a critical stage of a delinquency proceeding. In determining that a petition, the sole charging instrument in a juvenile delinquency case, was not the substantial equivalent of an indictment pursuant to State v. Sanchez, 129 N.J. 261 (1992), the court thrust open the "window of opportunity" for police and prosecutorial overreaching seemingly shut by Sanchez. As a result, young people enjoy lesser, rather than greater, constitutional protections than those afforded adults. This poses the same danger of procedural irregularity recognized by the Gault Court, encourages police and prosecutorial interrogation post-filing, and is inconsistent with forty years of juvenile justice jurisprudence. It also runs afoul of Rothgery v. Gillespie County, __ U.S. __, 128 S. Ct. 2578, 171 L. Ed. 2d 366 (2008), in which the United States Supreme Court recently held that the adult Sixth Amendment right to counsel attaches at the time the initial charging instrument is filed, even in the case of indictable offenses.

In the forty-two years since Gault was decided, the number of state courts to contemplate directly the question of when the right to counsel attaches in delinquency cases is surprisingly sparse. However, the case law that is available is unified in its conclusion: the juvenile right to counsel attaches no later than the moment at which delinquency petition is filed. Legislative recognition of the right is more widespread; following Gault, every jurisdiction in the United States promulgated a statutory protection recognizing and protecting the juvenile right to counsel in delinquency cases, and a number of statutes articulate early attachment of that right.

These legislative formulations are underscored, in many states, by analogous rules of court that stress the import of the juvenile right to counsel and the need for its protection by the judiciary.[11] And, buttressing these judicial pronouncements and legislative formulations, national practice standards provide another source of recognition and protection of the right to counsel.

A. COURTS CONSTRUING THE SIXTH AMENDMENT IN THE JUVENILE CONTEXT ATTACH THE RIGHT TO COUNSEL WHEN THE PETITION ALLEGING DELINQUENCY IS FILED.

While the question of the precise moment of attachment of the juvenile right to counsel has not been frequently litigated,

[11] For a list of statutes and court rules, please refer to footnote 17, infra.

courts to which the question has been posed have ruled, consistent with the United States Supreme Court's recent holding in Rothgery, that the filing of the complaint is the trigger for attachment of the right. In fact, with what appears to be the sole exception of the Appellate Division's decision below, courts that have contemplated the issue have unanimously determined that the right to counsel attaches for a juvenile at the moment the adversarial process begins.

As early as 1985, the Appellate Court of Illinois held that a juvenile's Sixth Amendment right to counsel was violated when he was interrogated by police following the filing of a delinquency petition. Illinois v. Fleming, 480 N.E. 2d 1221, 1224 (Ill. App. Ct. 1985). Based upon information he obtained from one of Fleming's acquaintances, a police officer filed a delinquency petition charging fifteen year old Fleming with murder and aggravated battery. Ibid. An arrest warrant issued, and police extradited Fleming from Georgia to Chicago. Ibid.

In Chicago, the police interrogated Fleming and obtained a confession, which Fleming later sought to suppress on the ground that the interrogation violated his Sixth Amendment right to counsel. Id. at 1223. The question on appeal was whether Fleming's right to counsel attached with the filing of the delinquency petition. Id. at 1223-24. The court declared that the filing of a delinquency petition is analogous to the filing

of a criminal complaint, taking particular note of prosecutorial oversight of and involvement in case initiation. Id. at 1225. The court further found that "the right to counsel attached when the delinquency petition was filed and an arrest warrant issued because it was at that point that adversarial proceedings began." Ibid. Therefore, Fleming's Sixth Amendment right to counsel was violated by his subsequent interrogation, despite the issuance of Miranda warnings. Ibid.

Perhaps due to what should be an obvious synchronicity of formal charging and attachment, Fleming appears to be the only appellate decision in the country arising out of facts directly analogous to this case. Much more frequently, courts have examined the question of whether the right attaches at some earlier stage. Even as they have rejected such claims, however, courts have unanimously recognized that juvenile proceedings commence with the filing of a petition or complaint and therefore, the Sixth Amendment right to counsel attaches at that point. See Missouri v. Greer, 159 S.W. 3d 451, 461 (Mo. Ct. App. 2005)(denying a violation of juvenile defendant's Sixth Amendment right to counsel where he was to be tried as an adult, noting that no charges had yet been filed and no indictment yet returned at the time of his confession. "The Sixth Amendment right to counsel attaches only at or after the time that adversary judicial proceedings have been initiated against an

accused by way of a formal charge, preliminary hearing, indictment, information, or arraignment." (citation omitted)(emphasis added); In re D.E.B., 1996 Tex. App. LEXIS 4439, *10 (Tex. App. 1996)(holding that a pre-trial identification of a juvenile defendant did not violate his right to counsel because, "[u]nder the Sixth Amendment, appellant had no right to counsel when he was detained because no formal charges had yet been filed.")(emphasis added); Deshawn E. v. Safir, 156 F. 3d 340, 349-50 (2d Cir. 1997)(applying New York law to decline to recognize a Sixth Amendment right to counsel in an interrogation arising from a routine juvenile adjustment process, noting that "[a]t the time of questioning . . ., the juveniles have not been arrested or charged with any crime. The adjustment process takes place before any juvenile delinquency petition is filed. Adversarial judicial proceedings have not commenced and the right to counsel has not attached.")(emphasis added); In re Nicomedes F., 177 A.D. 2d 316, 317 (N.Y. App. Div. 1991)(finding no right to counsel when service of a written notice of release of stolen property was served upon a juvenile and his mother. Since the notice was given "prior to the filing of the juvenile delinquency petition" it was also prior to the commencement of juvenile proceedings); In the Matter of the Welfare of M.A., 310 N.W. 2d 699, 702 (Minn. 1981)(holding a juvenile's confessions to police prior to filing of formal

delinquency petitions were voluntary, acknowledging that "[i]t would seem the right to counsel attaches at the time the formal petition is filed. At this point, there is a definite commencement of the adversary proceedings.")(emphasis added).

It is clear from these rulings that state courts confronting the right to attachment of counsel in the juvenile context have reached a natural consensus that the right to counsel attaches at the moment adversarial judicial proceedings commence. There is also clear agreement that "commencement" occurs no later than the moment a delinquency petition is filed, a consensus that also defines the statutory landscape.

B. STATE LEGISLATURES AND ANALOGOUS RULES OF COURT EXTEND GREATER PROTECTIONS OF THE RIGHT TO COUNSEL TO JUVENILES THAN TO ADULTS, AND NEW JERSEY LAW IS REFLECTIVE OF THIS NATURAL CONSENSUS.

One hundred percent of United States jurisdictions have codified the juvenile right to counsel in legislation or court rules, and often both.[12] The most recent trends in the

[12] Alaska Stat. § 12-15-210; Ala. R. Juv. P. 11; Alaska Ct. Delinq. R. 16; Ariz. Rev. Stat. Ann. § 8-221; Ariz. R. Juv. R. P. 10; Ark. Code Ann. § 9-27-316; Cal. Welf. & Inst. Code § 633; Cal. R. Ct. 5.534; Col. Rev. Stat. 19-1-105; Col. R. Juv. P. 3; Conn. Gen. Stat. § 46b-135; Del. Fam. Ct. Crim. R. 44; D.C. Code § 16-2304; D.C. SCR-Juv. R. 44; Fla. R. Juv. P. 8.165; Ga. Code Ann. § 15-11-6; Ga. Unif. Juv. Ct. R. 8.3; Haw. Fam. Ct. R. 155; Id. Code Ann. § 50-514; Id. Juv. R. 9; 705 Ill. Comp. Stat. 405/5-170; Ind. Code 31-32-4-1; Ind. Code 31-37-12-5; Ind. Code 31-32-5-1; Iowa Code 232.11; Kan. Stat. Ann. 38-2306; Ky. Rev. Stat. Ann. § 610.290; La. Child. Code. Ann. art. 809; Me. Rev. Stat. Ann. tit. 15 § 3306; Md. Code Ann., Cts. & Jud. Proc. §3-8A-20; Md. R. 11-106; Mass. Dist. Ct. Sp. R. Civ. P. 205; Mich. Comp. Laws §

formulation of these provisions reflect an increasingly robust expression of that right. The formulation of these enactments may vary from jurisdiction to jurisdiction; nevertheless, there are discernable patterns of consensus that unite concepts and principles across state lines and emphasize the import of a right to counsel for juveniles that is distinct from and more protective than the counsel rights afforded to adults.

Some state statutes explicitly mandate the moment of attachment for the right to counsel. For example, Arizona law declares that "Before any court appearance which may result in institutionalization. . . the court shall appoint counsel for the juvenile[.]" ARIZ. REV. STAT. ANN. § 8-221(C)(emphasis added). Similarly, Arkansas requires appointment prior to the detention hearing to ensure that the juvenile and her counsel have

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712A.17c; MICH. CT. R. 3.915; MINN. STAT. 260B.163; MINN. R. JUV. DELINQ. P. 3.01; MISS. CODE ANN. § 43-21-201; MO. REV. STAT. 211.211; MO. SUP. CT. R. 116.01; NEB. REV. STAT. § 43-272; NEB. R. CT. 13; NEV. REV. STAT. ANN. § 62D.030; N.H. REV. STAT. ANN. § 169-D:12; N.J.S.A. § 2A:4A-39; N.J. Ct. R. 5:3-4; N.M. STAT. ANN. § 32A-2-14; N.M. CHILD. CT. R. 10-205(A); N.Y. FAM. CT. ACT § 320.3.; N.C. GEN. STAT. § 7B-2000; N.D. CENT. CODE § 27-20-26; OHIO REV. CODE ANN. § 2151.352; OHIO JUV. R. 4; OKLA. STAT. tit. 10 § 24; OR. REV. STAT. § 419C.200; OR. UNIF. TRIAL CT. R. 11.010; 42 PA. CONS. STAT. § 6337; PA. R. JUV. CT. PRO. 151; P.R. LAWS ANN. tit. 34, § 2206.; P.R. CT. R. 13.6; R.I. GEN. LAWS § 14-1-58.; R.I. R. JUV. P. R. 9; S.C. CODE ANN. § 17-23-60; S.C. APP. CT. R. 602; S.D. CODIFIED LAWS § 26-7A-30; TENN. CODE ANN. § 37-1-126; TENN. R. JUV. P. 30; TEX. FAM. CODE § 51.10; UTAH CODE ANN. § 78-3A-913; UTAH R. JUV. P. R. 15; VT. STAT. ANN. tit. 33 § 5221; VT. FAM. PRO. R. 6; V.I. CODE ANN. tit. 5 § 2505; VA. CODE ANN. § 16.1-266; VA. SUP. CT. R. 8:17; REV. CODE WASH. § 13.34.090; WASH. JUV. CT. R. 6.2; W. VA. CODE § 49-5-2; W. VA. R. CR. P. 5; WIS. STAT. § 48.23; WYO. STAT. § 7-1-105; WYO. R. CR. P. 44.

sufficient opportunity to confer prior to a hearing. ARK. CODE ANN. § 9-27-316. Connecticut directs that the right attaches "[a]t the commencement of any proceeding concerning the alleged delinquency of a child." CON. GEN. STAT. § 46b-135(a). A Georgia Court Rule attaches the right "[p]rior to the commencement of the detention hearing. . ." while Idaho law specifies that the right attaches "[a]s early as possible in the proceedings." GA. UNIF. JUV. CT. R. 8.3, ID. CODE ANN. § 50-514.

Illinois law is particularly protective, declaring that "[a] minor who was under 13 years of age at the time of the commission of an act that if committed by an adult would be a [serious violation] must be represented by counsel during the entire custodial interrogation. 705 ILL. COMP. STAT. 405/5-170 (emphasis added). This Illinois provision, promulgated in 2001, was revised in 2005 to specify that the minor is absolutely unable to waive this right to the assistance of counsel. IL Legis 94-345 (July 26, 2005). Illinois' protection mirrors Iowa law, which attaches the right "[f]rom the time the child is taken into custody for any alleged delinquent act that constitutes a serious or aggravated misdemeanor or felony under the Iowa criminal code." IOWA CODE 232.11. A Minnesota court rule mandates that the "right attaches no later than when the child first appears in court." MINN. STAT. 260B.163.

North Carolina has taken a unique approach by legislating a juvenile presumption of indigency. § 7B-2000(b) ("All juveniles shall be conclusively presumed to be indigent, and it shall not be necessary for the court to receive from any juvenile an affidavit of indigency."). This eliminates the need for an inquiry before counsel is assigned, and automatically entitles a juvenile to counsel once the delinquency petition is filed.

Similarly, North Dakota's Uniform Juvenile Court Act provides that "a party is entitled to representation by legal counsel at all stages of any proceedings under this chapter." N.D. Cent. Code. §27-20-26 (2007). The North Dakota courts have broadly construed the stages of a juvenile proceeding, finding that "proceedings" are "not limited to those instances which take place in the courtroom, but include circumstances, such as an interrogation, where the officer has focused his investigation on a particular suspect and is intent on gathering evidence." In Interest of J.D.Z., 431 N.W. 2d. 272, 275 (N.D. 1988)(affirming suppression of a confession obtained from a juvenile who was not represented by counsel), accord In Interest of D.S., 263 N.W. 2d 114 (N.D. 1978)(suppressing confession and murder weapons obtained as fruits of the confession because a juvenile was interrogated without counsel).

While these attachments of the right to counsel at a specific moment in a delinquency proceeding are a compelling

statement of the special protections afforded to juveniles, state efforts to limit the ability of a juvenile to waive his or her right to counsel are even more demonstrative. By endowing juveniles with more robust protections than those available to adults, laws restricting waiver accommodate the core differences between juveniles and adults and imply legislative recognition of those differences.

In this context, the most restrictive laws provide that a juvenile may not waive counsel at any stage of the delinquency proceeding. See IOWA CODE 232.11; see also OHIO JUV. R. 3. Others, like the Illinois statute discussed earlier in this section, make the assistance of counsel unwaivable in certain circumstances. 705 ILL. COMP. STAT. 405/5-170; see also ARK. CODE ANN §9-27-317 (expressly forbids waiver in enumerated circumstances); LA. CHILD. CODE ANN. art. 810 (no wavier in felony-grade acts); WIS. STAT. § 48.23 (no waiver if juvenile is less than 15 years old). Minnesota is more generous in permitting a juvenile charged with a gross misdemeanor or felony to waive his or her right to counsel, but requires the court to appoint "stand-by counsel" where a juvenile has exercised this ability. MINN. STAT. 260B.163. Other jurisdictions require that the juvenile consult with an attorney before the court can accept a waiver of the right to counsel. ALASKA STAT. § 12-15-210 (consult with attorney where juvenile is alleged to have committed a

felony); FLA. R. JUV. P. 8.165 (requires "a meaningful opportunity to confer with counsel regarding the child's right to counsel, the consequences of waiving counsel, and any other factors that would assist the child in making the decision to waive counsel."); LA. CHILD. CODE ANN. art. 810 (requiring that a waiver not be accepted until a juvenile has conferred with a guardian or attorney); N.J. STAT. ANN. § 2A:4A-39 (juvenile may not waive without consultation with counsel); TENN. R. JUV. P. 30(waiver valid after full consultation with the attorney). Indiana requires that waiver be executed by counsel or a guardian unless the child is emancipated. IND. CODE 31-32-5-1. Kansas prohibits admission of any statement made by a juvenile under the age of fourteen unless the child consulted with a parent or attorney prior to waiving his or her right to counsel. KAN. STAT. ANN. 38-2333.

Most frequently, states do not permit juveniles to independently waive their right to counsel. Some require that a parent or guardian also waive the right before the waiver becomes effective. See ALASKA STAT. § 12-15-210 (requiring "a parent or guardian with whom the minor resides or resided before the filing of the petition [to] concur[] with the waiver"); Arizona (requiring waiver by both guardian and juvenile), accord ALASKA CT. DELINQ. R. 16; ARK. CODE ANN. § 9-27-317 (guardian or counsel must agree with the juvenile's decision to waive); 42 PA.

CONS. STAT. § 6337 (parents must be present in court in order to waive). Others ask the court to make a "best interests" of the juvenile determination before accepting a waiver. CONN. GEN. STAT. § 46B-135; ID. CODE ANN. § 50-514, accord ID. JUV. R. 9. Still others require that any waiver be made after consultation with counsel, and in the presence of counsel. MD. CODE ANN., CTS. & JUD. PROC. § 3-8A-20. Michigan permits waiver except where a guardian objects. MICH. CT. R. 3.915. Oklahoma explictly denies parents or guardians the right to waive for the child. OKL. STAT. ANN. TIT. 10 § 7003-3.7 (parent or guardian may not waive counsel for child).

When statutory and court rule protections of the right to counsel are reduced to statistics, the natural consensus is overwhelming. All fifty states, the District of Columbia, Puerto Rico, and the Virgin Islands have promulgated statutory and/or court rule protections that, at a minimum, recognize the right to counsel for juveniles, and require that juveniles be notified of the right.[13] Fourty-eight jurisdictions require courts to advise juveniles of their right to counsel.[14] In

[13] Ibid.

[14] ALASKA STAT. § 12-15-210; ALASKA CT. DELINQ. R. 16; ALA. R. JUV. P. 11; ARIZ. REV. STAT. ANN. § 8-221; ARIZ. R. JUV. R. P. 10; ARK. CODE ANN. § 9-27-316; CAL. WELF. & INST. CODE § 633; CAL. R. CT. 5.534; COL. REV. STAT. 19-1-105; COL. R. JUV. P. 3; CONN. GEN. STAT. § 46B-135; DEL. FAM. CT. CRIM. R. 44; D.C. CODE § 16-2304; D.C. SCR-JUV. R. 44; FLA. R. JUV. P. 8.165; GA. CODE ANN. § 15-11-6; GA. UNIF. JUV. CT. R. 8.3; ID. CODE ANN. § 50-514; ID. JUV. R. 9; IND. CODE 31-32-4-1; IND.

thirty-five states, the right to counsel applies explicitly to all stages (or, in the District of Columbia, Mississippi, and New Jersey, to all "critical" stages) of the proceedings.[15] At

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CODE 31-37-12-5; IND. CODE 31-32-5-1; IOWA CODE 232.11; KAN. STAT. ANN. 38-2306; KY. REV. STAT. ANN. § 610.290; LA. CHILD. CODE ANN. art. 809; ME. REV. STAT. ANN. tit. 15 § 3306; MD. CODE ANN., CTS. & JUD. PROC. §3-8A-20; MD. R. 11-106; MASS. DIST. CT. SP. R. CIV. P. 205; MICH. COMP. LAWS § 712A.17c; MICH. CT. R. 3.915; MINN. STAT. 260B.163; MINN. R. JUV. DELINQ. P. 3.01; MISS. CODE ANN. § 43-21-201; MO. REV. STAT. 211.211; MO. SUP. CT. R. 116.01; NEB. REV. STAT. § 43-272; NEB. R. CT. 13; NEV. REV. STAT. ANN. § 62D.030; N.H. REV. STATE. ANN. § 169-D:12; N.J.S.A. § 2A:4A-39; N.J. Ct. R. 5:3-4; N.M. STAT. ANN. § 32A-2-14; N.M. CHILD. CT. R. 10-205(A); N.Y. FAM. CT. ACT § 320.3.; N.C. GEN. STAT. § 7B-2000; N.D. CENT. CODE § 27-20-26; OHIO REV. CODE ANN. § 2151.352; OHIO JUV. R. 4; OKLA. STAT. tit. 10 § 24; OR. REV. STAT. § 419C.200; OR. UNIF. TRIAL CT. R. 11.010; 42 PA. CONS. STAT. § 6337; PA. R. JUV. CT. P. 151; P.R. LAWS ANN. tit. 34, § 2206.; P.R. CT. R. 13.6; R.I. R. JUV. P. R. 9; S.C. APP. CT. R. 602; S.D. CODIFIED LAWS § 26-7A-30; TENN. R. JUV. P. 30; TEX. FAM. CODE § 51.10; UTAH CODE ANN. § 78-3A-913; VT. STAT. ANN. tit. 33 § 5221; VT. FAM. PRO. R. 6; V.I. CODE ANN. tit. 5 § 2505; VA. CODE ANN. § 16.1-266; VA. SUP. CT. R. 8:17; REV. CODE WASH. § 13.34.090; WASH. JUV. CT. R. 6.2; W. VA. CODE § 49-5-2; W. VA. R. CR. P. 5; WIS. STAT. § 48.23; WYO. STAT. § 7-1-105; WYO. R. CR. P. 44.

[15] ALASKA STAT. § 12-15-210; ALA. R. JUV. P. 11; ARIZ. REV. STAT. ANN. § 8-221; ARK. CODE ANN. § 9-27-316; CAL. WELF. & INST. CODE § 633; CAL. R. CT. 5.534; CONN. GEN. STAT. § 46B-135; DEL. FAM. CT. CRIM. R. 44; D.C. CODE § 16-2304; D.C. SCR-JUV. R. 44; FLA. R. JUV. P. 8.165; GA. CODE ANN. § 15-11-6; HAW. FAM. CT. R. 155; ID. CODE ANN. § 50-514; ID. JUV. R. 9; IND. CODE 31-37-12-5; IND. CODE 31-32-5-1; IOWA CODE 232.11; KAN. STAT. ANN. 38-2306; LA. CHILDREN'S CODE art. 809; ME. REV. STAT. ANN. tit. 15 § 3306; MD. CODE ANN., CTS. & JUD. PROC. §3-8A-20; MD. R. 11-106; MASS. DIST. CT. SP. R. CIV. P. 205; MICH. COMP. LAWS § 712A.17c; MICH. CT. R. 3.915; MINN. STAT. 260B.163; MINN. R. JUV. DELINQ. P. 3.01; MISS. CODE ANN. § 43-21-201; MO. REV. STAT. 211.211; MO. SUP. CT. R. 116.01. NEV. REV. STAT. ANN. § 62D.030; N.J.S.A. § 2A:4A-39; N.J. Ct. R. 5:3-4; N.M. STAT. ANN. § 32A-2-14; N.C. GEN. STAT. § 7B-2000; N.D. CENT. CODE § 27-20-26; OHIO REV. CODE ANN. § 2151.352; 42 PA. CONS. STAT. § 6337; PA. R. JUV. CT. P. 151; P.R. CT. R. 13.6; S.D. CODIFIED LAWS § 26-7A-30; TENN. CODE ANN. § 37-1-126; TEX. FAM. CODE § 51.10; UTAH CODE ANN. § 78-3A-913; REV. CODE WASH. § 13.34.090; W. VA. CODE § 49-5-2; WIS. STAT. § 48.23 "All critical stages" is

least thirteen states explicitly require the court to appoint counsel in certain circumstances.[16]

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reflective of the adult Sixth Amendment formulations. See Levick and Desai, Still Waiting, supra note 15, at 184-90.

[16] See D.C. SCR-JUV. R. 44 ("In delinquency and in need of supervision cases, the respondent shall be represented by counsel at all judicial hearings. . . If counsel is not retained for the respondent, or if it does not appear that counsel will be retained, counsel shall be appointed."); GA. CODE ANN. § 15-11-6 ("Counsel must be provided for a child not represented by the child's parent, guardian, or custodian."); ID. JUV. R. 9 ("In the event a juvenile appears before the court without parent(s) or guardian, the court shall appoint counsel to represent the juvenile"); KAN. STAT. ANN. 38-2306 ("Upon failure to retain an attorney, the court shall appoint an attorney to represent the juvenile."); MASS. DIST. CT. SP. R. CIV. P. 207 ("A child. . . against whom a complaint is made. . . shall be represented by counsel at every stage of the proceedings if it shall appear to the court that such child may be committed to the custody of the Youth Service Board as the result of such complaint."); MINN. STAT. 260B.163 ("The court shall appoint counsel, or stand-by counsel if the child waives the right to counsel, for a child who is. . . charged by delinquency petition with a gross misdemeanor or felony offense"); N.M. CHILD. CT. R. 10-205 ("Counsel must be appointed within five days of when a delinquency petition is filed or at the conclusion of the detention hearing, whichever occurs first."); N.D. CENT. CODE § 27-20-26 ("Counsel must be provided for a child not represented by his parent, guardian, or custodian."); OKLA. STAT. tit. 10 § 24("When it appears that a minor desires counsel but is indigent and cannot for that reason employ counsel, the court shall appoint counsel."); PA. R. JUV. CT. PRO. 151 (" In any case, the court shall assign counsel for the juvenile if the juvenile is without financial resources or otherwise unable to employ counsel."); R.I. GEN. LAWS § 14-1-58 ("The public defender shall appear on behalf of an accused delinquent child who is financially unable to afford counsel."); TEX. FAM. CODE § 51.101("A juvenile court. . . shall appoint an attorney to represent the child on or before the fifth working day after the date the petition for adjudication or discretionary transfer hearing was served on the child."); VT. STAT. ANN. tit. 33 § 5221 ("The court shall appoint an attorney for a child who is a party to a proceeding brought under the juvenile judicial proceedings chapters").

Despite the Appellate Division's interpretation below, New Jersey's own statutory formulation of the juvenile right to counsel is squarely in line with the consensus that has emerged across the country. Here, the protection extends to "every critical stage in the proceeding. . . that may result in the institutional commitment of the juvenile." N.J.S.A. § 2A:4A-39(a). The statute further provides particularly strong protections against waiver:

> A juvenile who is found to be competent may not waive any rights except in the presence of and after consultation with counsel, and unless a parent has first been afforded a reasonable opportunity to consult with the juvenile and the juvenile's counsel regarding this decision. The parent or guardian may not waive the rights of a competent juvenile. . . .

Id. at (b)(1)(emphasis added). New Jersey law thus reflects the natural and national consensus that juveniles facing delinquency charges need even greater protections than adults facing similar charges. To hold that the right to counsel attaches at a point subsequent to the filing of a petition would contravene the statute's underlying goals and run counter to the vast body of developmental and scientific research discussed in Part I of this brief.

C. NATIONAL PRACTICE STANDARDS, COMMENTARIES, AND REFORM EFFORTS EMPHASIZE THE IMPORT OF EARLY APPOINTMENT OF COUNSEL FOR JUVENILES FACING DELINQUENCY CHARGES.

National juvenile justice experts and professional organizations consistently recognize the critical importance of early, effective, and ongoing legal representation for young people charged with delinquency. These groups cite the attachment of the right to counsel at the earliest stage possible for juvenile court proceedings as a core protective principle to which all juvenile justice systems should aspire.

In 1974, at the dawn of the post-Gault era, Congress enacted the Juvenile Justice and Delinquency Prevention Act (JJDPA). Pub. L. 93-415 (1974). Out of the JJDPA arose the National Advisory Committee for Juvenile Justice and Delinquency Prevention, which was charged with developing national juvenile justice standards and guidelines. These guidelines, published in 1980, require that children be represented by counsel in delinquency matters from the earliest stage of the process.[17]

The venerable Juvenile Justice Standards of the Institute of Judicial Administration (IJA) and the American Bar Association (ABA) create a framework for the juvenile justice

[17] National Advisory Committee for Juvenile Justice and Delinquency Prevention, Standards for the Administration of Juvenile Justice §3.132 Representation by Counsel – For the Juvenile (1980), cited in National Juvenile Defender Center, Role of Juvenile Defense Counsel in Delinquency Court at 2 (Spring 2009).

system and its relationship to the rights and responsibilities of young people. See IJA-ABA, Juvenile Justice Standards: Standards Relating to Pre-trial Court Proceedings (1980). The Standards are intended to serve as guidelines for action by legislators, judges, and other groups concerned with the treatment of youth at state and federal levels.

The standards establish a clear requirement for the juvenile right to counsel: "In delinquency cases, the juvenile should have the effective assistance of counsel at all stages of the proceedings." Id., Standard 5.1(A) (emphasis added). This model guideline sets the time of attachment as when "the juvenile is taken into custody. . ., when the petition is filed against the juvenile, or when the juvenile appears personally at an intake conference." Id., Standard 5.1(B).

The Commentary to the IJA/ABA Standards states that officials having custody of juveniles are required to take steps to implement the right to counsel once the right attaches. Id., Commentary, Standard 5.1(B) ("Stage at which right arises"). The Commentary recognizes that there are various legislative approaches that states have taken in codifying the right to counsel, but argue that the "prompt provision of counsel. . . will relieve pressures on overcrowded detention facilities by speeding the release of juveniles." Ibid.

The Standards further make clear that young people should be advised of their right to counsel at the earliest possible moment. The IJA-ABA Juvenile Justice Standards: Standards Relating to Counsel for Private Parties states "[w]hen a juvenile is taken into custody, placed in detention or made subject to an intake process, the authorities taking such action have the responsibility promptly to notify the juvenile's lawyer, if there is one, or advise the juvenile with respect to availability of legal counsel." Standard 2.4(a)(1). According to the Commentary, "legal representation in screening, judicial, and administrative proceedings, which may affect a juvenile's custody or status" is essential. Id., Standard 2.4, Commentary. These Standards explain that young people do not necessarily understand the right to counsel, and therefore, the authorities should be required to provide "advice and assistance concerning legal representation, particularly during preliminary proceedings." Ibid.

The National Juvenile Defender Center (NJDC) and the National Legal Aid and Defender Association (NLADA) have developed a set of principles intended to promote a holistic and vigorous system of defense representation for indigent youth. NJDC/NLADA Ten Core Principles for Providing Quality Representation through Public Defense Delivery System (July

2008)(Principles).[18] The Principles seek to ensure that "children do not waive appointment of counsel and that defense counsel are assigned at the earliest possible stage of the delinquency proceedings." Id., Principle 1(B)(emphasis added). The NJDC/NLADA Principles further aspire to a juvenile justice system that "demonstrates strong support for the right to counsel and due process in delinquency courts to promote a juvenile justice system that is fair, non-discriminatory and rehabilitative." Id., Principle 10(A).

The National Council of Juvenile and Family Court Judges (NCJFCJ), a membership organization consisting of over 1700 juvenile and family court judges, has developed guidelines to improve the treatment of juvenile's in delinquency proceedings. The NCJFCJ Juvenile Delinquency Guidelines are grounded "in the most current research and promising practices available at the time of development." NCJFCJ, Juvenile Delinquency Guidelines: Improving Court Practice in Juvenile Delinquency Cases 16 (2005). Principle number 7 of the Guidelines calls for juvenile justice systems "to ensure that counsel is available to every youth at every hearing." Id. at 25 (emphasis added). The

[18] The Principles are discussed at length in the newly-published National Juvenile Defender Center, Role of Juvenile Defense Counsel in Delinquency Court at 2 (Spring 2009). This report endorses a framework of zealous defense advocacy for children from arrest through the post-dispositional phases of delinquency proceedings. Id. at 13.

Guidelines go further to insist that "it is the responsibility of counsel for youth to begin active representation of the client before the detention or initial hearing." Id. at 30 (emphasis added).

The American Bar Association's Criminal Justice Standards draw no distinction between adult and juvenile offenders when discussing the attachment of the right to counsel – both are entitled to counsel at the filing of formal charges. "Counsel should be provided to the accused. . . at appearance before a committing magistrate, or when formal charges are filed, whichever occurs first." ABA, Criminal Justice Standards: Standards for Providing Defense Services, Standard 5-6.1 (2002) (emphasis added).

Most recently, on April 14, 2009, the National Right to Counsel Committee of the Constitution Project issued a report descrying the state of America's indigent defense system for adults and youth. National Right to Counsel Committee, Justice Denied America's Continuing Neglect of Our Constitutional Right to Counsel (Constitution Project, Spring 2009). Authored by a nationally-prominent bi-partisan committee (co-chaired by former Vice President Walter Mondale and former F.B.I. Director William Sessions), the report sets forth a number of recommendations for reform. Chief among these is Recommendation Number 9, which cites to the Supreme Court's ruling in Rothgery and states:

"Prompt eligibility screening should be undertaken by individuals who are independent of any defense agency, and defense lawyers should be provided as soon as feasible after accused persons are arrested, detained, or request counsel." Id. at 197 (emphasis added).

D. NEW JERSEY IS UNIQUELY POSITIONED TO ENFORCE ATTACHMENT OF THE RIGHT TO COUNSEL NO LATER THAN THE FILING OF A DELINQUENCY PETITION.

In many states, bureaucratic barriers impede the early assignment of counsel to youth charged with delinquency. In New Jersey, however, these barriers do not exist. To the contrary, as the Family Court correctly pointed out below, New Jersey enjoys the benefits of a statewide public defender system. As a result, juvenile defense attorneys are assigned to each of the State's juvenile courts and readily available for at least provisional assignment at the moment a delinquency petition is filed. This availability of counsel is well-document in the record of the case at bar.

In addition, New Jersey has the current good fortune of being one of eight states in the country to have been selected for participation in the John D. and Catherine T. MacArthur Foundation's Juvenile Indigent Defense Action Network. This multi-year effort, part of the Foundation's larger "Models for Change" juvenile justice reform initiative, aims to ensure, among other things, that young people receive effective

assistance of counsel across the continuum of juvenile court involvement. Reflecting the widespread recognition of the critical nature of defense representation discussed above, one of the foci of this effort is early access to counsel, both in New Jersey and nationally.[19]

III. IN LIGHT OF THEIR UNIQUE VULNERABILITY TO INTERROGATION TECHNIQUES, AND OF UNITED STATES SUPREME COURT PRECEDENT, NEW JERSEY SHOULD REQUIRE DEFENSE COUNSEL TO BE PRESENT AT CUSTODIAL INTERROGATIONS OF JUVENILES.

The considerations that underscore the importance of early attachment of Sixth Amendment protections apply with equal, if not greater, force to the waiver of Fifth Amendment rights. Thus, although the issue is not squarely before the Court, amici respectfully urge the Court to consider adopting a per se rule that juveniles be afforded the opportunity to consult with an attorney prior to any custodial interrogation.

The United States Supreme Court has repeatedly recognized the coercive nature of custodial interrogations. In Miranda v. Arizona, 384 U.S. 436, 455 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), the Court observed that "Even without employing brutality, the 'third degree' or [other] specific stratagems . . . and the very fact of custodial interrogation exacts a heavy toll on individual liberty and trades on the weaknesses of individuals."

[19] See http://www.modelsforchange.net/directory/listing.html?tags=Indigent+Defense+Action+Network (last visited April 16, 2009).

To ensure that criminal defendants received the full protection of the Fifth Amendment's privilege against self-incrimination, the Supreme Court laid out a prophylactic rule in Miranda, requiring law enforcement to inform suspects in police custody of their constitutional rights, or what are now commonly called Miranda rights, prior to any questioning. Even still, in Dickerson v. United States, 530 U.S. 428, 120 S.Ct. 2326, 147 L.Ed.2d 405 (2000), despite the potentially mitigating issuance of warnings in thousands of interrogations across the country in the intervening decades since Miranda, the Court observed that the nature of custodial interrogation remained unchanged: "[C]ustodial police interrogation, by its very nature, isolates and pressures the individual . . . [T]he coercion inherent in custodial interrogation blurs the line between voluntary and involuntary statements . . . thus heighten[ing] the risk that the privilege against self-incrimination will not be observed." Dickerson, 530 U.S. 428, 435 (2000).

A. SUPREME COURT JURISPRUDENCE RECOGNIZING THE DIFFERENCES BETWEEN ADOLESCENTS AND ADULTS SUPPORTS THE PROPOSITION THAT JUVENILES MERIT ADDITIONAL PROTECTION IN INTERROGATION.

1. Supreme Court Case Law Has Consistently Expressed a Strong Preference for Providing Effective Assistance to Juveniles Facing Interrogation.

Far in advance of Gault, the United State Supreme Court considered the coercive nature of juvenile interrogations. In Haley v. Ohio, 332 U.S. 596, 68 S.Ct. 302, 92 L.Ed. 224 (1948), the Court held that the totality of the circumstances surrounding the murder confession of a 15-year-old black boy were so "darkly suspicious," id. at 600-01, that they could not "be squared with the due process of law which the Fourteenth Amendment commands." Id. at 599.

In Haley, five or six police officers took turns interrogating John Harvey Haley for five hours, alone and in pairs, from midnight until 5:00 A.M. Id. at 598. He was beaten, and, after he was shown the alleged confessions of two accomplices, John Haley confessed. He was never advised of his right to counsel; although a lawyer retained by his mother tried to see him twice, the police denied access both times. The Court reversed the judgment of the Ohio Court of Appeals, finding that the trial court should have excluded the confession as violative of due process. Id. at 598.

Through the entire opinion, there is no question that due process protections extend to a juvenile defendant whose confession has been coerced. In fact, the youth of the accused was a crucial factor in the majority's decision, with the Court warning that a juvenile's waiver of rights must be examined with "special care: What transpired would make us pause for careful

inquiry if a mature man were involved." Id. at 599-600 (emphasis added). Painting a vivid picture of the boy's vulnerability, the Court held that "[n]either man nor child can be allowed to stand condemned by methods which flout constitutional requirements of due process of law." Id. at 601.

The Warren Court took up this exact issue again in Gallegos v. Colorado, 370 U.S. 49 82 S.Ct. 1209, 8 L.Ed.2d 325 (1962). Despite Gallegos' weaker facts, the Court used the opinion to reaffirm Haley. Gallegos involved a murder confession, this time from a 14-year-old boy. Significantly, there is no element of physical beating in Gallegos; instead,the boy was arrested and held in juvenile hall for six days before he confessed. 370 U.S. 49, 50 (1962). While he was detained, he did not have access to either his mother or an attorney. The boy made a confession on the second day, which a police officer recorded by hand. After six days, he signed a full and formal confession, which was vital to the state's case at trial. Ibid. The Court reversed the conviction, holding the totality of the circumstances indicated that "the formal confession on which this conviction may have rested was obtained in violation of due process." Id. at 55.

Like Haley, this case is notable for its unequivocal recognition that juveniles are particularly vulnerable to interrogation tactics. The importance the Court placed on

Gallegos's youth and powerlessness in relation to the interrogating officers cannot be overstated:

> [A] 14-year-old boy, no matter how sophisticated, is unlikely to have any conception of what will confront him when he is made accessible only to the police. That is to say, we deal with a person who is not equal to the police in knowledge and understanding of the consequences of the questions and answers being recorded and who is unable to know how to protect his own interests or how to get the benefits of his constitutional rights. . . . A lawyer or an adult relative or friend could have given the petitioner the protection which his own immaturity could not. Adult advice would have put him on a less unequal footing with his interrogators. Without some adult protection against this inequality, a 14-year-old boy would not be able to know, let alone assert, such constitutional rights as he had.

Gallegos, 370 U.S. at 54. Here, even before it had the neuroscience to support its position, there is no question that the Court found that the state's process did not provide adequate safeguards in light of Gallegos' youth: "[W]ithout some adult protection against this inequality, a 14-year-old boy would not be able to know, let alone assert, such constitutional rights as he had. To allow this conviction to stand would, in effect, be to treat him as if he had no constitutional rights." Id. at 54-55.

The Court next considered the unique vulnerabilities of youth in In re Gault, 387 U.S. 1 (1967). Gault went beyond Haley and Gallegos in holding that children facing delinquency

proceedings are entitled to the protection of the Fifth Amendment's privilege against compelled self-incrimination. Id. at 55. The Court noted that the privilege is "broader and deeper" than simple exclusion of confessions that may be unreliable because they are the product of coercion; a crucial purpose of the privilege, the Court observed, "is to prevent the state, whether by force or by psychological domination, from overcoming the mind and will of the person under investigation and depriving him of the freedom to decide whether to assist the state in securing his conviction." Id. at 47. In extending the privilege to youth, the Court made clear that "whatever may be their precise impact, neither the Fourteenth Amendment nor the Bill of rights is for adults alone." Id. at 13.

2. The Latest Adolescent Brain Science Research Indicates that Juveniles Are Uniquely Vulnerable in Custodial Interrogation Situations.

The adolescent brain development research discussed in Part I, supra, confirms the Supreme Court's observations in Gallegos. Because the prefrontal cortex, responsible for impulse control, risk assessment, abstract thinking, rationality, and moral reasoning, is still developing, adolescents rely on the amygdala, the center of emotional impulsivity, to make

decisions. See Claudia Wallis, What Makes Teens Tick, TIME, (September 26, 2008), available at http://www.time.com/time/magazine/article/0,9171,994126-2,00.html (last visited April 16, 2009). In light of the stressful nature of custodial interrogation, this reliance produces several results that militate in favor of providing additional safeguards to juveniles facing interrogation. For example, research shows that adolescents misread emotional information and cues. Dr. Deborah Yurgelun-Todd of Harvard Medical School and McLean's Hospital in Belmont, Massachusetts conducted a recent study of how adults and adolescents understand emotional cues. In the study, teenage and adult volunteers were asked to name the emotion shown in a series of pictures of human faces exhibiting fear. As they responded to the stimuli, Yurgelun-Todd monitored their brains in an MRI. While all the adults correctly named the emotion as fear, many of the adolescents named different emotions, like shock or anger. See Inside the Teenage Brain, Frontline, Interview with Deborah Yurgelun-Todd, available at http://www.pbs.org/wgbh/pages/frontline/shows/teenbrain/interviews/todd.html (last visited April 14, 2009). This data suggest that adults process emotional cues, while adolescents react to them. In other words, "a child is more likely to react than to try to think through his or her options in an emotionally

charged situation." See King, Waving Childhood Goodbye, supra, at 442.

Compounding this deficiency is the fact that adolescents cannot engage in counterfactual reasoning the way adults can. Id. at 440. Counterfactual reasoning describes the process of "imagining a set of circumstances leading up to an event that may have had a different outcome if only a critical preceding event did not take place," – or thinking through the alternative scenarios that would result from varying choices at discrete decision points, and choosing the best course of action. Ibid. This is a very sophisticated process that requires "the ability to recall simultaneously several different hypothetical, or abstract, ideas in working memory, and to manipulate those ideas while imagining the consequences of different permutations of facts or circumstances." Ibid. In short, it requires a fully-functioning frontal lobe.

A juvenile facing interrogation must be able to reason counterfactually. He must understand the meaning of Miranda warnings in theory (e.g., what exactly is a right); the meaning of the warnings for his own situation (e.g., whether asking for a lawyer means that the interrogation stops, that he waits at the precinct for hours until an attorney is located, that the police will assume that he is guilty because he has asked for an attorney, or that the police will think that he is not smart

enough to understand the warnings); his goals and how they interact (e.g., to go home; to be honest; to not seem stupid; to not snitch; to put an end to the interrogation; to protect a sibling, parent, or friend); and what options become foreclosed as he makes different choices (e.g., confessing at this stage might mean he could go home today but limits options at trial).[20] Not only must he make these decisions, but he must also constantly re-evaluate them in the fluid and stressful situation of an interrogation, as he takes in new and constantly changing information, both verbal (e.g., like a statement from the questioner that he should "be a man and get this off your chest," or repeated leading questions like "You were 16 when this happened, right?" or "And you put your penis in her vagina, right?") and non-verbal (e.g., the presence of two law enforcement officers instead of one, the layout and starkness of

[20] It is extremely unusual for a juvenile to consider the long-term effects of an admission. First, the fact that there is a wide array of possible consequences, both direct and collateral, about which the juvenile is not usually informed (e.g., secure detention, secure "treatment," probation, house arrest, electronic monitoring, expulsion from school, loss of his family's housing benefits, disqualification from eligibility for the military, deportation, or denial of federal student loan assistance for higher education) impede a reasoned decision. But, at a more elementary level, the reasoning process necessary to consider each of these long-term possibilities requires a level of brain development that most juveniles have not attained. Abigail A. Baird and Jonathan A. Fugelsang, The Emergence of Consequential Thought: Evidence from Neuroscience, 359 Phil. Transactions Royal Soc'y B: Biological Scis. 1797, 1798-99, 1800 (2004).

the interrogation room, the looks and interactions between the two officers, the weapons the officers are wearing, being handcuffed) about his situation. In this way, juveniles "are doubly handicapped in stressful situations involving emotional stimuli. That is, they both misinterpret the stimuli they are trying to process and they lack the ability to access their higher-order reasoning centers when considering how to respond to the stimuli." Id. at 443.

Because of their stage of brain development, juveniles are "as vulnerable in the interrogation room as they are in the courtroom." Id. at 414. See Tamar Birckhead, The Age of the Child: Interrogating Juveniles after Roper v. Simmons, 65 Wash. & Lee L. Rev. 385, 406 (2008). Far from being novel, the notion that children are suggestible is closer to commonsensical.[21] In the 1980's, however, following a series sensational cases in which child care providers were falsely accused of sexual abuse by school aged children, as well as a number of cases in which juveniles falsely confessed in response to aggressive police interrogation,[22] researchers began to fold factors like age, intelligence, memory of the child, style of questioning, tone,

[21] Developmental psychologists have published on this topic since the end of the nineteenth century. See e.g., Maurice H. Small, The Suggestibility of Children, 13 Pedagogical Seminary 176, 177 (1896).

[22] Two highly publicized instances in which juveniles gave false confessions include the New York's Central Park jogger case, in

In addition, research has shown that because juveniles are especially vulnerable to pressure from authority figures, they are more easily manipulated by leading questions, suggestion, repetition, and other commonly-used interrogation tactics than adults.[23] Finally, research shows that juveniles have difficulty understanding the Miranda warnings, "rendering the warnings almost completely ineffectual in serving their stated

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which five juveniles, all aged fourteen to sixteen, falsely confessed to rape and assault, and in Seattle, the murder case in which fourteen-year-old Michael Crowe falsely confessed to killing his younger sister. See also Steven A. Drizin & Richard A. Leo, The Problem of False Confessions in the Post-DNA World, 82 N.C. L. Rev. 891, 944 (2004). Drizin and Leo have documented more forty false confessions from suspects under eighteen at the time of questioning. In both these cases, the police used deception. Crowe was told by police of physical evidence that proved he was the killer. He was presented with false test results that purportedly proved he was lying to the police. Crowe eventually succumbed to the pressures and confessed. Crowe said of his interrogation: "'Nobody told me that police are legally allowed to lie during interrogations. Instead, I started believing maybe I'd blocked the whole thing out.'" Id. at 269-70. In the Central Park jogger case, the young men were told that they would be allowed to leave if they told the police what happened, and officers made it clear that they would accept only a confession as an account of "what happened." Id. at 270.

[23] In most states, laws typically do not otherwise restrict police interrogation strategies applied in interrogations of juveniles compared to strategies used with adults. Many of these strategies are psychologically coercive. These strategies include minimization, down-playing the suspect's alleged actions or their consequences; expressing the belief that the suspect's character is not that of a criminal, and that a confession is likely to reveal some non- malevolent reason for the alleged action, and maximization, creating fear that absence of a confession will result more severe consequences, and exaggerating or fabricating evidence of the suspect's guilt. See Barry Feld, Police interrogation of juveniles: An Empirical Study of Policy and Practice, 97 Journal of Criminal Law and Criminology 219 (2006).

purpose." Id. at 414.[24] In fact, according to some commentators, adolescents may not understand the warnings administered by law enforcement, or the consequences of waiving Miranda rights, or even understand the concept of a right. See Steven A. Drizin & Greg Luloff, Are Juvenile Courts a Breeding Ground for Wrongful Conviction?, 34 N. Ky. L. Rev. 257, 269 (2007). A study of adolescents' comprehension of Miranda warnings found that only 20.9% of juveniles demonstrated an adequate understanding of all components of Miranda warnings. Thomas Grisso, Juveniles' Capacities to Waive Miranda Rights: An Empirical Analysis, 68 Cal. L. Rev. 1134 (1980) (hereinafter "Juvenile Capacities").

The psychological development of adolescents also affects the way in which they respond to interrogation techniques by law enforcement. Law enforcement officers rely on a variety of psychological methods to gain confessions from suspects. The most widely used strategy, the "Reid Technique," consists of a nine-step process, the purpose of which is to elicit incriminating statements. See Drizin and Luloff, Breeding Ground, supra at 270. As part of the nine-step process, the interrogator accuses the suspect, dismisses denials and

[24] See also Feld, supra note 23, at 233 (finding that juveniles aged fifteen and younger showed the "clearest and greatest disability" in exercising their Miranda rights and that while juveniles aged sixteen and older fared relatively better, "many still exhibited significant deficits which could increase their vulnerability during interrogation").

potential alibis, disregards any objections by the subject, all in a process of shifting a suspect from a position of confidence to one of helplessness and to lead him to the point where the evidence is incontrovertible that the suspect is guilty. Id. at 271.

B. THE PRESENCE OF A PARENT OR GUARDIAN ALONE IN CUSTODIAL INTERROGATIONS IS NOT A SUFFICIENT DUE PROCESS SAFEGUARD.

The perfect storm of coercive interrogation techniques and adolescent immaturity and vulnerability render the advice of counsel particularly critical in juvenile cases. Attorneys assist youths in understanding the Miranda warnings and help to ensure that a waiver or confession is in fact voluntary and knowing. See Grisso, Juvenile Capacities, supra, at 1163. These responsibilities cannot be performed adequately by parents or other, non-lawyer adults.

As noted above, New Jersey law recognizes the difference between parents and attorneys in the Sixth Amendment context. According to statute, "A juvenile who is found to be competent may not waive any rights except in the presence of and after consultation with counsel, and unless a parent has first been afforded a reasonable opportunity to consult with the juvenile and the juvenile's counsel regarding this decision. The parent or guardian may not waive the rights of a competent juvenile." N.J.S.A. 2A:4A-39. Just as a child must have a right to speak to

counsel prior to any waiver of that right to counsel, where research and studies have documented the many ways in which juveniles are vulnerable in custodial interrogation settings, it is imperative that the law provide protection for such a youth through the provision of an attorney at the outset of an interrogation.

This Court held, in State v. Presha, 163 N.J. 304 (2000), that a parent or legal guardian should be present for the interrogation of a youth whenever possible because "[p]arents are in a position to assist juveniles in understanding their rights, acting intelligently in waiving those rights, and otherwise remaining calm in the face of an interrogation." Id. at 315-16. In coming to this conclusion, however, the Court noted that the realities of current juvenile delinquency practice veer dramatically from the State's ostensible mission of rehabilitating juvenile offenders. Id. at 314. The Court stated that the parents' role in the interrogation context is no longer simply to protect the youth's interest and to ensure the truthfulness of any statement to the police, ibid, but also to serve as a buffer between the youth and the police. "Parents are in a position to assist juveniles in understanding their rights, acting intelligently in waiving those rights, and otherwise remaining calm in the face of an interrogation." Id.

at 315 (citing Gallegos v. Colorado, 370 U.S. 49, 54, 82 S.Ct. 1209, 8 L.Ed.2d 325 (1962).

The Court went on to observe that the absence of a parent is considered a "highly significant" factor in analysis of the totality of circumstances. With this elevation of the parent's role, the Court held that it was "satisfied that the rights of juveniles will be protected in a manner consistent with constitutional guarantees and modern realities." Id. at 315.

A closer examination of the parent-child relationship, however, reveals that the presence of an "interested adult," such as a parent or guardian, is not an adequate due process safeguard for youth subject to custodial interrogation. As an initial matter, parents often lack an adequate understanding of Miranda warnings themselves. The same study examining juveniles' comprehension of Miranda warnings found that only 42.3% of adults expressed an adequate understanding of each of the four warnings when asked to paraphrase each warning and that only 23.1% of the adults expressed inadequate understanding of at least one of the four warnings. Grisso, Juveniles' Capacities to Waive Miranda Rights: An Empirical Analysis, 68 Cal. L. Rev. at 1161.

The parent-child[25] relationship also raises potential conflicts between the parent and the child that can undermine any protection the parent would be able to provide to the child in a custodial interrogation situation. These conflicts can involve personal, interfamily issues; implicated third-parties related to the case, like witnesses or victims; or stress often already scarce resources, like money, or time. See e.g., Hillary B. Farber, The Role of the Parent/Guardian in Juvenile Custodial Interrogations: Friend or Foe?, 41 Am. Crim. L. Rev. 1277, 1289 (2004) (discussing possible conflicts in the parent child relationship in the context of the Model Rules of Professional Conduct); see also Kristin Henning, It Takes a Lawyer to Raise a Child?: Allocating Responsibilities Among Parents, Children, and Lawyers in Delinquency Cases, 6 Nev. L. J. 836 (2006).

Financial conflicts also may exist between the parent and the child. For example, the parent may not want to pay for an attorney, or any of the attendant fees that may be imposed as part of the court case. In many jurisdictions, courts require the parent's presence at all court hearings. A parent may not want to risk his or her job by taking too many days off for

[25] "Parent" is meant to connote all "interested adults" who are not attorneys and who are ethically bound to provide zealous, client-centered representation that reflects the child's expressed interests.

court. Farber, The Role of the Parent/Guardian in Juvenile Custodial Interrogations, supra, at 1297-98. A parent may also have a conflict in particular types of cases. For example, in many jurisdictions, if a child is charged with a drug offense and the family resides in public housing, the family may lose their home because of the child's involvement. See Kristin Henning, Eroding Confidentiality in Delinquency Proceedings: Should Schools and Public Housing Authorities Be Notified?, 79 N.Y.U. L. Rev. 520 (2004).

Parents may have personal conflicts that impede their ability to safeguard the rights of their children. For example, a parent may want to maintain her own innocence. Or a parent may not want the child in the home anymore because the child is charged with a violent crime or is difficult to handle. See Farber, The Role of the Parent/Guardian in Juvenile Custodial Interrogations, supra, at 1298. Conflicts may also arise from the nature of the parental role, which is very different in purpose from the role of an attorney. A parent may have moral reasons for desiring their child to "tell the truth" or "do the right thing." Birckhead, The Age of the Child, supra, at 419. He or she may be upset by the arrest and may unwittingly encourage the child to talk to police officers. The parent may also feel a sense of duty to get to the truth and may encourage the child to answer questions, which may be good parenting, but

is not a reliable source of guidance for the protection of the child's constitutional rights. See King, Waiving Childhood Goodbye, supra, at 468. Finally, the parent may not agree with the premise that a child can refuse to speak to a police officer. See Grisso, Juveniles' Capacities to Waive Miranda Rights supra, at 1163 (noting study where nearly three-quarters of a sample of parents disagreed with the premise that children should be allowed to withhold information from police when suspected of committing a crime).

The presence of a parent or guardian, therefore, does not necessarily safeguard children's constitutional rights. Through ignorance or worse, parental involvement can actively undermine a young person's assertion of those rights.[26] The advice and guidance of legal counsel, rather than simply that of a parent, thus are critical to ensuring the legitimacy and constitutionality of the interrogation process.

CONCLUSION

For the foregoing reasons, the judgment of the Appellate Division should be reversed and the case should be remanded for proceedings consistent with this Court's opinion.

[26] See Saul M. Kassin & Gisli H. Gudjonsson, The Psychology of Confessions: A Review of the Literature and Issues, 5 Psychol. Sci. in Pub. Interest 33 (2004).

Respectfully submitted,

URBAN LEGAL CLINIC,
RUTGERS SCHOOL OF LAW—NEWARK

By:_____
Laura Cohen

Dated: April 17, 2009