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Innocent Until Proven Arrested: How Pretrial Juvenile Detention for Nonviolent Offenders in Ohio Inflicts Constitutional Violations

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INNOCENT UNTIL PROVEN ARRESTED: HOW PRETRIAL JUVENILE DETENTION FOR NONVIOLENT OFFENDERS IN OHIO INFLECTS CONSTITUTIONAL VIOLATIONS

TARYN SCHOENFELD*

ABSTRACT

When a juvenile is accused of committing a crime in Ohio, juvenile court judges must determine whether to detain the child pretrial in a juvenile jail or permit the child to go home to await trial. Whereas alleged adult offenders have the right to pay a monetary bond to be released from jail pretrial, juveniles have no such right. Thus, once a judge makes the decision to detain a juvenile pretrial—prior to being adjudicated delinquent of any crime—it is difficult for that decision to be undone. While incarcerated, juveniles suffer irreversible psychological, emotional, mental, and social harms, despite juvenile courts being created on the principles of treatment and rehabilitation for less culpable juvenile offenders.

The Ohio Rules of Juvenile Procedure dictate the circumstances in which a judge may detain a child pretrial. These rules, however, are overly vague and provide juvenile court judges too much discretion in determining when to remand a child pretrial, ultimately violating juveniles' due process rights. This Note argues that the Ohio Rules of Juvenile Procedure governing pretrial detention should be revised to restrict the use of pretrial detention for only the most violent juvenile offenders and reserve pretrial detention for use only as a last resort. Limiting the use of juvenile pretrial detention in these ways will give Ohio children a fighting chance at a successful adult future.

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CONTENTS

I. INTRODUCTION	80
II. BACKGROUND	82
A. <i>A History of the Creation of the Juvenile Court System in the United States and in Ohio.</i>	82
B. <i>Terminology Used in Ohio's Juvenile Courts.</i>	83
C. <i>The Development of Due Process Rights For Juveniles.</i>	83
D. <i>The Numbers Today in the United States and in Ohio.</i>	85
E. <i>Racial Disparities Present in Juvenile Detention Centers.</i>	86
F. <i>Ohio's Statutes and Court Rules Regarding Juvenile and Adult Detention.</i> ..	87
G. <i>Two Model States' Detention Rates Compared to Ohio and Those States' Statutes Regarding Pretrial Juvenile Detention.</i>	90
III. ANALYSIS	91
A. <i>Ohio Judges' Extensive Discretion in Determining Whether to Detain Alleged Juvenile Offenders Pretrial Violates Juveniles' Due Process Rights.</i>	91
B. <i>Criticisms of the Schall Majority Opinion and Using the Dissent as a Guide ..</i>	95
C. <i>Critiquing Rule 7 Compared to Pretrial Detention for Juveniles in Other States and Detention of Adults in Ohio.</i>	96
D. <i>Pretrial Juvenile Detention Also Violates The Eighth Amendment's Requirement to Refrain from Inflicting "Cruel and Unusual Punishment" on Criminal Suspects.</i>	97
E. <i>Children Living in Pretrial Detention Suffer Irreversible Psychological, Emotional, Mental, and Social Harms.</i>	100
F. <i>Racial Disparities Among Juveniles in Detention is a Problem that Cannot be Ignored.</i>	100
G. <i>A Proposed Solution to the Problem.</i>	102
IV. CONCLUSION	104

I. INTRODUCTION

Under Ohio law, it is easier for judges to impose pretrial detention on alleged juvenile offenders than on alleged adult offenders. The statutes governing pretrial detention for accused adults are detailed, specific, and overall limit the use of pretrial detention. The statutes and rules governing pretrial detention for juveniles, conversely, are broad, vague, and provide judges with great discretion to require an accused juvenile to await trial in detention. The Ohio Rules of Juvenile Procedure outline the process judges must follow in determining whether to detain a juvenile pretrial. Rule 7(A) of the Ohio Rules of Juvenile Procedure as written provides judges too much discretion in determining whether to detain juvenile offenders pretrial, which results in constitutional violations of the Eighth and Fourteenth Amendments. Rule 7(A) should be revised to restrict the use of pretrial detention for only the most violent juvenile offenders and reserve pretrial detention for use as a last resort, thus reducing the negative lifelong effects on juveniles.

Society views children as less blameworthy than adults when they commit criminal acts. Children are expected to make mistakes, and they should be afforded the

opportunity to learn and grow from such mistakes into successful and productive adults. For many children, however, life is not so simple and innocent. Enter Joshua. Joshua was in the juvenile system in Cuyahoga County, Ohio at age nineteen because a person can stay there until age twenty-one.¹ Joshua ran with gang members, and he was arrested for committing armed robberies when he was fifteen years old.² Joshua was not a violent kid; he joined the Heartless Felons, a prominent Cleveland gang, at age thirteen during his first stint in juvenile detention because it offered him protection on the streets and in the juvenile detention facilities.³ Joshua had no intention of being a lifelong criminal. In fact, he often aided the police in the prosecution of his fellow gang-members.⁴

In 2014, Joshua was sent to a restrictive, maximum-security-like juvenile detention center, colloquially referred to as “juvie.”⁵ While in juvie, Joshua was frequently assaulted by groups of other juveniles—badly enough to require time in a hospital—at the instruction of staff members (which was not an unusual occurrence).⁶ Two of Joshua’s friends, who also spent time in juvie, spoke about having sex with multiple female guards who were in their twenties and thirties.⁷ Not only are these sexual acts by staff members at the facilities coercive and abuses of power, they are also felony crimes.⁸

It is true that Joshua received rehabilitation services, which he valued, while in juvie.⁹ This process, however, is backwards. While the juvenile courts and detention centers may argue that they are providing juveniles with extensive therapeutic programming aimed at rehabilitation, the juveniles and their families may argue that it is the detention centers themselves that created the need for this programming in the first place. Had Joshua not been required to go to a maximum-security juvenile detention center when he was just thirteen years old, perhaps he would have never joined the Heartless Felons, never been subjected to a life of crime, never endured frequent physical abuse, and never landed back in the juvenile court system three years later.

Joshua’s story involves what he experienced after being found delinquent for committing a crime. However, children are also being sent to detention centers following an arrest to await trial. Thus, judges should use pretrial detention as a last resort in these scenarios to reduce the possibility of more children experiencing the same injustices as Joshua.

¹ *A Madman’s Vacation*, SERIAL, at 2:20 (Nov. 8, 2018), <https://serialpodcast.org/season-three/8/a-madmans-vacation>.

² *Id.* at 4:12.

³ *Id.* at 8:30–8:35, 20:17.

⁴ *Id.* at 9:35–12:30.

⁵ *Id.* at 19:20.

⁶ *Id.* at 24:18–24:56, 44:59. A prison guard bought pizza for a group of kids, in exchange for them assaulting Joshua. *Id.* at 25:42–26:21.

⁷ *Id.* at 46:20.

⁸ OHIO REV. CODE ANN. § 2907.03 (West 2020).

⁹ *A Madman’s Vacation*, *supra* note 1, at 31:55.

Part II of this Note explains why the juvenile justice system was created over 100 years ago. It also presents the case law regarding the creation and limitations of juveniles' rights in the justice system. Next, it outlines the Ohio statutes and rules that dictate when and how a juvenile court judge may choose to detain a child after an arrest, along with other model states' similar statutes. Part III describes the wide discretion Ohio juvenile court judges have in determining whether to detain alleged juvenile offenders pretrial. Next, it analyzes the constitutional violations of pretrial juvenile detention and the racial disparities present in the juvenile justice system. Finally, it offers a solution to the problem. Part IV briefly concludes.

II. BACKGROUND

A. *A History of the Creation of the Juvenile Court System in the United States and in Ohio*

For over a century, the United States has recognized that child offenders are less blameworthy than adult offenders, and children have an increased ability to change because of their young age.¹⁰ Consequently, the United States established its first juvenile court in Illinois in 1899 to address the differences between adult and juvenile criminal offenders.¹¹ Early juvenile courts were created with goals of rehabilitating and treating young people, as opposed to locking kids in jail among adult offenders¹² potentially more than twice or three times their age. These early juvenile courts sought to offer guidance and education to kids,¹³ not punish them severely.

Many Ohio leaders were appalled with the conditions juvenile offenders faced when being thrown in city jails amongst adult criminals.¹⁴ Consequently, in 1902 Cuyahoga County followed Illinois' lead and established Ohio's first and the United States' second juvenile court to separate juvenile and adult offenders.¹⁵ The Insolvency and Juvenile Court, as Cuyahoga County named it, emphasized treatment and rehabilitation over punishment for juvenile offenders.¹⁶ The Court sought to find juveniles employment and provided them with mental and emotional treatment.¹⁷ The Ohio juvenile courts even set national standards for this new rehabilitation-focused model of handling juvenile offenders in the criminal justice system.¹⁸ Clearly, the nation was beginning to lean away from prosecuting adults and children in the same manner, straying from imposing extreme punishment on juvenile offenders.

¹⁰ *Youth in the Justice System: An Overview*, JUV. L. CTR., <https://jlc.org/youth-justice-system-overview> (last visited Mar. 24, 2022).

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ Richard A. Gallitto, *History*, CUYAHOGA CNTY. CT. OF COMMON PLEAS JUV. DIV., <http://juvenile.cuyahogacounty.us/en-US/history.aspx> (last visited Mar. 24, 2022).

¹⁵ *Encyclopedia of Cleveland History: Cuyahoga County Juvenile Court*, CASE W. RESRV. UNIV., <https://case.edu/ech/articles/c/cuyahoga-county-juvenile-court> (last visited Mar. 24, 2022).

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

B. Terminology Used in Ohio's Juvenile Courts

The juvenile justice system differs from the adult criminal justice system not only in claiming to achieve different goals, but in its technical terminology as well. Juveniles do not commit “crimes,” they rather commit “delinquent acts,” which would otherwise be considered criminal acts had they been committed by an adult offender.¹⁹ Instead of saying that juveniles have been “convicted” and found “guilty,” juvenile courts say that they have been “adjudicated” and found to be “delinquent.”²⁰ After adjudication, juveniles receive “dispositions” aimed at providing them with a treatment plan instead of “sentences,” which guilty adult offenders receive.²¹ At various points in juvenile cases, children can be “detained” in “detention centers,” which range from the most restrictive, secured, locked facilities, to “non-secure detention” often in shelter homes, to the least restrictive “home detention.”²²

The difference in the terminology used in the juvenile justice system as compared to the adult criminal justice system ties back to the purpose of creating separate court systems in the first place. The proponents of creating a separate juvenile justice system did so because they believed juvenile offenders to be less blameworthy.²³ This notion is reflected in the above terms—juvenile offenders are not guilty of crimes to be sentenced in state prisons, but have rather been adjudicated of their delinquent acts and receive dispositions in detention centers.²⁴ These terms all center around the idea that children should be rehabilitated, treated,²⁵ and not forever deemed guilty criminals.

C. The Development of Due Process Rights for Juveniles

The Fourteenth Amendment of the United States Constitution states that no “State [shall] deprive any person of life, liberty, or property, without due process of law.”²⁶ Pretrial juvenile detention is vulnerable to due process violations as alleged delinquents’ liberty is being restricted when the courts remove children from their homes and require them to live in a more restrictive environment prior to being adjudicated delinquent of any crime. The Supreme Court of the United States first recognized a possibility of due process rights for all juveniles in *Kent v. United States* when it held that juvenile courts must ensure due process and fair treatment in determining whether to waive the court’s jurisdiction over the juvenile and send the child to adult court.²⁷

¹⁹ *Juvenile Court Terminology*, NAT’L JUV. DEF. CTR., <https://njdc.info/juvenile-court-terminology/> (last visited Mar. 24, 2022).

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ *Youth in the Justice System*, *supra* note 10.

²⁴ *Juvenile Court Terminology*, *supra* note 19.

²⁵ *Youth in the Justice System*, *supra* note 10.

²⁶ U.S. CONST. amend. XIV.

²⁷ *Kent v. United States*, 383 U.S. 541, 562 (1966).

One year later, the Supreme Court furthered the protection of juveniles by holding that the Due Process Clause of the Fourteenth Amendment of the United States Constitution applies to children as well as adults.²⁸ *In re Gault* granted children the right to a defense attorney, the right to confront and cross-examine witnesses, and the privilege to be free from self-incrimination.²⁹ *In re Gault* sparked further reform of the juvenile justice system, as the Supreme Court continued to grant more due process rights to juvenile offenders.³⁰ In 1970, the Supreme Court decided *In re Winship*, extending the same standard that guilt of an adult offender must be proven “beyond a reasonable doubt” to juvenile offenders as well.³¹

This era in which the Supreme Court began recognizing juveniles’ due process rights³² aligned with the original goals in creating a separate juvenile justice system—to treat young people fairly and serve their best interests to foster productive members of society.³³ However, in 1984, the Supreme Court decided *Schall v. Martin* and controversially held that juvenile pretrial detention does not violate juveniles’ due process rights.³⁴ The majority in *Schall* reasoned that pretrial juvenile detention was legitimate because it protects the juvenile and the community from potential future crime.³⁵ Thus, the Court upheld this pretrial detention practice known as preventive detention.³⁶ *Schall* contained a compelling dissent, however, in which Justice Thurgood Marshall argued that the harms of subjecting a juvenile who has not yet been adjudicated delinquent to detention far outweigh any hypothetical benefits to the juvenile or to society for the “what-if” scenario of a child potentially committing a crime while on pretrial release.³⁷

The criminal justice system in the United States is founded on the legal principle of a presumption of innocence, requiring the prosecution to prove defendants’ guilt of crimes beyond a reasonable doubt before restricting their freedom.³⁸ Courts have interpreted the presumption-of-innocence principle to mean that, to preserve one’s due process rights, the government may not punish a person prior to conviction.³⁹ In 1987, however, the United States Supreme Court decided *United States v. Salerno*, upholding preventive detention as not violating one’s presumption of innocence under

²⁸ *In re Gault*, 387 U.S. 1, 30–31 (1967).

²⁹ *Id.* at 10.

³⁰ *Youth in the Justice System*, *supra* note 10.

³¹ *In re Winship*, 397 U.S. 358, 368 (1970).

³² *Youth in the Justice System*, *supra* note 10.

³³ NAT. RSCH. CTR. & INST. OF MED., JUVENILE CRIME, JUVENILE JUSTICE 154 (Joan McCord et al., 2001).

³⁴ *Schall v. Martin*, 467 U.S. 253, 256–57 (1984).

³⁵ *Id.* at 266.

³⁶ *Id.* at 256–57.

³⁷ *Id.* at 308–09 (Marshall, J., dissenting).

³⁸ *Presumption of Innocence*, BLACK’S LAW DICTIONARY (11th ed. 2019).

³⁹ *See United States v. Salerno*, 481 U.S. 739, 749 (1987).

the Fourteenth Amendment's Due Process Clause.⁴⁰ The Court held that preventive detention was not intended to be a form of punishment, but rather was meant as a regulatory measure in "preventing danger to the community."⁴¹ The *Salerno* majority further reasoned that the importance of maintaining a person's liberty may be second to crime prevention and maintaining public safety.⁴² *Salerno* contained a persuasive dissent, however, again from Justice Marshall, in which he argued that the majority simply ignored the punitive nature of any form of detention.⁴³ The *Salerno* dissent reasoned that permitting a court to detain a person pretrial allows detention on far less than the beyond-a-reasonable-doubt standard of proof required for a finding of guilt.⁴⁴

D. *The Numbers Today in the United States and in Ohio*

In the United States, on any given day, nearly 60,000 children under the age of 18 are incarcerated in juvenile jails.⁴⁵ These jails are correctional-style facilities and are restrictive in nature.⁴⁶ Many juveniles are being detained for low-level offenses, and two-thirds of juveniles are being confined in the most restrictive of facilities.⁴⁷ Twenty percent of children in juvenile facilities are being detained without even having had a trial or a hearing,⁴⁸ despite the Due Process rights established by *In re Gault*, resulting in thousands of children being detained having not even been found delinquent.⁴⁹ Over 3,200 juveniles are being detained for minor technical violations of probation or parole or for mere status offenses.⁵⁰

Fortunately, the number of confined children in the juvenile justice system and in adult prisons and jails has decreased by over sixty percent since 2000.⁵¹ Ohio has seen similar trends, as youth incarceration in the state has declined significantly from 2005–2019, dropping from an average daily population of 1,679 to 530 juveniles in

⁴⁰ *Id.* at 751.

⁴¹ *Id.* at 746–48.

⁴² *Id.* at 750.

⁴³ *Id.* at 759–61 (Marshall, J., dissenting).

⁴⁴ *Id.* at 763.

⁴⁵ *America's Addiction to Juvenile Incarceration: State by State*, AM. CIV. LIBERTIES UNION, <https://www.aclu.org/issues/juvenile-justice/youth-incarceration/americas-addiction-juvenile-incarceration-state-state#:~:text=On%20any%20given%20day%2C%20nearly,These%20rates%20vary%20widely> (last visited Mar. 28, 2022).

⁴⁶ Wendy Sawyer, *Youth Confinement: The Whole Pie 2019*, PRISON POL'Y INITIATIVE (Dec. 19, 2019), <https://www.prisonpolicy.org/reports/youth2019.html#:~:text=On%20any%20given%20day%2C%20over,justice%20or%20criminal%20justice%20involvement>.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

correctional facilities.⁵² However, from 2015–2019, youth incarceration has begun to gradually increase, as the average daily population in 2015 was only 470.⁵³ Thus, while there are fewer children living in detention now than in 2000, there are more detained children now than in 2015.

E. Racial Disparities Present in Juvenile Detention Centers

Children being held in pretrial detention across the nation reflect grave racial disparities.⁵⁴ Following an arrest for allegedly committing a delinquent act, judges are imposing pretrial detention on juveniles at racially disparate rates. Judges across the nation mandate pretrial detention for less than 21% of arrested Caucasian children, but for 30% and 32% of arrested African American and Hispanic children respectively.⁵⁵ Thus, judges are choosing to detain children of color pretrial much more frequently than their Caucasian peers.

Data also shows that Ohio specifically is disproportionately incarcerating African American juveniles.⁵⁶ In 2018, although African Americans accounted for less than 16% of the total juvenile population in the state, they accounted for almost 56% of the population in juvenile correctional facilities.⁵⁷ Similarly, blacks and whites were adjudicated delinquent in juvenile court at relatively similar rates (about 49% and 45% respectively), yet blacks made up about 60% of commitments following adjudication, whereas whites made up about only 30% of commitments.⁵⁸ The implications of these racial disparities are discussed in detail in Part III(F).

In the early 2000s, approximately 79% and 15% of all births were to white and black Ohio mothers respectively.⁵⁹ However, of the births to *unmarried* Ohio mothers, only 63% were to unmarried white mothers, while 31% were to unmarried black

⁵² ANDREEA MATEI & SAMANTHA HARVELL, URB. INST., DATA SNAPSHOT OF YOUTH INCARCERATION IN OHIO 2 fig.1 (2020), https://www.urban.org/sites/default/files/publication/102218/data-snapshot-of-youth-incarceration-in-ohio_0.pdf.

⁵³ *Id.*; *Annual Report Fiscal Year 2015*, OHIO DEP'T OF YOUTH SERVS. (2015), <https://dys.ohio.gov/static/About+DYS/Communications/Reports/Annual+Reports/FY2015AnnualReport.pdf>. Data shows that the average daily population of youth living in detention centers decreased from 530 youth in 2019 to 463 youth in 2020. The data for 2020 is not included here, however, because it may have been impacted by the COVID-19 pandemic and thus may not depict actual trends. OHIO DEP'T OF YOUTH SERVS., *ANNUAL REPORT FISCAL YEAR 2020*, 10 (2020); *ACLU of Ohio Calls on Juvenile Judges to Depopulate Juvenile Detention Centers as the COVID-19 Pandemic Persists*, ACLU OF OHIO (Sept. 23, 2020), <https://www.acluohio.org/archives/press-releases/aclu-of-ohio-calls-on-juvenile-judges-to-depopulate-juvenile-detention-centers-as-the-covid-19-pandemic-persists>.

⁵⁴ Sawyer, *supra* note 46.

⁵⁵ *Id.*

⁵⁶ MATEI & HARVELL, *supra* note 52.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ BRIAN GOESLING ET AL., *THE MARRIAGE MEASURES GUIDE OF STATE-LEVEL STATISTICS* 221 (2008).

mothers.⁶⁰ About fifteen years later, these babies have now grown into Ohio's current population of teens and juveniles. In 2018, 76% of black children lived in single-parent families⁶¹ compared to only 29% of white children living in single-parent families.⁶² Single-parent families are more likely to live in poverty,⁶³ resulting in access to fewer resources and parents having to choose odd jobs with abnormal work hours. These challenging living arrangements may be contributing to the racial disparities present among juvenile pretrial detainees in Ohio. The analysis of this effect is discussed in detail in Part III(F).

F. Ohio's Statutes and Court Rules Regarding Juvenile and Adult Detention

Ohio's statutes and court rules governing pretrial juvenile detention grant judges great discretion in determining whether to detain an alleged juvenile offender pretrial. Ohio juvenile courts are required to take an all-or-nothing approach to pretrial detention because juveniles do not have the right to be released on bail.⁶⁴ Consequently, juveniles are either permitted to await trial from home or are absolutely detained pretrial. Ohio has state statutes in the Ohio Revised Code governing juvenile detention.⁶⁵ First, section 2151.31 of the Ohio Revised Code permits judges to detain juveniles prior to final disposition for only the following reasons:

[if] detention or shelter care is required to protect the child from immediate or threatened physical or emotional harm, because the child is a danger or threat to one or more other persons and is charged with violating a section of the Revised Code that may be violated by an adult, because the child may abscond or be removed from the jurisdiction of the court, because the child has no parents, guardian, or custodian or other person able to provide supervision and care for the child and return the child to the court when

⁶⁰ *Id.*

⁶¹ 62% of black families with children under the age of 18 were single-mother families. *Ohio African Americans, OHIO DEV. SERVS. AGENCY*, <https://development.ohio.gov/files/research/P7003.pdf> (last visited Mar. 28, 2022).

⁶² *Children in Single-Parent Families by Race in Ohio*, THE ANNIE E. CASEY FOUND., <https://datacenter.kidscount.org/data/tables/107-children-in-single-parent-families-by-race#detailed/2/37/false/37,871,870,573,869,36,868,867,133,38/10,11,9,12,1,185,13/432,431> (Dec. 2020).

⁶³ Emily Campbell, *Ohio's Single-Mom Households More Likely to Live in Poverty than Single Dads, What Does this Mean for Kids?*, THE CTR. FOR CMTY. SOLS. (Oct. 7, 2019), <https://www.communitysolutions.com/ohios-single-mom-households-likely-live-poverty-single-dads-mean-kids/#:~:text=even%20greater%20disparities.,About%20two%2Dthirds%20of%20all%20children%20who%20live%20below%20poverty,children%20in%20married%2Dcouple%20households.>

⁶⁴ VOICES FOR OHIO'S CHILD., OHIO'S FAMILY & YOUTH GUIDE: THE FAMILY GUIDE TO THE JUVENILE JUSTICE SYSTEM IN OHIO 1, 5 (2008), <https://www.njjn.org/uploads/digital-library/youthguide.pdf>.

⁶⁵ OHIO REV. CODE ANN. §§ 2151.31, 2151.311, 2151.314 (West 2020).

required, or because an order for placement of the child in detention or shelter care has been made by the court pursuant to this chapter.⁶⁶

Next, section 2151.311 of the Ohio Revised Code specifies that the court should “[r]elease the child to the child’s parents, guardian, or other custodian” unless one of the above reasons in section 2151.31 applies to the child’s circumstances.⁶⁷ Specifically, section 2151.311 clarifies that if the child’s parent, guardian, or custodian fails to bring the child to court when required, the court may detain the child thereafter.⁶⁸ Finally, section 2151.314 of the Ohio Revised Code mandates that the court hold a hearing within seventy-two hours of initial detainment to determine whether pretrial detention is required under section 2151.31.⁶⁹ At this hearing, the court must also determine whether to appoint a willing and appropriate relative of the child as temporary custodian.⁷⁰

Ohio also enacted the Ohio Rules of Juvenile Procedure in 1972, which specifically govern various proceedings within juvenile court.⁷¹ Rule 7 governs detention and shelter care for children in juvenile court.⁷² Rule 7 incorporates the language of section 2151.31 of the Ohio Revised Code. Specifically, Rule 7(A) of the Ohio Rules of Juvenile Procedure states, “[a] child taken into custody shall not be placed in detention or shelter care *prior to final disposition* unless any of the following apply” and then proceeds to list five provisions a judge may consider when choosing to detain a child pretrial.⁷³ These five provisions essentially list the same factors written in section 2151.31.

Provision 1 focuses on the safety of the child and the community, as it allows a judge to detain a child pretrial if there is a need “to protect the child [or the person or property of others] from immediate or threatened physical or emotional harm.”⁷⁴ Provisions 2 and 3 focus on the child’s supervision and reappearance in court for future proceedings.⁷⁵ Provision 2 allows a judge to detain a child pretrial if the judge believes the child “may abscond or be removed from the jurisdiction of the court;”⁷⁶ and provision 3 allows a judge to detain a child pretrial if the child does not have a “parent, guardian, custodian or other person able to provide supervision and care for the child and return the child to the court when required.”⁷⁷ Provision 4 vaguely allows a judge to detain a child pretrial if “[a]n order for placement of the child in detention or shelter

⁶⁶ *Id.* § 2151.31(C)(1).

⁶⁷ *Id.* § 2151.311(A)(1).

⁶⁸ *Id.* § 2151.311(B).

⁶⁹ *Id.* § 2151.314(A).

⁷⁰ *Id.* § 2151.314(B)(2).

⁷¹ OHIO R. JUV. P.

⁷² OHIO R. JUV. P. 7.

⁷³ *Id.* at 7(A) (emphasis added).

⁷⁴ *Id.* at 7(A)(1).

⁷⁵ *Id.* at 7(A)(2)–(3).

⁷⁶ *Id.* at 7(A)(2).

⁷⁷ *Id.* at 7(A)(3).

care has been made by the court.”⁷⁸ Finally, provision 5 allows judges to detain a child pretrial if “[c]onfinement is authorized by statute.”⁷⁹

Similar to Ohio Revised Code section 2151.314(B), Rule 7(F)(3) requires the court to hold a hearing within seventy-two hours of initial detention to determine whether pretrial detention is required pursuant to Rule 7(A).⁸⁰ The rule also similarly requires the court to assess whether the child has any appropriate relatives who may serve as temporary custodians if the child’s parents or custodians are alleged to be unfit to care for the child.⁸¹ All of the provisions of Rule 7 will be examined in detail in Part III below.

The Ohio Revised Code statutes governing adult pretrial detention are much more specific. Section 2937.222, in conjunction with sections 2903.06 and 2903.211 of the Ohio Revised Code, restricts the denial of bail and the use of pretrial detention only to “an accused [adult] charged with aggravated murder when it is not a capital offense, murder, a felony of the first or second degree,” aggravated vehicular homicide, vehicular homicide, vehicular manslaughter, menacing by stalking, “or a felony OVI offense.”⁸² Additionally, to deny an adult bail altogether, an additional hearing must be held where the judge must make a finding of “clear and convincing evidence that the accused poses a substantial risk of serious physical harm to any person or to the community, and finds by clear and convincing evidence that no release conditions will reasonably assure the safety of that person and the community.”⁸³ Section 2937.222 further specifies that, to make this finding, judges should consider “[t]he nature and circumstances of the offense charged, including whether the offense is an offense of violence.”⁸⁴

In Ohio adult criminal courts, judges also use data to make these pretrial placement determinations. Judges use a defendant’s Public Safety Assessment (“PSA”) to help determine what risk a defendant poses to the community if released from jail pretrial.⁸⁵ PSA factors include a defendant’s age, prior criminal history, and prior history appearing in court when required to determine a person’s risk level.⁸⁶ Judges can then

⁷⁸ *Id.* at 7(A)(4).

⁷⁹ *Id.* at 7(A)(5). Rule 7(A)(5) was amended to ensure that the statutory provisions in the Ohio Revised Code regarding juvenile detention were recognized as valid rationales by the Ohio Rules of Juvenile Procedure.

⁸⁰ *Id.* at 7(F)(1).

⁸¹ *Id.* at 7(F)(3).

⁸² OHIO REV. CODE ANN. §§ 2937.222, 2903.06, 2903.211 (West 2020). For adults, all other offenses are subject to orders setting financial bond. While bonds sometimes result in adults being detained due to an inability to pay even if they have not been ordered to be detained, they are at least given an opportunity for pretrial release. Juveniles, however, cannot be detained on bond, but only through detention orders.

⁸³ *See id.* § 2937.222(B).

⁸⁴ *See id.* § 2937.222(C)(1).

⁸⁵ *Public Safety Assessment: Risk Factors and Formula*, LAURA AND JOHN ARNOLD FOUND., <https://www.supremecourt.ohio.gov/Boards/bailSys/resources/PSARiskFactors.pdf> (last visited Jan. 8, 2021).

⁸⁶ *Id.*

use this data to determine bail amounts and how much State supervision is required for each particular alleged adult offender on an individualized basis.

G. Two Model States' Detention Rates Compared to Ohio and Those States' Statutes Regarding Pretrial Juvenile Detention

The American Civil Liberties Union (“ACLU”) has gathered data regarding detention rates per state.⁸⁷ The ACLU reports how many juveniles are detained in the state as a youth incarceration rate per 100,000 juveniles.⁸⁸ Vermont stands as the lowest in this regard nationally, with a youth incarceration rate of 58 per 100,000 (translating to a 0.058% youth incarceration rate).⁸⁹ Following behind Vermont is New Hampshire, with a youth incarceration rate of 75 per 100,000 (or 0.075%).⁹⁰ Compare these rates to Ohio, which lands exactly in the middle with the 25th-highest youth incarceration rate in the United States, with a rate of 198 per 100,000, translating to 0.198% of Ohio’s juveniles living in some form of detention.⁹¹ Nationally, the average youth incarceration rate is about 193 per 100,000 (or 0.193%).⁹² While Ohio’s rate may appear relatively low, it is still more than double New Hampshire’s rate, more than triple Vermont’s rate, and slightly above the national rate. Removing the two outlier states, the national average youth incarceration rate falls to about 182 per 100,000 (or 0.182%), ranking Ohio the 23rd-highest state (now out of forty-eight states) regarding youth incarceration rates with a rate now higher than the national average.⁹³

Vermont’s statute dictates that children who have allegedly committed a crime should be returned to the care of their parent, guardian, or custodian *unless* it is “determine[d] that the child’s immediate welfare, the protection of the community, or both, require the child’s continued removal from the home.”⁹⁴ These factors provided in section 5252 of Vermont’s state statutes are reiterated throughout other sections.⁹⁵ Thus, it is apparent that Vermont values and places importance on the welfare and safety of the child and the community when choosing whether to detain a juvenile pretrial. Vermont requires courts to issue an emergency care order pending a temporary care hearing to justify its decision to detain a child pretrial.⁹⁶ Temporary

⁸⁷ *America's Addiction to Juvenile Incarceration*, *supra* note 45.

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ South Dakota and Wyoming have youth incarceration rates of 493 and 430 per 100,000 respectively. *Id.* These numbers are beyond the statistical upper bound for outlier values. These values were calculated using the statistical formulas for calculating outliers. *Identifying Outliers: IQR Method*, PA. STATE UNIV., <https://online.stat.psu.edu/stat200/lesson/3/3.2> (last visited Mar. 31, 2022).

⁹⁴ VT. STAT. ANN. tit. 33, § 5252 (2019) (emphasis added).

⁹⁵ *Id.* §§ 5253, 5255.

⁹⁶ *Id.* § 5253.

care hearings in Vermont are thorough and emphasize the importance of allowing the child to return home with a parent, guardian, or custodian.⁹⁷

New Hampshire's statutes regarding pretrial juvenile detention make clear that detaining a child should be a last resort.⁹⁸ The statute provides other options that should be considered first: keeping the child with his or her parent, guardian, or custodian; putting the child in the supervision and care of a relative or friend; or placing the child in a foster home, group home, crisis home, or shelter care facility.⁹⁹ Only if those options are not viable will the New Hampshire juvenile courts then consider detaining the child. Pretrial juvenile detention in New Hampshire requires a finding by clear and convincing evidence that secure detention is necessary, which can be based on one of three criteria: "[t]o insure the presence of the juvenile at a subsequent hearing; or [t]o provide care and supervision for a minor who is in danger of self-inflicted harm when no parent, guardian, custodian, or other suitable person or program is available to supervise and provide such care; or [t]o protect the personal safety or property of others from the probability of serious bodily harm or other harm."¹⁰⁰

III. ANALYSIS

A. *Ohio Judges' Extensive Discretion in Determining Whether to Detain Alleged Juvenile Offenders Pretrial Violates Juveniles' Due Process Rights*

The Supreme Court greatly restricted alleged juvenile offenders' freedoms in *Schall*. The Court upheld pretrial detention for juveniles on the basis that juveniles pose a threat to the community or themselves because they could commit another crime while on pretrial release.¹⁰¹ Following Rule 7(A) of the Ohio Rules of Juvenile Procedure, however, judges may detain juveniles pretrial (prior to final disposition) for a much wider variety of reasons. *Schall* emphasizes safety, which only provision 1 of Rule 7(A) references, as discussed below.

The language in provisions 2–5, however, neither reference the juvenile's alleged past crime nor a fear for the safety of the community or the juvenile. Recall that Rule 7(A)(2) states that a judge may detain a child pretrial out of fear that "[t]he child may abscond or be removed from the jurisdiction of the court."¹⁰² The focus of this provision is to ensure an alleged juvenile offender's appearance in court. Therefore, if a judge believes the child for some reason will leave the area of the court's jurisdiction, under Rule 7(A)(2), the judge is permitted to detain the child pretrial.

Schall, however, did not address the issue of the constitutionality of detaining a child pretrial for fear of the child not appearing in court when required.¹⁰³ *Schall* focused solely on upholding pretrial detention for juveniles only when doing so

⁹⁷ *Id.* § 5255.

⁹⁸ N.H. REV. STAT. ANN. § 169-B:14 (2017).

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Schall v. Martin*, 467 U.S. 253, 265–66 (1984).

¹⁰² OHIO R. JUV. P. 7(A)(2).

¹⁰³ *Schall*, 467 U.S. at 255 n.1.

“protect[s] both the juvenile and society from the hazards of pretrial crime.”¹⁰⁴ Nowhere does Rule 7(A)(2) mention anything about protecting the alleged juvenile offender or society from the juvenile potentially committing a criminal act while on pretrial release. Rule 7(A)(2) is about providing convenience to the court—allowing the court to detain children pretrial to guarantee their return to court for further hearings and preventing the court from having to maneuver some hypothetical situation in which the child leaves the court’s jurisdiction. Rule 7(A)(2) is vague and provides Ohio Juvenile Court judges with little direction for determining when a child fits its description. More importantly, Rule 7(A)(2) reaches beyond the bounds of *Schall* by permitting pretrial juvenile detention in instances not concerning the safety of anyone. Thus, provision 2 of Rule 7(A) violates *Schall* and should be removed as a reason to permit pretrial juvenile detention.

Rule 7(A)(3) is similar to Rule 7(A)(2) in that it permits judges to detain children pretrial when “[t]he child has no parent, guardian, custodian or other person able to provide supervision and care for the child and return the child to the court when required.”¹⁰⁵ These two provisions to Rule 7(A) are similar in permitting pretrial detention to ensure the child returns to court when required. For the same reasons as explained above for Rule 7(A)(2), Rule 7(A)(3) violates *Schall* in making no reference to a concern for the safety of anyone stemming from releasing the child pretrial.

Rule 7(A)(3) goes even further in mentioning the ability of the child’s guardian “to provide supervision and care for the child.”¹⁰⁶ It is unclear exactly what this language in provision 3 seeks to accomplish. May a judge detain a child pretrial for the sole reason that the child is not being adequately supervised and cared for at home? Or must that inadequate supervision directly create a concern that no adult will be able to return the child to court when required? Regardless of which interpretation of this provision is chosen, there is still no mention of protecting the safety of the child or the community because of a fear of the child committing a crime while on pretrial release, as required by *Schall*. This provision allows judges to detain children pretrial simply out of fear that the child will not return to court for future hearings. In theory, then, a juvenile who is charged with a small, victimless drug offense,¹⁰⁷ for example, may be detained pretrial under Rule 7(A)(3) if the child’s parent, guardian, or custodian fails to appear with the child in court. These provisions, therefore, create more judicial discretion in pretrial juvenile detention than *Schall* intended to allow. Thus, the practice of detaining juveniles pretrial solely because of a fear they will not return to court when required violates even *Schall*, and provision 3 should be removed from Rule 7(A).

Rule 7(A)(4) permits detention when “[a]n order for placement of the child in detention or shelter care has been made by the court.”¹⁰⁸ The language of this provision is vague and offers little guidance as to what such an “order” might entail. In practice,

¹⁰⁴ *Id.* at 274.

¹⁰⁵ OHIO R. JUV. P. 7(A)(3).

¹⁰⁶ *Id.*

¹⁰⁷ For example, drug possession. CHILD.’S DEF. FUND OHIO, RETHINKING JUVENILE DETENTION IN OHIO 6 (Oct. 2010), <https://www.cdfohio.org/wp-content/uploads/sites/6/2018/07/juvenile-detention-issue-brief-OCT2010.pdf> (“[A] high percentage of [youth in pre-trial detention are] charged with non-violent offenses.”).

¹⁰⁸ OHIO R. JUV. P. 7(A)(4).

when juveniles are arrested, they are brought before the court for the judge assigned to the case to determine immediate placement.¹⁰⁹ At the child's later formal placement hearing, the child is brought before a different placement judge.¹¹⁰ The placement judge must follow the placement decision imposed by the earlier assigned judge.¹¹¹ Thus, if an assigned judge orders the child to detention, under Rule 7(A)(4) the placement judge cannot alter that "court order" and must detain the child pretrial. Even if the placement judge finds differently under the other Rule 7(A) factors, pretrial detention is still required.

Schall requires a finding that pretrial detention will preserve public safety and protect the community from potential future crime, yet this provision makes no reference to either of these goals. A court rule should aim to provide guidance to the court and judges in determining when to invoke pretrial detention while providing alleged juvenile offenders with notice regarding when and why they may be subjected to such detention. Rule 7(A)(4), however, offers no such clarity, forcing judges and juveniles in the community to guess as to its meaning. While the assigned judge is likely applying the factors in Rule 7(A)(1)–(3), this judge makes this order immediately following the arrest. The placement judge, however, reviews the case later in the process after learning more facts and gaining a better understanding of the case. Despite this better understanding, the placement judge cannot alter an order for a child to be detained even if the current facts of the case would support a different, more appropriate placement. Thus, without specificity and guidance added to the language, provision 4 should be removed from Rule 7(A).

Rule 7(A)(5) permits pretrial juvenile detention when it is "authorized by statute."¹¹² While vague and not perfectly clear, this provision is likely referencing the statutes in the Ohio Revised Code governing juvenile detention. The language in Ohio Revised Code section 2151.31(C)(1) is almost identical to the provisions in Rule 7(A).¹¹³ Section 2151.31(C)(1) outlines each of the factors that amounted to provisions 1–4 in Rule 7(A).¹¹⁴ Therefore, including a separate provision permitting detention authorized by statute in section 2151.31(C)(1) is redundant, as all of those factors are covered in Rule 7(A)(1)–(4). If Rule 7(A)(5) is indeed referencing Ohio Revised code section 2151.31(C)(1), then provision 5 is unnecessary and should be removed.

Provision 1 of Rule 7(A) is the only provision in Rule 7 that references safety. Rule 7(A)(1)(a)–(b) dictate the rationales provided by the Supreme Court in *Schall*—that judges may detain a child pretrial "to protect the child" or to "protect the person or property of others" from "immediate or threatened physical or emotional harm."¹¹⁵ *Schall* focuses completely on "protecting the juvenile and the community from

¹⁰⁹ THE SUP. CT. OF OHIO & THE OHIO JUD. SYS., DETAINED YOUTH 1 (2018), <https://supremecourt.ohio.gov/JCS/CFC/resources/juvenileBenchCards/7detainedYouth.pdf>.

¹¹⁰ *Id.* at 2.

¹¹¹ *See id.*

¹¹² OHIO R. JUV. P. 7(A)(5).

¹¹³ *See supra* Part II(F).

¹¹⁴ *See supra* Part II(F).

¹¹⁵ OHIO R. JUV. P. 7(A)(1)(a)–(b).

harmful pretrial conduct, including pretrial crime.”¹¹⁶ According to *Schall*, as long as the court does not intend for the pretrial detention of a specific child to be a form of punishment, it is permissible.¹¹⁷ All that is required under *Schall* is that the judge make a probable cause finding that the child committed the charged offenses and state facts and reasons on the record for choosing to detain the child.¹¹⁸ *Schall* does mention that judges should consider the “nature and seriousness of the charges” as the facts and reasons for choosing to detain a child pretrial to preserve community safety.¹¹⁹

Rule 7(A)(1) does not expressly dictate that the potential for “pretrial crime” and the consideration of the seriousness of the charged offense, as directed by *Schall*,¹²⁰ must be the driving factors for allowing judges to invoke preventive detention. Rule 7(A)(1)(a)–(b) only vaguely references the purposes for preventive detention outlined in *Schall* of protecting the child and the community from further harm. “Safety,” however, which *Schall* overwhelmingly emphasized, is completely absent from provision 1. Nowhere does provision 1 direct the judge to refer to the serious nature of the charged offense, as instructed by *Schall*, when justifying a child’s pretrial detention. Because this fear for potential future crime based on a certain level of seriousness in the juvenile’s charged offense is not expressly dictated anywhere in Rule 7(A)(1), the rule, as written, again provides Ohio judges with more discretion to detain children pretrial than *Schall* intended to allow and consequently violates children’s due process rights.

The majority and dissenting opinions in *Salerno* should be construed together to reach a more desirable outcome. Recall that the *Salerno* majority emphasized protecting public safety,¹²¹ while the dissent emphasized that pretrial detention is punishment and violates due process rights.¹²² Taken together, the reasoning behind the two opinions should uphold preventive detention only in extreme cases where a suspect is accused of a violent crime and when the suspect poses a threat to public safety, allowing nonviolent suspects accused of lower-level crimes to await trial from their homes. Applying the law in this manner maintains the public safety the majority values, while minimizing the amount of pretrial punishment imposed on juveniles that the dissent fears.

As explained above, Rule 7(A) of the Ohio Rules of Juvenile Procedure has expanded judges’ discretion in choosing whether to release a juvenile suspect pretrial or subject the child to pretrial detainment. The provisions in Rule 7(A) do not reference the type of crime of which the suspect is accused, thus allowing judges to detain juvenile suspects pretrial for lower-level, often nonviolent and victimless crimes that do not pose a threat to public safety. Although *Salerno* held that preventive detention is not a form of punishment when imposed to prevent danger to the

¹¹⁶ *Schall v. Martin*, 467 U.S. 253, 268 (1984).

¹¹⁷ *Id.* at 269.

¹¹⁸ *Id.* at 276.

¹¹⁹ *Id.* at 279.

¹²⁰ *Id.* at 274.

¹²¹ *United States v. Salerno*, 481 U.S. 739, 750 (1987).

¹²² *Id.* at 759–61 (Marshall, J., dissenting).

community,¹²³ the provisions in Rule 7(A) reach beyond this goal. This extensive discretion given to Ohio juvenile court judges in imposing pretrial detention for juveniles violates the presumption of innocence principle guaranteed by the Due Process clause of the Fourteenth Amendment, as children are being held in detention for reasons beyond what *Salerno* permits before having been convicted of any crime. Following *Salerno*, courts have placed value on protecting public safety and crime prevention. Thus, when merging these needs with the value of preserving due process rights as emphasized by the *Salerno* dissent, Ohio juvenile court judges should consider imposing pretrial detention on a juvenile suspect only when both the alleged crime is violent in nature and the child poses a threat to public safety.

B. Criticisms of the Schall Majority Opinion and Using the Dissent as a Guide

The *Schall* majority opinion upholding preventive detention to protect the juvenile and the community from potential future crime has been widely criticized. Such criticisms note the lack of direction *Schall* provides judges in implementing preventive detention for juveniles, which results in violations of their due process rights.¹²⁴ In his dissenting opinion, Justice Marshall also critiqued the *Schall* majority and noted the due process violations it imposed.¹²⁵ He argued that “[o]nly a very important government interest can justify deprivation of liberty in this basic sense,” and he reasoned that the abstract, potential future crimes the majority discussed were not important enough government interests to validate pretrial juvenile detention.¹²⁶ Justice Marshall also recognized that it would be nearly impossible to predict whether a juvenile would commit a crime in the future while on pretrial release.¹²⁷

Justice Marshall’s arguments support a finding that not only does expanding judges’ discretion beyond the majority holding in *Schall* regarding pretrial juvenile detention violate juveniles’ due process rights, but the majority *Schall* holding itself violates children’s due process rights. When a judge chooses to detain a child pretrial under the *Schall* guidelines, the child’s due process rights have been violated because the child has yet to be adjudicated delinquent for any crime. However, as Justice

¹²³ *Id.* at 747–48.

¹²⁴ See Albert W. Alschuler, *Preventive Pretrial Detention and the Failure of Interest-Balancing Approaches to Due Process*, 85 MICH. L. REV. 510, 510 (1986) (arguing that “neither a legitimate nor a very important governmental interest can justify preventive detention in the absence of significant proof of past wrongdoing”); Charles P. Ewing, *Schall v. Martin: Preventive Detention and Dangerousness through the Looking Glass*, 34 BUFF. L. REV. 173, 225 (1985) (analyzing empirical research showing that judicial predictions of criminal conduct “are more likely to prove wrong than right and [the empirical research] suggests that this likelihood of error cannot be reduced appreciably by the imposition of procedural safeguards”); Jeffery Fagan & Martin Guggenheim, *Preventive Detention and the Judicial Prediction of Dangerousness For Juveniles: A Natural Experiment*, 86 J. CRIM. L. & CRIMINOLOGY 415, 416 (1996) (arguing that the consequences of false judicial predictions of dangerousness are the hidden costs of preventive detention); *United States v. Melendez-Carrion*, 790 F.2d 984, 999 (2d Cir. 1986) (“[P]retrial preventive detention has never been part of the general American approach to criminal justice.”); *Carter ex rel. M.C. v. Doyle*, 95 F. Supp. 2d 851, 858 (N.D. Ill. 2000) (acknowledging that pretrial detention involves unconstitutional procedures).

¹²⁵ *Schall v. Martin*, 467 U.S. 253, 283 (1984) (Marshall, J., dissenting).

¹²⁶ *Id.* at 288.

¹²⁷ *Id.* at 302.

Marshall correctly points out, the *Schall* majority goes even further to allow judges to detain children for something they *might* do in the future.¹²⁸ Under this holding, it is not even possible to offer the child due process of law as required by the Fourteenth Amendment because the court is detaining the child for an act he or she has not yet even committed.

Justice Marshall also notes that judges need not base their choice to detain a child pretrial on the child's prior criminal history showing a predisposition for committing criminal acts¹²⁹ and it is thus wholly subjective. Consequently, judges are permitted to detain children pretrial who have been "arrested for trivial offenses and persons without any prior contacts with juvenile court."¹³⁰ Such preventive detention results in the deprivation of the child's liberty without due process of law (because the child has not yet been convicted of any crime), just as the Fourteenth Amendment prohibits. Thus, while it is true that the *Schall* majority decision violates juveniles' due process rights on its own, it remains the law today. The Ohio Rules of Juvenile Procedure, therefore, should be careful to not reach beyond the already expansive *Schall* holding. Rule 7(A) of the Ohio Rules of Juvenile Procedure, however, provides judges even more discretion in detaining children pretrial than dictated in *Schall*, as several Rule 7(A) provisions make no mention of a concern for public safety or a desire to prevent future crime. Thus, these Rule 7(A) provisions violate the intent and rationale behind allowing pretrial juvenile detention in *Schall* and consequently violate juveniles' due process rights granted by the Fourteenth Amendment.

C. Critiquing Rule 7 Compared to Pretrial Detention for Juveniles in Other States and Detention of Adults in Ohio

In the Ohio adult criminal justice system, judges are only permitted to deny bail and detain individuals pretrial when the accused is charged with specific offenses.¹³¹ The judge must also make a finding by clear and convincing evidence that "the accused poses a substantial risk of serious physical harm to any person or to the community" by evaluating "[t]he nature and circumstances of the offense charged, including whether the offense is an offense of violence."¹³² While the Ohio Revised Code is careful to restrict mandated pretrial detention for adults only to specific, serious offenses and encourages judges to assess whether the accused is charged with a violent offense, the Ohio Rules of Juvenile Procedure are much more vague. Rule 7(A) makes no mention of specific offenses for which judges may impose detention. Only section 2151.31 of the Ohio Revised Code mentions particular offenses in stating that judges may impose pretrial juvenile detention when "the child is a danger or threat to one or more other persons *and is charged with violating a section of the Revised Code that may be violated by an adult.*"¹³³ In theory then, a juvenile arrested for possession of a small amount of marijuana may be held in detention pretrial as such

¹²⁸ *Id.* at 302 (Marshall, J., dissenting). Imagine getting grounded by your parents as a kid on a Monday because they thought you *might not* clean your room on Wednesday.

¹²⁹ *Id.* (Marshall, J., dissenting).

¹³⁰ *Id.* at 295.

¹³¹ OHIO REV. CODE ANN. § 2937.222(A) (West 2020).

¹³² *Id.* § 2937.222(B)–(C).

¹³³ *Id.* § 2151.31(C) (emphasis added).

possession is a violation of Ohio Revised Code section 2925.11.¹³⁴ An adult in the same situation, however, cannot be completely denied bail and forced into pretrial detention because this charged offense does not meet the many levels of specificity required by the Ohio Revised Code to deny bail to an alleged adult offender.

In addition to the type of crime alleged, section 2937.222 requires judges to consider whether the adult is charged with a violent offense,¹³⁵ whereas the juvenile rules make no mention of violence. While it is clear that the adult statute associates preserving safety in the community with crimes of violence, the juvenile statutes and rules make no such connection. Thus, the juvenile rules permit pretrial detention when there is some ambiguous threat of physical or emotional harm, regardless of whether the charged offense is violent.

The Ohio Rules of Juvenile Procedure should follow the Ohio Revised Code's lead in specifying only the most serious crimes for which judges may detain a child. Doing so would undoubtedly minimize the potential for excessive use of pretrial juvenile detention and the harmful effects associated with this practice. It is peculiar that it is easier to hold a child in detention indefinitely pretrial than to hold an adult when children are considered less blameworthy than adults, and the purpose for creating a separate juvenile justice system was to rehabilitate children and be less punitive. The statutes and rules governing juvenile pretrial detention should be at least as specific and restrictive of the use of pretrial detention as the statutes governing pretrial detention for adults. Thus, the juvenile rules would benefit from adding the specificity that the adult statutes contain.

Recall that in Ohio adult criminal courts, judges use Public Safety Assessments to determine how to set a defendant's bail.¹³⁶ The juvenile courts in Ohio would be wise to implement a similar evidence-based¹³⁷ practice. A tool like the PSAs only furthers the principles of rehabilitation and treatment upon which the juvenile court was founded, as the factors value treatment and offenders' ability to change. The PSAs, with an emphasis on avoiding recidivism, also align with the reasoning in *Schall* of detaining children who pose a serious safety threat. If the juvenile courts used a tool like a PSA to determine whether to detain a child or send a child home to await trial, juvenile courts would not only better serve the best interests of the child and the community, but they would also be limited to detaining the child pretrial only if there was evidence to support that the child was likely to recidivate. Thus, both the safety of the community and children's due process rights would be better preserved.

D. Pretrial Juvenile Detention Also Violates the Eighth Amendment's Requirement to Refrain From Inflicting "Cruel and Unusual Punishment" on Criminal Suspects

Under the Eighth Amendment to the United States Constitution, the government shall not inflict "cruel and unusual punishments" on people.¹³⁸ Courts have found that, in prisons, such cruel and unusual punishments not allowed under the Eighth

¹³⁴ *Id.* § 2925.11(A).

¹³⁵ *Id.* § 2937.222(C)(1).

¹³⁶ See *Public Safety Assessment*, *supra* note 85.

¹³⁷ *Id.*

¹³⁸ U.S. CONST. amend. VIII.

Amendment include: physical brutality; rape, sexual assault, and sexual harassment; indecent prison conditions; and lack of medical care.¹³⁹

Regarding physical abuse, prison officials violate the Eighth Amendment when they apply physical force “maliciously and sadistically to cause harm” instead of “in a good-faith effort to maintain or restore discipline.”¹⁴⁰ Research shows that juveniles in pretrial detention are vulnerable to physical abuses, such as beatings, blows, asphyxiation, and more.¹⁴¹ In Ohio specifically, a Cleveland youth detention center has experienced gruesome violence from both staff onto juveniles and juveniles onto others.¹⁴² One study analyzing the systemic or recurring maltreatment in states’ juvenile corrections facilities determined Ohio to have clearly documented violent and abusive conditions ongoing since 2000.¹⁴³ As of 2019, the violence in the Cuyahoga County juvenile detention center has been deemed “critical,” as more violent offenders are being held with children as young as twelve years old facing very minor charges.¹⁴⁴ Whether juveniles in pretrial detention are experiencing physical abuse from staff members—a clear and definite Eighth Amendment violation—or from other juvenile detainees, they are living in physically unsafe environments. Court officials and legislators should feel a sense of urgency in creating a safe space for juvenile detainees so as to not violate the Eighth Amendment.

Regarding rape, sexual assault, and sexual harassment, Congress passed the Prison Rape Elimination Act (“PREA”) in 2003, recognizing that these acts in detention centers constitute Eighth Amendment violations.¹⁴⁵ Even prior to the enactment of PREA, courts recognized that rape or sexual assault by a detention staff member are Eighth Amendment violations.¹⁴⁶

Viewing Ohio specifically, the Department of Justice (“DOJ”) issued a report analyzing 2018 data and determined Ohio to be the only state to have a “high” ranking for its rate of sexual victimization in juvenile correctional facilities.¹⁴⁷ The DOJ’s

¹³⁹ CTR. FOR CONST. RTS. & THE NAT’L LAWS. GUILD, *THE JAILHOUSE LAWYER’S HANDBOOK* 36–41 (Rachel Meeropol & Ian Head eds., 5th ed. 2010).

¹⁴⁰ *Hudson v. McMillian*, 503 U.S. 1, 7 (1992).

¹⁴¹ JUV. JUST. ADVOC. INT’L, *CHILDREN ON PRETRIAL DETENTION: PROMOTING STRONGER INTERNATIONAL TIME LIMITS* 14 (2018), <https://www.wcl.american.edu/index.cfm?LinkServID=336BF47E-F500-5734-BF735718257FE45B>.

¹⁴² *Let’s Stop the Violence in Youth Detention Centers*, MST SERVS. (Oct. 2, 2018, 2:40 PM), <https://info.mstservices.com/blog/violence-in-youth-detention-centers>.

¹⁴³ RICHARD A. MENDEL, THE ANNIE E. CASEY FOUND., *NO PLACE FOR KIDS: THE CASE FOR REDUCING JUVENILE INCARCERATION* 7 (2011), <https://assets.aecf.org/m/resourcedoc/aecf-NoPlaceForKidsFullReport-2011.pdf>.

¹⁴⁴ Rachel Dissell, *Violence in County Juvenile Detention Center Called “Critical,”* THE PLAIN DEALER (Jan. 12, 2019), https://www.cleveland.com/court-justice/2014/02/post_3.html.

¹⁴⁵ Prison Rape Elimination Act of 2003, 108 Pub. L. 79, 117 Stat. 972.

¹⁴⁶ *Farmer v. Brennan*, 511 U.S. 825, 847 (1994); *Schwenk v. Hartford*, 204 F.3d 1187, 1197 (9th Cir. 2000).

¹⁴⁷ Anna Sturla, *DOJ Report Ranks Ohio ‘High’ for Sexual Victimization in Juvenile Detention Facilities, Despite Overall Decline*, CNN (Dec. 14, 2019, 9:54 PM), <https://www.cnn.com/2019/12/14/us/justice-report-ohio-juvenile-facilities/index.html>.

report defined sexual victimization as “any forced or coerced sexual acts between young people held in juvenile correctional facilities, or any sexual contact between them and facility staff.”¹⁴⁸ More than fifteen percent of the 140 Ohio juveniles surveyed “reported being forced or coerced into sexual activity with other youths or detention staff in 2018.”¹⁴⁹

Recall Joshua’s friends’ stories of female guards engaging in sexual acts with the juveniles living in detention. There is a clear power dynamic here as the female guards are in complete control of the juvenile detainees’ daily lives and perhaps also their eventual fate in their pending delinquency cases. The guards control the juvenile detainees’ punishments, rewards, and may influence their statements or potential confessions to prosecutors. These sexual acts are illegal,¹⁵⁰ and the United States Supreme Court has recognized such acts as Eighth Amendment violations.¹⁵¹ Thus, as Ohio’s juvenile prisoners report the highest rate of sexual victimization in the United States as a whole,¹⁵² the state is inflicting cruel and unusual punishment, in violation of the Eighth Amendment, on all juvenile detainees, whether they are held in detention pretrial or post-disposition.

Regarding indecent prison conditions, the standard to raise an Eighth Amendment violation argument is high. Restrictive and even harsh conditions are permitted under the Eighth Amendment.¹⁵³ To succeed in arguing an Eighth Amendment violation for indecent prison conditions, detainees must show that they were exposed to serious harm or were deprived of a basic human need.¹⁵⁴ Ohio juvenile detention centers are often over capacity for the number of juvenile detainees they house.¹⁵⁵ Ohio youth correctional facilities also report arbitrary and excessive use of isolation and unsafe living environments.¹⁵⁶ Nationally, children living in pretrial detention experience a lack of sufficient food and sanitary water, poor hygienic facilities, and lack of adequate medical care.¹⁵⁷ All of these conditions may be enough to demonstrate that pretrial juvenile detainees were exposed to serious harms or were deprived of basic human needs such that they may succeed in arguing Eighth Amendment violations. Thus, to have fewer juveniles living in detention and avoid violating the Eighth Amendment,

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* Compared with the national rate of 7.1%. *Id.*

¹⁵⁰ OHIO REV. CODE ANN. § 2907.03 (West 2020).

¹⁵¹ *See Brennan*, 511 U.S. at 847; *Hartford*, 204 F.3d at 1187.

¹⁵² Randy Ludlow, *Ohio’s Juvenile Prisoners Report Highest Rate of Sexual Victimization in Nation*, THE COLUMBUS DISPATCH (Dec. 13, 2019, 6:22 AM), <https://www.dispatch.com/story/news/politics/2019/12/12/ohio-s-juvenile-prisoners/2091644007>.

¹⁵³ *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981).

¹⁵⁴ *Brennan*, 511 U.S. at 843; *Wilson v. Seiter*, 501 U.S. 294, 304 (1991).

¹⁵⁵ Dissel, *supra* note 144.

¹⁵⁶ MENDEL, *supra* note 143, at 8.

¹⁵⁷ JUVENILE JUSTICE ADVOCATES INTERNATIONAL, *supra* note 141. Note that a lack of adequate medical care constitutes an Eighth Amendment violation on its own. CENTER. FOR CONSTITUTIONAL. RIGHTS. & THE NATIONAL LAWYERS GUILD, *supra* note 139, at 41.

Ohio juvenile court judges should be more limited as to when they can impose pretrial detention.

E. Children Living in Pretrial Detention Suffer Irreversible Psychological, Emotional, Mental, and Social Harms

The longer a child spends in detention, the more likely he or she is to suffer irreversible damage. Many detained children have at least one mental health disorder, with anxiety and depression at the forefront.¹⁵⁸ A great number of children in detention have already experienced traumatic events, and the abuse they experience while detained only contributes to high suicide rates and post-traumatic stress disorder.¹⁵⁹ Even short periods of detention have shown to increase a child's likelihood to abuse drugs and alcohol, which also increases the risk of lifelong mental health and substance abuse problems.¹⁶⁰

Despite the historical purpose of providing treatment and rehabilitation in the juvenile justice system, juvenile detention centers lack mental health, educational, and vocational resources.¹⁶¹ The longer children spend in detention, the less likely they are to have successful social reintegration, meaning it will be more difficult for them to reintegrate into society and their communities.¹⁶² There is an increased likelihood of dropping out of school for kids who have been detained, which hinders their lifelong economic potential.¹⁶³ Because of the restrictive environment in juvenile detention centers, juvenile detainees' development often becomes stunted.¹⁶⁴ Ultimately, more time spent in juvenile detention increases the risk of recidivism for child offenders, which conflicts with the purpose for creating a juvenile justice system separate from the adult criminal justice system in the first place.¹⁶⁵ Thus, to avoid these irreparable damages, Ohio juvenile court judges should only use pretrial detention as an absolute last resort and only for the most violent offenders.

F. Racial Disparities Among Juveniles in Detention is a Problem That Cannot be Ignored

Pretrial detention is undoubtedly harmful for all children who suffer the negative effects of detention, and there is an urgent need to reduce the use of pretrial detention for all juveniles. However, the racial disparities present among children in detention cannot be ignored, as Ohio, and the United States generally, are indisputably subjecting juveniles of color to detention at disproportionate rates compared to their white peers.¹⁶⁶ Thus, reducing the use of pretrial detention will most significantly

¹⁵⁸ JUVENILE JUSTICE ADVOCATES INTERNATIONAL, *supra* note 141, at 14.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* at 15.

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.* at 16.

¹⁶⁴ *Id.* at 15–16.

¹⁶⁵ *Id.* at 16.

¹⁶⁶ *See supra* Part II(E).

impact and benefit children of color, as these children bear the heaviest burden of pretrial detention.

There is a long history of society incorrectly perceiving African American children specifically as more dangerous and more likely to be criminals than their white peers.¹⁶⁷ As African American babies grow into boys, society stereotypically views them as “dangerous, associated with evil and threat, and likely to be criminals.”¹⁶⁸ These stereotypes provide the “foundation for implicit bias exercised by others toward [African American boys],” which leads to discrimination.¹⁶⁹ “[T]he false conflation between Black identity and danger” in American society is ubiquitous despite it having no factual basis.¹⁷⁰

This prejudicial perception may also contribute to the disproportionate rate of African American children being subjected to detention at any phase of a delinquency case. As previously discussed, Rule 7(A)(1) is not specific enough in how it permits juvenile court judges to impose pretrial detention based on a need to preserve public safety. Without requiring a violent charged offense and specific evidence that the accused may threaten public safety, it seems that Rule 7(A)(1) allows judges to detain juveniles based on perception or personal instinct. As history has shown, such perception and instinct may lead judges to impose detention more frequently on African American children because of implicit biases that they are more dangerous and prone to being criminals than white children.¹⁷¹

It is possible that the vague language of Rule 7(A) of the Ohio Rules of Juvenile Procedure is also contributing to this problem. It is difficult, however, to evaluate how much the vagueness of Rule 7(A) is contributing to these racial disparities because Ohio does not keep extensive or detailed data for the juvenile justice system.¹⁷² Consequently, Ohioans are forced to speculate as to why this problem truly exists, and lawmakers and judges have no meaningful data to inform decisions regarding how to fix the problem.

¹⁶⁷ Nancy E. Dowd, *Black Boys Matter: Developmental Equality*, 45 HOFSTRA L. REV. 47, 84 (2016); Joan W. Howarth, *Representing Black Male Innocence*, 1 J. GENDER RACE & JUST. 97, 103–08 (1997); Jonathan D. Glater, *What We Wish For: In the Wake of Brown v. Board*, 11 ALA. C.R. & C.L. L. REV. 113, 138 (2019).

¹⁶⁸ Dowd, *supra* note 167, at 84.

¹⁶⁹ *Id.* at 84–87.

¹⁷⁰ Howarth, *supra* note 167, at 104.

¹⁷¹ In Florida, the same judge sentenced a white and black man to two years and twenty-six years respectively for committing nearly identical offenses. Amy Sherman, *Was Race the Only Difference In Sentencing of Two Defendants In Florida?*, POLITIFACT (June 17, 2020), <https://www.politifact.com/factchecks/2020/jun/17/facebook-posts/was-race-only-difference-sentencing-two-defendants/>.

¹⁷² Kyle Swenson, *Report: Ohio Lacks Any Meaningful Data on Juvenile Court Cases*, CLEVELAND SCENE (June 29, 2016, 1:11 PM), <https://www.clevescene.com/scene-and-heard/archives/2016/06/29/report-ohio-lacks-any-meaningful-data-on-juvenile-court-cases>; John Harper, *What Happens to Kids Who are Sent to Ohio Juvenile Courts? Data Doesn't Show*, THE PLAIN DEALER (June 28, 2016), https://www.cleveland.com/court-justice/2016/06/what_happens_to_kids_who_are_s.html.

Perhaps one problem is that African American children are much more likely to be born to single mothers and live in single-parent households.¹⁷³ Juveniles with only one parent in the home are much less likely to be able to have that parent present with them in court, as the parent may have to work, and may risk losing a job and the ability to support a family by calling off of work to attend a court hearing. Ohio juvenile court judges may then be much more likely to impose pretrial detention on child in this scenario under Rule 7(A)(3) in finding that the child does not have adequate parental supervision to return the child to court when necessary. Coming full circle, African American children are more likely to be put in this situation because of the higher frequency of single-parent homes in the African American population. Thus, it seems obvious that despite the lack of data connecting Rule 7(A) to pretrial juvenile detention, such a connection likely exists.

Ultimately, without detailed data, there is no way to concretely know whether Rule 7(A) is contributing to the racial disparities present in Ohio juvenile detention centers. Only inferences like the above can be made, but until data comes forward to rebut them, they are persuasive. Detaining people of color at significantly disparate rates as compared to other individuals is a huge problem at all levels of the criminal justice system, and it cannot be ignored. Thus, Ohio should feel a sense of urgency to collect the data necessary to determine and begin working on solving this problem.

G. A Proposed Solution to the Problem.

Without question, children being held in pretrial detention are being deprived of their Eighth and Fourteenth Amendment rights guaranteed under the United States Constitution. Juvenile pretrial detainees in Ohio are being subjected to cruel and unusual punishment and have been stripped of their due process rights. Thus, Rule 7(A) of the Ohio Rules of Juvenile Procedure should be revised to reflect the due process requirements outlined by the Fourteenth Amendment and its corresponding Supreme Court decisions.

Rule 7(A) should be written in a way to permit juvenile court judges to mandate that children await trial in detention only in extreme cases when they are being accused of serious, violent crimes *and* if they pose a high risk of inflicting harm on themselves or the community unless they are detained. Because the Supreme Court has stressed the importance of protecting public safety, there is no need to require alleged juvenile offenders to await trial in detention for nonviolent crimes which are often victimless, mere status offenses, or technical violations. Rule 7(A) must be explicit and unambiguous in its wording so as to leave no possibility for judges to apply it arbitrarily or subjectively.

Provision 7(A)(1) should be the only provision to survive a Rule 7(A) revision. As previously discussed, the remaining provisions do not refer to the seriousness of the alleged offense or the need to protect the community or the juvenile. Provision 1, conversely, does pertain to those needs as dictated by *Schall*.¹⁷⁴ Because even *Schall* is controversial in upholding preventive detention for alleged juvenile offenders, as a persuasive dissent argued preventive detention was a due process violation,¹⁷⁵ the Ohio Legislature should be careful not to extend judges' discretion for allowing pretrial

¹⁷³ See *supra* Part II(E)–(F).

¹⁷⁴ See *Schall v. Martin*, 467 U.S. 253, 262 (1984).

¹⁷⁵ *Id.* at 283 (Marshall, J., dissenting).

juvenile detention in more instances than *Schall* permits. Provision 1 of Rule 7(A) could even benefit from being revised so as to specify that the child may only be detained to protect the child's and the community's safety *because of the violent and serious nature of the child's alleged offense*. The Ohio Legislature, in writing and potentially revising the Ohio Rules of Juvenile Procedure, must take extra caution in ensuring it does not violate children's constitutional rights when choosing to detain juveniles pretrial. Thus, revising Rule 7(A) to omit unnecessary provisions and add specificity is in the best interest of both the alleged juvenile offender and the State.

The Ohio Rules of Juvenile Procedure should also follow other states' models and seek to offer alleged juvenile offenders more alternatives to awaiting trial in detention. Other states view detention as a last resort for juveniles awaiting trial, and Ohio should do the same. Recall that New Hampshire's statute governing pretrial juvenile detention provides many specific alternatives that should be considered first: keeping the child with his or her parent, guardian, or custodian; putting the child in the supervision and care of a relative or friend; or placing the child in a foster home, group home, crisis home, or shelter care facility.¹⁷⁶ While under Rule 7(F)(3) Ohio does urge judges to consider the child's relatives to serve as temporary custodians,¹⁷⁷ no other alternatives are mentioned. Additionally, Rule 7(F)(3) only mentions that the judge should consider alternative relatives as temporary custodians, but it does not explicitly instruct that the juvenile should then be permitted to go home to await trial with this temporary custodian.¹⁷⁸ While likely implied, the language of Rule 7 should seek to be perfectly clear to avoid arbitrary use and misinterpretation of the rule.

Ohio would be wise to add alternatives to detention similar to other states' statutes to its rules as well. Children should be placed in the least restrictive environment so as to not compromise their physical, social, emotional, and mental wellbeing and development. The State and courts should value these alternatives so as to not risk potentially violating the Eighth and Fourteenth Amendments by subjecting a child to cruel and unusual punishment or violating his or her due process rights, both of which are more prominent when a child is removed from the home and placed in restrictive detention facilities. Thus, revising Rule 7 to be more specific *and* to include more alternatives to pretrial detention not only protects the safety of the child and the community, but also safeguards the State from potentially violating a child's constitutional rights. Ultimately, the rule should read as follows:

(A) A child taken into custody shall not be placed in detention or shelter care prior to final disposition unless:

(1) the child is charged with a violent offense and detention or shelter care is required:

(a) to protect the child from immediate or threatened physical or emotional harm; or

(b) to protect the person or property of others from immediate or threatened physical or emotional harm; and

¹⁷⁶ N.H. REV. STAT. ANN. § 169-B:14 (2017).

¹⁷⁷ OHIO R. JUV. P. 7(F)(3).

¹⁷⁸ *Id.*

(2) only when no other less restrictive alternative to detention is available, such as keeping the child with his or her parent, guardian, or custodian; putting the child in the supervision and care of a relative or friend; or placing the child in a foster home, group home, or crisis home.

Ohio juvenile courts and the Ohio Legislature may argue that because judges may not impose bail for alleged juvenile offenders as they do for alleged adult offenders to ensure they return to court when required, judges, when concerned about reappearances in court, should be permitted to detain such juveniles.¹⁷⁹ Thus, they may argue that provisions 2 and 3 in Rule 7(A) should remain. This argument, however, should not prevail for juveniles arrested for nonviolent crimes. The interests in upholding juveniles' due process rights guaranteed by the Fourteenth Amendment are not outweighed by concerns that the child will not reappear in court when the alleged crime is nonviolent, posing a minimal threat to the public's or the juvenile's safety.

Ohio courts and the Ohio Legislature may also argue that judges should be permitted extensive discretion in detaining a child pretrial, as the child's and public's safety may be threatened for reasons outside of the specifically accused crime. Thus, they may argue that provisions (1)(a) and (1)(b) of Rule 7(A) should remain as is, unrevised. This argument, however, is defeated by Supreme Court precedent which rationalizes allowing preventive detention for juveniles because of a fear that juveniles will commit a similar crime while on pretrial release, posing a threat to the juveniles' and the public's safety. *Schall* permits preventive detention only when the judge can provide "facts and reasons justifying the detention," specifically considering the "nature and seriousness of the charges."¹⁸⁰ Thus, permitting judges to detain juveniles pretrial should be limited to an analysis of the arresting crime and whether it is serious and violent in nature. Revising the relevant provisions in Rule 7(A) to clarify this standard will preserve children's due process rights.

IV. CONCLUSION

The discretion given to judges to detain children pretrial, permitted by the language of Rule 7(A) of the Ohio Rules of Juvenile Procedure, gravely violates children's constitutional rights. Alleged adult and juvenile offenders have due process rights under the Fourteenth Amendment of the United States Constitution. These rights include a presumption of innocence and require a finding of guilt beyond a reasonable doubt before a deprivation of liberty. Children also have an Eighth Amendment right to not be subjected to cruel and unusual punishment. All of these rights are violated when juvenile court judges are permitted to detain children pretrial, that is, *before* a child has been adjudicated delinquent, for reasons which do not concern the welfare and safety of the child and the community and which consequently results in children being abused—physically, psychologically, and sexually—while living in restrictive detention centers.

Ohio should revise Rule 7(A) to eliminate provisions 2–5 and clarify provision 1. Provision 1 of Rule 7(A) as revised accomplishes the goals outlined by the United States Supreme Court—detain a juvenile pretrial *only when* the alleged offense is of a serious, violent nature *and* when the child poses a threat to public safety. Think back to Joshua, a child in the eyes of the law. Joshua is a product of the system, and his

¹⁷⁹ 18 U.S.C. § 5034.

¹⁸⁰ *Schall*, 467 U.S. at 279–80.

endured abuse is the fault of the State. Perhaps if Joshua and others like him had been subject only to this new version of Rule 7(A) and if a judge had properly analyzed his risk-assessment level with a data-based tool like a PSA, perhaps then Joshua's childhood story would have never been told.