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Due Process Junior: Competent (Enough) for the Court

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**DUE PROCESS JUNIOR:
COMPETENT (ENOUGH) FOR THE COURT**

The Need to Amend Ohio's Juvenile Competency Statute to Ensure that
Juvenile Due Process Rights are Protected and Better Inform Judicial
Discretion in Determining Juvenile Competency

Tigan Woolson*

*I would like to thank Professors Sandra Kerber and Matthew Ahn for supporting me as I learned to write in a whole new discipline, and Judge Robert Triozzi for listening to my frustrated musings about the criminal justice system while advising my work on this note. I'd be remiss not to thank my editors on the Journal of Law and Health, who worked hard to make sure that my ideas were polished. Finally, I would like to thank the wonderful attorneys of the Cuyahoga County Public Defender Juvenile Division for their mentorship and guidance.

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I. INTRODUCTION

Few questions are as uncomfortable for a society as how it will treat children that have acted in a way that transgresses its laws. This question tests our most basic values. What happens when a twelve-year-old is accused of assault or a fourteen-year-old is implicated in a robbery? Should they face a criminal trial and detention or be provided resources and guidance to reduce their potential for future transgressions? If they are to face a trial, do they have the same rights as adults? Can rights like competency to stand trial even function in the same way for a child?

Until the dawn of the twentieth century, these children might have gone to the same jail as an adult convicted of the same crime, or they might have been sent to a workhouse. About a hundred and twenty years ago, social reformers began to shift the approach to this question in part as a reaction to the conditions children faced in adult jails and in part based on two key social ideals.¹ Social reformers created new separate juvenile courts. First, these courts were meant to recognize that children make mistakes in the process of learning right from wrong and are generally less blameworthy than an adult might be for committing the same act.² Second, juvenile courts were meant to recognize that children who have so erred are far more malleable than their adult counterparts.³ These courts operated on the premise that providing rehabilitation and guidance rather than punishment could give these youth an opportunity to shift course before reaching adulthood.⁴

Cuyahoga County, Ohio was one of the very first jurisdictions in the United States to take systemic action. In 1902, Cuyahoga County created a separate juvenile court system, only the second such court in the nation.⁵ This new court was part of a movement which began in 1899 in Cook County, Illinois and spread across the nation, as states developed separate courts, laws, and corrections programs for juveniles.⁶

Here, at their very root, juvenile courts were built on the assumption that children are developmentally less aware of the consequences their actions may incur and less prepared to make decisions that will stick with them for life. However, as societal attitudes about the culpability of youth shifted and the similarities between these new juvenile courts and the adult criminal courts grew, these ideals became more historical than foundational.⁷ This shift in the courts' approach eventually forced the question of due process rights to the Supreme Court.⁸

¹ *Encyclopedia of Cleveland History: Cuyahoga County Juvenile Court*, Case W. Rsr. Univ. (2020), <https://case.edu/ech/articles/c/cuyahoga-county-juvenile-court>; Thomas Grisso & Robert G. Schwartz, *Introduction to YOUTH ON TRIAL, A DEVELOPMENTAL PERSPECTIVE ON JUVENILE JUSTICE* 1, 1 (Thomas Grisso & Robert G. Schwartz eds., 2000).

² Grisso & Schwartz, *supra* note 1, at 3.

³ *Id.*

⁴ *Id.*

⁵ *Encyclopedia of Cleveland History*, *supra* note 1.

⁶ *Encyclopedia of Cleveland History*, *supra* note 1; Grisso & Schwartz, *supra* note 1, at 1..

⁷ Grisso & Schwartz, *supra* note 1, at 3.

⁸ Lawrence Steinberg & Robert G. Schwartz, *Developmental Psychology Goes to Court*, in *YOUTH ON TRIAL, A DEVELOPMENTAL PERSPECTIVE ON JUVENILE JUSTICE* 9, 13 (Thomas Grisso & Robert G. Schwartz eds., 2000); *In re Gault*, 387 U.S. 1, 17-18 (1967).

The original courts, because they were thought to be more rehabilitative than punitive, had not been bound by the due process constraints of the adult criminal courts.⁹ The growing similarities to the ideology of the criminal courts, increasingly severe punishments, and abuses of the expansive judicial discretion in the juvenile court led to a shift in the mid-1960's, with the Supreme Court finding that juveniles were owed many of the same due process protections as adults.¹⁰ The Supreme Court did not extend every protection to juveniles though, and they never addressed whether competence to stand trial reaches into the juvenile court.

This competency right—that a person cannot be made to stand trial if that person cannot understand the proceedings against them and contribute to their own defense—is crucial to the right to a fair hearing.¹¹ It is so basic, in fact, that every state eventually adopted it, either by statute or case law in their juvenile courts.¹² Unfortunately, those historical ideals of juvenile rehabilitation and redirection have faded from the purpose of the courts and are not often reflected in juvenile competency statutes and case law today.

For example, lacking specific legislative guidance in Ohio, the courts evaluated juveniles under the adult competency statute, tempered only by the application of loosely defined “juvenile norms.”¹³ Even when Ohio became one of about twenty states to legislate on juvenile competency in 2011, the legislation did not include adequate safeguards, especially at the attainment phase of a competency proceeding.¹⁴ Further, the case law trial courts may rely on when exercising their broad discretion under the statute diverges from the understandings of juvenile competence that are supported by developmental psychology professionals. Since appeals courts are highly deferential to the trial courts on this matter, it is necessary to amend the legislation to provide more robust protection of the due process right to a fair trial for alleged juvenile delinquents.

Section II of this paper will address the due process origins of competency to stand trial, the development of juvenile court system, and due process rights in juvenile court system. Section III will outline the structure and process contained in the Ohio juvenile competency statute. Section IV of this paper will address the

⁹ Richard Bonnie & Thomas Grisso, *Adjudicative Competence and Youthful Offenders*, in *YOUTH ON TRIAL, A DEVELOPMENTAL PERSPECTIVE ON JUVENILE JUSTICE* 73, 93 (Thomas Grisso & Robert G. Schwartz eds., 2000).

¹⁰ Gault, *supra* note 8, at 17-18; Kent v. United States, 383 U.S. 541, 555-56 (1966).

¹¹ Drope v. Missouri, 420 U.S. 162, 172 (1975) (citing Pate v. Robinson, 383 U.S. 375 384-85 (1966)).

¹² KIMBERLY LARSON, THOMAS GRISSE, NAT'L YOUTH SCREENING AND ASSESSMENT PROJECT & MODELS FOR CHANGE, *DEVELOPING STATUTES FOR COMPETENCE TO STAND TRIAL IN JUVENILE DELINQUENCY PROCEEDINGS: A GUIDE FOR LAWMAKERS* 22 (2012), https://www.njjn.org/uploads/digital-library/Developing_Statutes_for_Competence_to_Stand_Trial_in_Juvenile_Delinquency_Proceedings_A_Guide_for_Lawmakers-MfC-3_1.30.12_1.pdf.

¹³ *In re Williams*, 687 N.E.2d 507, 511 (1997).

¹⁴ *Juvenile Justice: States with Juvenile Competency Laws*, NAT'L CONF. OF STATE LEGISLATURES, <https://www.ncsl.org/research/civil-and-criminal-justice/states-with-juvenile-competency-laws.aspx> (last visited May 5, 2022).

urgent need to protect juvenile due process by analyzing the disconnect between the statute, existing case law, and the developmental psychology of youth. Next, it will identify the gaps in the statute's protections and address the need for more detailed and informed statutory standards for competency and attainment to adequately protect the competency right for juveniles. Part V of this paper concludes this discussion.

II. BACKGROUND

A. Due Process of Law: Competent to Stand Trial

The Constitution and the Bill of Rights exist to protect all citizens from arbitrary government actions and protect the precious liberties founders sought to carve out in this nation. The criminal justice system required special attention because it needed to balance the physical liberty interest of the accused with the order and safety offered by a system of laws and consequences. This balancing act implicates many of the basic rights included in the Bill of Rights. Some of the basic elements of criminal justice in the United States are found in the Fifth Amendment to the United States Constitution, which lays out the foundational limitations on the federal government's ability to deprive people of their life, liberty, or property, including a fair hearing and due process of law.¹⁵ No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury [...] nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.¹⁶

The Fourteenth Amendment to the United States Constitution provides the guarantee that no *state* shall "deprive any person of life, liberty, or property, without due process of law".¹⁷ The Supreme Court has refrained from incorporating every right protected in the Bill of Rights or every aspect of federal criminal due process into the due process clause of the Fourteenth Amendment, despite its linguistic similarity to the Fifth Amendment.¹⁸

However, the right not to be convicted while incompetent to stand trial has been incorporated in the due process clause of the Fourteenth Amendment.¹⁹ As such, it applies to states just as it applies to the federal criminal courts, and no accused person can be made to stand trial if he is not competent at the time of trial. A fair trial is only possible when the accused is competent, when the accused can understand the proceedings against them, and when the accused can contribute to their own defense.²⁰

¹⁵ US Const. amend. V.

¹⁶ *Id.*

¹⁷ US Const. amend XIV, §1.

¹⁸ CONG. RSCH. SERV., *Due Process Clause and Incorporation: Early Doctrine*, Constitution Annotated, https://constitution.congress.gov/browse/essay/amdt14-S1-3-1-1-2/ALDE_00000930/ (last visited May 5, 2022).

¹⁹ Pate, *supra* note 11, at 386.

²⁰ Drope, *supra* note 11, at 172; Dusky v. United States, 362 U.S. 402, 402 (1960).

This competency right does not require that the state prove that every defendant is competent to stand trial before proceeding with a prosecution.²¹ In *Medina v. California*, the Supreme Court observed that there remained no settled view as to who should bear the burden of proving that a defendant is not competent to stand trial.²² In *Medina*, the court found that it did not violate due process to place the burden of proving incompetence to stand trial on the defendant.²³ A defendant must, however, be presented with an opportunity to prove that they are not competent.²⁴ *Medina* created a generalized presumption that all criminal defendants are competent to stand trial, placing the burden on the defendant to prove that they are not competent to stand trial unless state law provides otherwise.²⁵

It has long been established that the adversarial criminal justice system often requires the assistance of experts to navigate, and the financial situation of the accused should not impact their ability to exercise due process rights.²⁶ In *Gideon v. Wainwright*, the Supreme Court held that the right to the assistance of counsel applied to the states, in part because it was necessary to ensure a fair trial.²⁷ In that opinion, Justice Black wrote “[f]rom the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law.”²⁸ Following this logic, the court also found that if a defendant couldn’t afford to engage counsel, the defendant must be provided counsel to ensure a fair trial.²⁹

The determination of whether a defendant is competent to stand trial often involves complex medical diagnosis and the interpretation of a defendant’s medical tests and mental health history and evaluations.³⁰ This not an area that is within the professional training of the court or of an attorney.³¹ Consistent with the holding in *Gideon* regarding access to counsel, in *Ake v. Oklahoma*, the Supreme Court found that an indigent criminal defendant must have access to a competent psychiatrist where sanity is a significant factor at trial.³² The *Ake* decision focused specifically on access to an expert where sanity at the time of the offense was at issue, but based on the reasoning in *Gideon* and *Ake*, it is clear that a defendant must be provided access to such an expert to ensure a fair hearing

²¹ *Medina v. California*, 505 U.S. 437, 449 (1992).

²² *Id.* at 447-48.

²³ *Id.* at 449.

²⁴ CONG. RSCH. SERV., *Competency for Trial*, Constitution Annotated, https://constitution.congress.gov/browse/essay/amdt5_4_8_2_1_2_2/#ALDF_00011167 (last visited May 5, 2022).

²⁵ *Medina*, *supra* note 21, at 449.

²⁶ *Ake v. Oklahoma*, 470 U.S. 68, 76 (1985).

²⁷ *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963).

²⁸ *Id.*

²⁹ *Id.*

³⁰ *McWilliams v. Dunn*, 137 S. Ct. 1790, 1794-95 (2017); *Ake*, *supra* note 26, at 83.

³¹ *Medina*, *supra* note 21, at 451. See also *Ake*, *supra* note 26, at 92 n.7 (“... the quality of representation at trial ... may be excellent and yet valueless to the defendant if the defense requires the assistance of a psychiatrist ... and no such services are available.”).

³² *Ake*, *supra* note 26, at 83.

and to assist in proving that they are not competent to stand trial if the issue of competency is raised.

In *McWilliams v. Dunn*, the defendant's competency to stand trial and sanity at the time of the offense were determined simultaneously by a commission convened by the state.³³ In 1986, McWilliams was tried, convicted, and sentenced to death. He was not provided the assistance of an expert who could meaningfully review the findings of neutral medical experts and contribute to his defense on the issue of his sanity or competence.³⁴ His attorney made it clear to the judge that he could not interpret the medical records received immediately before McWilliams's sentencing without an expert, but despite the attorney's efforts, the court did not provide time or funding to access an expert.³⁵ The Supreme Court held that this did not fulfill the state's obligation. Following *Ake*, the court held that when an indigent defendant's mental condition is both relevant to the punishment and seriously in question, the state must provide the defendant with access to a mental health expert who is sufficiently available to the defense and is independent from the prosecution to effectively "assist in evaluation, preparation, and presentation of the defense."³⁶ There is no time at which a defendant's mental condition is more relevant to their punishment than when determining if the defendant is competent to stand trial at all.

These amendments and precedents guarantee that the accused may not be made to stand trial while they are not competent. However, competence in this context is a term of art that carries different definitions at different aspects of the criminal process. For example, current precedent is that a defendant may be competent to stand trial, yet not competent to represent themselves.³⁷ The Supreme Court set the standard for competency to stand trial in *Dusky v. United States*, where it held that "...it is not enough for the district judge to find that "the defendant [is] oriented to time and place and [has] some recollection of events," but that the "test must be whether he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding – and whether he has a rational, as well as factual, understanding of the proceedings against him."³⁸

i. Ohio

All fifty states and the federal courts have established practices for determining a defendant's competence to stand trial.³⁹ Ohio has incorporated due process protections into its state Constitution and statutes. Section 16 of Article I of the Ohio Constitution guarantees the right to "due course of law" in the state of Ohio.⁴⁰ Ohio has further ensured an accused's right not to be convicted while incompetent to stand trial in Ohio Revised Code Section 2945.38.

For adults, Ohio provides a well-defined statutory framework for the competency process. Section 2945.38 and the related sections provide the basis

³³ *McWilliams*, *supra* note 30, at 1794-95.

³⁴ *McWilliams*, *supra* note 30, at 1796.

³⁵ *Id.*

³⁶ *Id.* at 1800 (quoting *Ake*, *supra* note 26, at 83).

³⁷ *Indiana v. Edwards*, 554 U.S. 164, 177-78 (2008).

³⁸ *Dusky*, *supra* note 20, at 402.

³⁹ *Medina*, *supra* note 21, at 447-48.

⁴⁰ *Direct Plumbing Supply Co. v. Dayton*, 38 N.E.2d 70, 72 (1941).

for the competency right for adult defendants in Ohio and some procedural guidance as to how the right should be protected. The statute provides that the court or any party to a criminal case may raise a question about the defendant's competency to stand trial.⁴¹ Once this concern is raised, if the trial has not yet begun, the court must hold a hearing to determine if the defendant is competent. If competency is raised after the trial starts, the court is only obligated to have a hearing for good cause shown or on the court's own motion.⁴² The section lays out acceptable timelines for the hearing in either scenario, with the provision that these may be extended if the defendant has been referred for evaluation.⁴³ The statute ensures the defendant the right to counsel at the hearing and appointed counsel if they cannot afford their own.⁴⁴

In Ohio, there is a statutory presumption that a defendant is competent to stand trial until a court finds otherwise by a preponderance of the evidence, often following a hearing.⁴⁵ If the court finds that the defendant is competent to stand trial the matter may proceed.⁴⁶ However, the court can also find that the defendant is not currently competent in one of two ways. The court may either find that the defendant is not competent to stand trial but there is a substantial probability they will become competent within a statutory period, or the court may find that the defendant is incompetent and there is not a substantial probability they will become competent within the statutory period.⁴⁷

If the court finds that the defendant is not competent but that there is a substantial probability they will become competent within a statutory period, the court may order treatment for up to a year.⁴⁸ If the court cannot determine if the person has a substantial probability of becoming competent, they may order "continuing evaluation" for up to four months to determine if they are likely to become competent within the one-year period.⁴⁹

If the court orders treatment, the statute requires the court to specify that the defendant either be committed to:

"a hospital, facility, or agency, as determined to be clinically appropriate by the department of mental health and addiction services," or to a "facility certified by the department of mental health and addiction services as being qualified to treat mental illness, to a public or community mental health facility, or to a psychiatrist or another mental health professional for treatment or continuing evaluation and treatment."⁵⁰

The statute also provides special consideration for those with intellectual disabilities.⁵¹ If medication is necessary to restore the defendant's competency to stand trial, and if the defendant lacks the capacity to give informed consent or

⁴¹ OHIO REV. CODE ANN. § 2945.37(B) (LexisNexis 2022).

⁴² OHIO REV. CODE ANN. § 2945.37(C) (LexisNexis 2022).

⁴³ *Id.*

⁴⁴ OHIO REV. CODE ANN. § 2945.37(D) (LexisNexis 2022).

⁴⁵ OHIO REV. CODE ANN. § 2945.37(G) (LexisNexis 2022).

⁴⁶ OHIO REV. CODE ANN. § 2945.38(A) (LexisNexis 2022).

⁴⁷ OHIO REV. CODE ANN. § 2945.38(B)(1)(a)(i) (LexisNexis 2022).

⁴⁸ *Id.*

⁴⁹ OHIO REV. CODE ANN. §§ 2945.38(B)(1)(a)(ii)-(iii) (LexisNexis 2022).

⁵⁰ OHIO REV. CODE ANN. § 2945.38(B)(1)(b) (LexisNexis 2022).

⁵¹ *Id.*

refuses medication, the person or facility administering treatment or evaluation may petition the court for authorization for the involuntary administration of medication.⁵² The statute does demand the court order the least restrictive option that is consistent with public safety and treatment goals, though it provides the court discretion based on the availability of housing and support services, so limited housing or service availability might well lead to a more restrictive treatment setting than necessary for the above goals.⁵³

The statute includes detailed reporting guidelines for the professionals and facilities tasked with treatment and ongoing evaluation.⁵⁴ These include requirements to notify the court if a person in treatment has been restored to competence,⁵⁵ at the end of the statutory period,⁵⁶ every six months,⁵⁷ and if a person supervising the treatment determines that the person being treated does not have a substantial likelihood of being restored to competence in the statutory period.⁵⁸ These reports are to include the examiner's opinion as to "the defendant's capability of understanding the nature and objective of the proceedings against the defendant and of assisting in the defendant's defense."⁵⁹ If the statutory period has not yet expired, the report should also contain the examiner's recommendation as to the "least restrictive placement or commitment alternative that is consistent with the defendant's treatment needs for restoration to competency and with the safety of the community."⁶⁰

The statute also defines the qualifications of an "examiner" to mean "psychiatrist or a licensed clinical psychologist who satisfies the criteria of division (I) of section 5122.01 of the Ohio Revised Code or is employed by a certified forensic center designated by the department of mental health and addiction services to conduct examinations or evaluations."⁶¹ The referenced section requires specific licensing and credentials for clinical psychologists.⁶²

If the court determines that the defendant is incompetent and there is not a substantial probability that they will become competent within one year, barring certain special circumstances, the court must dismiss the charges and discharge the defendant.⁶³ After this dismissal, the state may initiate the process for civil commitment of the defendant, which implicates separate statutory provisions.⁶⁴ When charges are dismissed under this statute, there is no statutory bar against refileing the charges if a defendant becomes competent.⁶⁵

B. Juvenile Courts

⁵² OHIO REV. CODE ANN. § 2945.38(B)(1)(c) (LexisNexis 2022).

⁵³ OHIO REV. CODE ANN. § 2945.38(B)(1)(b) (LexisNexis 2022).

⁵⁴ OHIO REV. CODE ANN. §§ 2945.38(F)-(H) (LexisNexis 2022).

⁵⁵ OHIO REV. CODE ANN. § 2945.38(F)(1) (LexisNexis 2022).

⁵⁶ OHIO REV. CODE ANN. § 2945.38(F)(2) (LexisNexis 2022).

⁵⁷ OHIO REV. CODE ANN. § 2945.38(F)(3) (LexisNexis 2022).

⁵⁸ OHIO REV. CODE ANN. § 2945.38(F)(4) (LexisNexis 2022).

⁵⁹ OHIO REV. CODE ANN. §§ 2945.38(F)(3), (G) (LexisNexis 2022).

⁶⁰ OHIO REV. CODE ANN. § 2945.38(H) (LexisNexis 2022).

⁶¹ OHIO REV. CODE ANN. § 2945.37(A)(2)(a) (LexisNexis 2022).

⁶² OHIO REV. CODE ANN. § 5122.01(I) (LexisNexis 2022).

⁶³ OHIO REV. CODE ANN. § 2945.38(B)(1)(a)(v)(I) (LexisNexis 2022).

⁶⁴ *Id.*

⁶⁵ *Id.*

Until the late 19th century in the United States, children and adults were all tried in the same criminal courts and detained in the same jails and prisons.⁶⁶ As early as the 16th century, courts in England had recognized that youth had less fully developed moral and cognitive capacity than adults and should be treated as such.⁶⁷ Social reformers in the United States sought to find an alternative to the adult criminal justice system, appalled by the conditions faced by children in the general detention facilities.⁶⁸ Many of these youth were being detained either for non-criminal offenses, for minor offenses, or for criminal offenses which arose out of poverty and neglect.⁶⁹ These reformers also operated under the premise that many of these children were simply in this position as a result of their societal circumstances.⁷⁰

A variety of institutions were developed around the nation, all focused on providing resources, education, and guidance to so called “wayward youth.”⁷¹ As the institutions coalesced, juvenile courts began to emerge around the nation.⁷² The first juvenile court was founded in Cook County, Illinois in 1899, and the second court was founded in Cuyahoga County, Ohio in 1902.

These new juvenile courts were more informal institutions than the adult criminal courts, founded on the concept of *parens patriae*, or the state as parent.⁷³ The courts were structured more like an agency than a criminal court, aimed at providing resources and guidance to improve the prospects of the young in its jurisdiction.⁷⁴ The theoretical foundation of these courts was informed by new psychological understandings of the differences between adults and adolescents.⁷⁵ The aim of the juvenile court was to redirect these youth from becoming career criminals in adulthood.⁷⁶

While the reasons for treating youth differently may not have been clearly articulated, the retributive punishment model of the adult criminal courts is based on punishing a person’s choice to act in a certain way.⁷⁷ By focusing on rehabilitation and education, it was clear that these courts viewed children as less culpable for such a choice, perhaps as a result of the impulsiveness and vulnerability to bad influences that can come with youth.⁷⁸ This era of the juvenile court was focused, ostensibly, on rehabilitation and therefore looked less at evidence of a criminal act and more at the individual circumstances of the child

⁶⁶ *Juvenile Justice History*, CENTER ON JUVENILE AND CRIMINAL JUSTICE, <http://www.cjcj.org/education1/juvenile-justice-history.html> (last visited May 5, 2022).

⁶⁷ *Id.*

⁶⁸ *Encyclopedia of Cleveland History*, *supra* note 1; Elizabeth A. Scott, *Criminal Responsibility in Adolescence: Lessons from Developmental Psychology*, in *YOUTH ON TRIAL, A DEVELOPMENTAL PERSPECTIVE ON JUVENILE JUSTICE* 291, 293 (Thomas Grisso & Robert G. Schwartz eds., 2000).

⁶⁹ *Juvenile Justice History*, *supra* note 66.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*; *Encyclopedia of Cleveland History*, *supra* note 1.

⁷³ Steinberg & Schwartz, *supra* note 8, at 11.

⁷⁴ Steinberg & Schwartz, *supra* note 8, at 12.

⁷⁵ Scott, *supra* note 68, at 294.

⁷⁶ *Id.* at 295.

⁷⁷ *Id.*

⁷⁸ *Id.*

before the court.⁷⁹ During this era, the child offender was conceived of being young, malleable, and much less blameworthy than an adult offender.⁸⁰

However, a system that gave judges so much discretion and had so few procedural limitations or protections allowed for dramatically disparate treatment of defendants, based on the specific values and sensibilities of each judge.⁸¹ The flexibility did not always result in outcomes that were less harsh or restrictive, or even those that were focused on rehabilitation.⁸² Skeptics of the system's effectiveness in reducing youth offenses had also begun to doubt the rehabilitation model and sought to shift the focus to public safety, rather than the welfare of the youth accused of criminal behavior, by advocating for harsher punishments and more punitive detention.⁸³ Despite this, the court still lacked the due process safeguards present in the criminal courts.

With its decision in *In re Gault* in 1967, the Supreme Court recognized this problem and formalized the juvenile courts by affording juveniles many of the procedural rights afforded to adults.⁸⁴ This was the next step in the evolution of a court that is more like a junior version of the adult criminal court.⁸⁵ This decision initiated the next era of the juvenile system, which was likely overdue in some respects.⁸⁶ Justice Fortas, writing for the court, observed that while the juvenile courts may have been founded on the "highest motives and most enlightened impulse," they had "demonstrated that unbridled discretion, however benevolently motivated, is frequently a poor substitute for principle and procedure."⁸⁷

As the court suggested the year before, in *Kent v. United States*, the lack of due process rights and courts failing to provide the kinds of individualized rehabilitative treatment promised left children in the system with the "worst of both worlds."⁸⁸ The court in *Gault* was careful to remind states that the "observance of due process standards, intelligently and not ruthlessly administered, will not compel the States to abandon or displace any of the substantive benefits of the juvenile process."⁸⁹ Nevertheless, attitudes about

⁷⁹ *Id.* at 291.

⁸⁰ *Id.* at 292.

⁸¹ *Juvenile Justice History*, *supra* note 66.

⁸² "Young Gault was arrested and detained on a charge of violating an Arizona penal law by using vile and offensive language to a lady on the telephone. If an adult, he could only have been fined or imprisoned for two months for his conduct. As a juvenile, however, he was put through a more or less secret, informal hearing by the court, after which he was ordered, or, more realistically, "sentenced," to confinement in Arizona's Industrial School until he reaches 21 years of age. Thus, in a juvenile system designed to lighten or avoid punishment for criminality, he was ordered by the State to six years' confinement in what is in all but name a penitentiary or jail." *Gault*, *supra* note 8, at 60-61.

⁸³ Scott, *supra* note 68, at 296.

⁸⁴ *Gault*, *supra* note 8, at 30-31.

⁸⁵ Steinberg & Schwartz, *supra* note 8, at 13.

⁸⁶ Scott, *supra* note 68, at 296; Steinberg & Schwartz, *supra* note 8, at 13; *Juvenile Justice History*, *supra* note 66.

⁸⁷ *Gault*, *supra* note 8, at 17-18.

⁸⁸ *Kent*, *supra* note 10, at 555-56; *Gault*, *supra* note 8, at 18-19; Scott, *supra* note 68, at 296.

⁸⁹ *Gault*, *supra* note 8, at 21.

juvenile criminal activity began to leave behind the image of the less blameworthy childlike offender professed by the founders of the juvenile courts.⁹⁰

The causal relationship of formally protecting these rights and the changes that followed is not entirely clear, but the ideological shift had already begun before *Gault*, and the need for protections was clear. In the period after *Gault*, juvenile courts more openly focused on assigning criminal responsibility and protecting public safety.⁹¹ Youth were seen as more like adults and accountability replaced rehabilitation as a central objective of the courts.⁹² In this era, statutes and dispositions were more related to the seriousness of the offense, public safety, and the offender's record, rather than the individual circumstances of the youth.⁹³ The courts still recognized that youth were not fully mature, and that immaturity did impact the blameworthiness of criminal behavior by juveniles.⁹⁴ These remnants of the founding ideology were reflected in reductions and limitations on the severity of consequences for youth in the juvenile courts.⁹⁵

This narrowing of the ideological differentiation between youth and adult offenders would not be a single shift, but a trend. A rise in violent crime in the 1980s and 1990s fueled a further shift towards the objectives of social control, criminal accountability, and public safety from the behavior of the youth.⁹⁶ The change in ideology, as framed by one advocate of this tougher approach, saw juvenile offenders as “criminals who happen to be young, not children who happen to be criminal.”⁹⁷

Many advocates of this new approach rejected the notion that the youth of these offenders altered their culpability, or that their developmental progress or individual circumstances had any bearing on their blameworthiness for their criminal behavior.⁹⁸ In fact, the more serious the crime or the more “adultlike” the conduct, the more the maturity of the offender is assumed.⁹⁹ Not far behind were statutory changes at the state and federal level that increased the severity of juvenile court dispositions, decreased confidentiality, and allowed youth to be charged in adult criminal court for more serious offenses, under the theory that these children were “old enough to do the crime, old enough to do the time.”¹⁰⁰

i. Terminology

In any discussion of the juvenile court, it is important to remember that despite its growing similarities to the adult criminal courts, it is still a separate system with its own language and procedures. This paper will focus on the terminology

⁹⁰ Scott, *supra* note 68, at 296.

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.* at 297.

⁹⁴ *Id.* at 296-7.

⁹⁵ *Id.* at 296.

⁹⁶ *Id.* at 297; Steinberg & Schwartz, *supra* note 8, at 13-4.

⁹⁷ Scott, *supra* note 68, at 297.

⁹⁸ *Id.* at 299.

⁹⁹ *Id.* at 298.

¹⁰⁰ *Id.*; Steinberg & Schwartz, *supra* note 8, at 13; Barry W. Wall et al., *AAPL Practice Resource for the Forensic Psychiatric Evaluation of Competence to Stand Trial*, 46 J. AM. ACAD. PSYCHIATRY LAW, Supp., Sept. 2018, at S4, S56

http://jaapl.org/content/jaapl/46/3_Supplement/S4.full.pdf.

used in the Ohio juvenile courts, as the focus is on the Ohio juvenile competency statute.

Unlike adult defendants accused of committing “criminal acts,” juveniles are accused of committing “delinquent acts.”¹⁰¹ The trial-like fact-finding hearing in a juvenile case is called an adjudicatory hearing.¹⁰² This paper focuses on an issue generally known and studied as “competency to stand trial,” so in the context of the juvenile courts within this discussion, “trial” should be read to mean the “adjudication hearing.” At the conclusion of that hearing, if the outcome is that the juvenile is “convicted” and found “guilty,” juvenile courts say that the youth has been “adjudicated” and found to be “delinquent.”¹⁰³ After the adjudication hearing, if juveniles are adjudicated delinquent, they receive “dispositions” as opposed to the “sentences” that adult defendants receive.¹⁰⁴ In juvenile court, there are many points in the process at which the youth might be “detained” in “detention centers,” which range from “locked facilities” at the most restrictive to “home detention” at the least restrictive.¹⁰⁵

There is no standardized difference in the terminology around an initial determination of whether the youth is competent to stand trial.¹⁰⁶ However, the process of becoming competent if an offender is found to be incompetent to stand trial is referred to in the Ohio Revised Code as “restoration” for adults and “attainment” for juveniles.¹⁰⁷

C. Juvenile Courts and Due Process

Since the Bill of Rights was adopted, the exact shape and application of the due process rights it guarantees in the criminal justice system have been formed through jurisprudence from the United States Supreme Court. In 1967, the Supreme Court changed the juvenile court system dramatically when it recognized that many due process protections must also apply to those accused of crimes as juveniles, not just adults. “Under our Constitution, the condition of being a boy does not justify a kangaroo court,” wrote Justice Fortas in delivering the opinion of the court.¹⁰⁸ *Gault* extended notice of charges, right to counsel, the rights of confrontation and examination, and the privilege against self-incrimination to the juvenile justice system.¹⁰⁹

In 1970, in *In re Winship* the court found due process dictated that the standard of proof for adjudicating a juvenile delinquent, like an adult conviction, must be “beyond a reasonable doubt.”¹¹⁰ In 1975, *Breed v. Jones* clarified that a youth adjudicated delinquent in the juvenile court could not then be tried for the same

¹⁰¹ *Juvenile Court Terminology*, NAT’L JUV. DEF. CTR., <https://njdc.info/juvenile-court-terminology/> (last visited May 5, 2022).

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ OHIO REV. CODE ANN. §§ 2945.38, 2152.51 (LexisNexis 2022).

¹⁰⁸ *Gault*, *supra* note 8, at 27-28.

¹⁰⁹ *Id.* at 27-28.

¹¹⁰ *In re Winship*, 397 U.S. 358, 368 (1970).

actions in the adult criminal court, as this would violate the due process principle of double jeopardy.¹¹¹ While the exact impact of the *Breed* decision has been altered by changes to the law the case originated under, the assertion that double jeopardy reaches a juvenile court adjudication is an important facet in understanding and applying due process in the juvenile courts.¹¹²

In 1984, the court struck a different tone when it came to pre-adjudication detention of juveniles. In *Schall v. Martin*, the court held that juvenile pretrial detention does not violate juveniles' Due process rights because it serves the legitimate purpose of protecting the youth and the public.¹¹³ The incongruity of this attitude towards detention was highlighted in Thurgood Marshall's dissent, where he argued that the harms of subjecting a juvenile who has not yet been adjudicated delinquent to detention far outweighed any speculative protection of the juvenile or the public from further harm.¹¹⁴

As noted by the National Juvenile Justice Network, certain due process rights, including the right to a jury trial, right to bail, right to a speedy trial, and right to represent oneself have not been extended to the juvenile courts.¹¹⁵ In addition to these rights, the Supreme Court has not yet addressed whether the requirement that a defendant be competent to stand trial extends to juvenile courts.¹¹⁶ However, the issue of competence to stand trial came to the forefront of juvenile defense in the 1990s, as punishments became harsher and more youth were removed to adult criminal courts.¹¹⁷

Once the issue was raised, it became so clear that a competent defendant was sufficiently fundamental to a fair hearing that, by 2012, all states except Oklahoma had recognized that a juvenile must be competent to stand trial.¹¹⁸ In 1989, The Oklahoma Court of Appeals found that because the purpose of the juvenile justice system was treatment rather than punishment, it was not necessary to apply the state's competency statute in juvenile proceedings.¹¹⁹ By 2016, however, Oklahoma had not only acknowledged the due process requirement that a juvenile defendant must be competent to stand trial, it had gone further than most states and included "developmental immaturity" as one of the grounds for a finding of juvenile incompetency.¹²⁰

Only about 23 states have implemented statutory guidance specifically for juvenile competency, while others rely on the states existing adult competency statutes.¹²¹ The application of an adult competency statute often provides for

¹¹¹ *Breed v. Jones*, 421 U.S. 519, 531 (1975).

¹¹² *Barker v. Estelle*, 913 F.2d 1433, 1439 (9th Cir. 1990).

¹¹³ *Schall v. Martin*, 467 U.S. 253, 256–57 (1984).

¹¹⁴ *Id.* at 308–09 (Marshall, J., dissenting).

¹¹⁵ LARSON et al., *supra* note 12, at 9 n.25.

¹¹⁶ Joseph Chien et al., *Predictors of Competency to Stand Trial in Connecticut's Inpatient Juvenile Competency Restoration Program*, 44 J. AM. ACAD. PSYCHIATRY LAW, no. 4, 2016, at 451, 452 <http://jaapl.org/content/jaapl/44/4/451.full.pdf>.

¹¹⁷ *Id.*

¹¹⁸ LARSON et al., *supra* note 12, at 21.

¹¹⁹ Kathryn A. LaFortune, *Oklahoma leads the way on juvenile competency*, 47 AM PSYCHOL. ASS'N, no.1, Jan. 2016 at 32, <https://www.apa.org/monitor/2016/01/jn>.

¹²⁰ *Id.*

¹²¹ *Juvenile Justice: States with Juvenile Competency Laws*, *supra* note 14; LARSON et al., *supra* note 12, at 2.

mental illness and intellectual disability but does not include any provision for developmental immaturity, which is a concern for juvenile justice policy advocates because this is a key piece of the juvenile competency equation.¹²² Developmental immaturity will be further addressed in section IV(A)(ii) of this paper.

III. O.R.C. 2152.51-59: JUVENILE COMPETENCY STATUTE

Ohio is among the minority of states that have adopted a juvenile competency statute. The statute was implemented in 2011 and provides the basic framework for juvenile competence in Ohio. It runs from a definitions section at Ohio Revised Code Section 2152.51 to Section 2152.59 on “proceedings where child determined competent; disposition of child determined not competent; competency attainment services.”¹²³

A. Competency

The statute largely focuses on the hearings and initial competency evaluation. Any child over fourteen who does not have a mental illness or developmental disability is rebuttably presumed competent to stand trial.¹²⁴ Once the issue of the youth’s competency has been raised by any party, the court has two options. First, the court may find the youth incompetent without evaluation or hearing by agreement of the parties or based on a prior determination of incompetency and inability to attain competency.¹²⁵ Second, if the court feels the matter needs further exploration, the court may decide whether there is a reasonable basis to conduct an evaluation or hold a hearing to make the determination within fifteen days of the motion.¹²⁶ If the court finds that there is reasonable basis for an evaluation, or if the parties agree to an evaluation, the court must order the evaluation and appoint the evaluator.¹²⁷

i. Evaluator Requirements and Evaluation Procedure

Section 2152.54 lays out the requirements for the evaluator appointed by the court. If the youth does not appear to the court to have at least a moderate level of intellectual disability, then the evaluation may be done by either a professional employed by a psychiatric facility that is certified to provide forensic services by the department of mental health and addiction services or by a psychiatrist or licensed clinical psychologist who meets certain statutory criteria and has specialized education, training, or experience in forensic evaluations of children or adolescents.¹²⁸ If the youth appears to have at least a moderate level of intellectual disability, the evaluator must have special education, training, or

¹²² LARSON et al., *supra* note 12, at 18.

¹²³ OHIO REV. CODE ANN. §§ 2152.51, 59 (LexisNexis 2022).

¹²⁴ OHIO REV. CODE ANN. § 2152.52(A)(2) (LexisNexis 2022).

¹²⁵ OHIO REV. CODE ANN. §§ 2152.52(B)(1)-(2) (LexisNexis 2022).

¹²⁶ OHIO REV. CODE ANN. §§ 2152.53(A)(2)-(3) (LexisNexis 2022).

¹²⁷ OHIO REV. CODE ANN. § 2152.53(B) (LexisNexis 2022).

¹²⁸ OHIO REV. CODE ANN. § 2152.54(A) (LexisNexis 2022).

experience in forensic evaluation of children or adolescents with intellectual disabilities.¹²⁹ If the court orders the first type of evaluation and the evaluator finds that the second type should have been ordered, they must notify the court and the court must appoint an evaluator with experience dealing with intellectual disabilities in forensic evaluations.¹³⁰

Section 2152.55 lays out the conditions and procedures of the evaluation. The evaluation is to be performed in the least restrictive setting available that will both facilitate an evaluation and maintain the safety of the child and community, though the setting may be altered if the youth is not cooperative during the evaluation process.¹³¹ The evaluator gets access to all the child's records, including any prior competency evaluations.¹³² Finally, within ten business days of the evaluator appointment, both attorneys on the case must provide the evaluator with all relevant records that are in their possession, with allowances for those that might create a risk of harm, interfere with another prosecution, or violate attorney client privilege.¹³³

Section 2152.56 details the contents to be included in the evaluator's written report. The statute states that the "report shall include the evaluator's opinion as to whether the child, due to mental illness, due to developmental disability, or otherwise due to a lack of mental capacity, is currently incapable of understanding the nature and objective of the proceedings against the child or of assisting in the child's defense."¹³⁴

The next section puts forth the basic criteria for evaluation:

(B) A competency assessment report shall address the child's capacity to do all the following:

- (1) Comprehend and appreciate the charges or allegations against the child;
- (2) Understand the adversarial nature of the proceedings, including the role of the judge, defense counsel, prosecuting attorney, guardian ad litem or court-appointed special assistant, and witnesses;
- (3) Assist in the child's defense and communicate with counsel;
- (4) Comprehend and appreciate the consequences that may be imposed or result from the proceedings.¹³⁵

The report must also contain the evaluator's opinion on the extent to which the child's competency may be impaired by their failure to meet any of the criteria listed in subsection (B).¹³⁶ The evaluator must also include any reasonable accommodations that might allow the child to understand the nature and

¹²⁹ OHIO REV. CODE ANN. § 2152.54(B) (LexisNexis 2022).

¹³⁰ OHIO REV. CODE ANN. § 2152.54(C) (LexisNexis 2022).

¹³¹ OHIO REV. CODE ANN. § 2152.55(A) (LexisNexis 2022).

¹³² OHIO REV. CODE ANN. § 2152.55(B) (LexisNexis 2022).

¹³³ OHIO REV. CODE ANN. §§ 2152.55(C)-(D) (LexisNexis 2022).

¹³⁴ OHIO REV. CODE ANN. § 2152.56(A) (LexisNexis 2022).

¹³⁵ OHIO REV. CODE ANN. § 2152.56(B) (LexisNexis 2022).

¹³⁶ OHIO REV. CODE ANN. § 2152.56(C) (LexisNexis 2022).

objectives of the proceedings against them if their competency is only slightly impaired.¹³⁷

If the evaluator finds that the child is not competent, then the report must also contain the evaluator's opinion as to whether the child could attain competency within the statutory periods included in the attainment chapter of the statute.¹³⁸ If the child could likely attain competency, the evaluator is asked to recommend the least restrictive setting consistent with the child's ability to attain competence and public safety and a list of attainment service providers that are located close to the youth's current address. Subsection (E) provides for the possibility that an evaluator may not be able to form the opinions required in the other subsections of 2152.56 and instructs the evaluator to put that in the report and make recommendations for services to support the safety of the child and the community.¹³⁹

Section 2152.57 deals with what happens once the report is submitted to the court. The child may submit their own report so long as it is within the time allowed for the court-ordered report and meets all the criteria of that report.¹⁴⁰ This section also prohibits the court from recovering the cost of the evaluation from the child or their parent or guardian, with the exception of missed appointments.¹⁴¹ Any party may object to the contents of a competency report before the hearing and move for an additional evaluation.¹⁴² If granted, the additional evaluation would occur at the expense of the moving party; however, the county must pay for the second evaluation if the child is indigent.¹⁴³

Once the report or reports are completed and received, the court must hold a hearing to determine if the child is competent to stand trial.¹⁴⁴ The court is provided the following guidance: "[i]n determining the competency of the child to participate in the proceeding, the court shall consider the content of all competency assessment reports admitted as evidence. The court may consider additional evidence, including the court's own observations of the child's conduct and demeanor in the courtroom."¹⁴⁵ The court must find that the child is competent or incompetent by a preponderance of the evidence and make a written determination.¹⁴⁶ If the child is competent, the case can proceed to an adjudication hearing.¹⁴⁷

However, if the child is found not to be competent to stand trial, the court must make another determination. The court must determine if the child could "likely attain competency by participating in services specifically designed to help the child develop competency" within the statutory period, which ranges from three months to one year depending on the offense charged.¹⁴⁸ If not able to determine

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ OHIO REV. CODE ANN. § 2152.56(E) (LexisNexis 2022).

¹⁴⁰ OHIO REV. CODE ANN. § 2152.57(B) (LexisNexis 2022).

¹⁴¹ OHIO REV. CODE ANN. § 2152.57(D) (LexisNexis 2022).

¹⁴² OHIO REV. CODE ANN. § 2152.57(E)(1) (LexisNexis 2022).

¹⁴³ OHIO REV. CODE ANN. § 2152.57(E)(2) (LexisNexis 2022).

¹⁴⁴ OHIO REV. CODE ANN. § 2152.58(A) (LexisNexis 2022).

¹⁴⁵ OHIO REV. CODE ANN. § 2152.58(C) (LexisNexis 2022).

¹⁴⁶ OHIO REV. CODE ANN. § 2152.58(D)(1) (LexisNexis 2022).

¹⁴⁷ OHIO REV. CODE ANN. § 2152.59(A) (LexisNexis 2022).

¹⁴⁸ OHIO REV. CODE ANN. §§ 2152.59(C)-(D) (LexisNexis 2022).

competency within the statutory period, the court must dismiss the charges against the child, though as with the adult statute, the prosecution are not barred from refileing at a later date.¹⁴⁹ The court can delay the release of a child after dismissal for a limited period to make referrals to agencies and services.¹⁵⁰

ii. Attainment

If the child is found likely to attain competency if provided with services, the court may order the child to participate in these services at the county's expense.¹⁵¹ The statute says only that the court shall "name a reliable provider to deliver the competency attainment services...."¹⁵² The named provider is then supposed to supply the court with a competency plan, and the competency services provided to the child shall be based on the attainment plan approved by the court.¹⁵³

There are also reporting requirements, like those in the adult statute, for the service provider. These requirements include filing a report every thirty days, at the termination of services, if the child is not cooperating, if a more restrictive setting is consistent with child's ability to attain competency and the safety of both the child and the community, if the child will not attain competency in the allotted time, and if the child has attained competency.¹⁵⁴

After any of these reports, the court may hold a hearing to determine if new orders are necessary.¹⁵⁵ If the court finds that the child has not, or is no longer likely to, attain competency in the allotted time frame, the court must dismiss the charges and follow the procedure above for a finding of incompetence. If competence is not the outcome, the adult statute provides that the state may delay dismissal and discharge in order to initiate civil commitment proceedings.¹⁵⁶ The juvenile statute instead provides that the court may delay dismissal up to ninety days for one of two actions.¹⁵⁷ First, the court may refer the matter to a public children's agency for a determination on whether an abuse, dependency, or neglect case needs to be filed.¹⁵⁸ Second, the court may refer the child or the child's family to local services to reduce the potential for reoffending.¹⁵⁹ These options are much less structured than the civil commitment option in the adult statute, focusing on community based interventions and services for the child and their family.

Finally, if at one of these hearings the court determines that the child has attained competency, the court may go forward with the delinquency case.¹⁶⁰

¹⁴⁹ OHIO REV. CODE ANN. § 2152.59(B) (LexisNexis 2022).

¹⁵⁰ *Id.*

¹⁵¹ OHIO REV. CODE ANN. § 2152.59(C) (LexisNexis 2022).

¹⁵² *Id.*

¹⁵³ OHIO REV. CODE ANN. §§ 2152.59(D), (E) (LexisNexis 2022).

¹⁵⁴ OHIO REV. CODE ANN. § 2152.59(F) (LexisNexis 2022).

¹⁵⁵ OHIO REV. CODE ANN. § 2152.59(H)(1) (LexisNexis 2022).

¹⁵⁶ OHIO REV. CODE ANN. § 2945.39(C) (LexisNexis 2022).

¹⁵⁷ OHIO REV. CODE ANN. § 2152.59(H)(3) (LexisNexis 2022).

¹⁵⁸ OHIO REV. CODE ANN. § 2152.59(H)(3)(a) (LexisNexis 2022).

¹⁵⁹ OHIO REV. CODE ANN. § 2152.59(H)(3)(b) (LexisNexis 2022).

¹⁶⁰ OHIO REV. CODE ANN. § 2152.59(H)(5) (LexisNexis 2022).

IV. PROTECTING AGAINST FAULTY COMPETENCY FINDINGS

A. Statute: Strength and Gaps

i. Guarantees The Right, The Evaluation, And Attainment Services Without Prohibitive Expense to Juvenile or Family

The statute, O.R.C. 2152.51-59, was a necessary first step. Prior to the statute, some juvenile court judges refused to evaluate competency absent explicit statutory mandate, and others felt that no child could be competent to stand trial because age and maturity would prevent them from fully understanding the charges against them and assisting in their defense.¹⁶¹ Some youth, after being found incompetent, were committed to attainment services or treatment indefinitely.¹⁶² The statute provides clear guidance on both of these issues and on who pays for services if they are warranted.¹⁶³ However, there are a number of areas in which this statute could be altered to better protect a juvenile's right to not stand trial while incompetent.

ii. Developmental Immaturity as a Predicate for Juvenile Incompetence

Many experts have observed that special care and attention must be paid when determining if youth are competent to stand trial. Research in the last twenty years has highlighted the differences in decision-making skills, risk assessment, and responses to social pressures in adolescents.¹⁶⁴ In addition to the mental health and intellectual disability considerations relevant to adult competency, some children may simply lack the developmental maturity to really participate in their defense as *Dusky* demands.¹⁶⁵

Mental health disorders and intellectual disabilities are more prevalent among juveniles involved with the juvenile justice system than they are among the general population.¹⁶⁶ As much as 50% of the juvenile justice population suffers from some form of mental illness as compared to about 20% of youth generally, and many in the juvenile justice population have more than one diagnosed disorder.¹⁶⁷ Intellectual disabilities are the basis for incompetence in juveniles at a much higher rate than for adults, with 58% of juvenile incompetence to stand trial findings predicated on intellectual disability, compared to just 6% of adults.¹⁶⁸ While these illnesses and disabilities are not enough on their own to make a juvenile incompetent, they often impact the juvenile's ability to fulfill the

¹⁶¹ *Editorial: Juvenile-justice gaps*, COLUMBUS DISPATCH (Mar. 5, 2009, 12:24 PM), <https://www.dispatch.com/story/opinion/columns/2009/03/05/editorial-juvenile-justice-gaps/23599305007/>.

¹⁶² *Id.*

¹⁶³ See discussion *supra* Section III(A)(i).

¹⁶⁴ LARSON ET AL., *supra* note 12, at 2; SCOTT, *supra* note 68, at 299-306; STEINBERG & SCHWARTZ, *supra* note 8, at 23-28.

¹⁶⁵ LARSON et al., *supra* note 12, at 10.

¹⁶⁶ *Id.* at 11-2.

¹⁶⁷ *Id.* at 13. See also Karen Abram et al., *Comorbid Psychiatric Disorders in Youth Detention*, 60 ARCHIVES GEN. PSYCHIATRY 1097, 1098 (2003) (finding approximately two-thirds of youth in the juvenile justice system meet criteria for at least one diagnosis, even after conduct disorder is excluded).

¹⁶⁸ LARSON et al., *supra* note 12, at 12.

factual recollection, assisting counsel, and rational understanding requirements laid out in *Dusky* by impacting memory, speech, learning, and abstract reasoning.¹⁶⁹

There should be a third factor considered when evaluating a juvenile's competency to stand trial: developmental immaturity.¹⁷⁰ A youth's neurological, cognitive, and psychosocial development all contribute to their factual and rational understanding of delinquency proceedings.¹⁷¹ Physical development of the brain continues beyond the jurisdiction of the juvenile court, into a person's twenties.¹⁷² Key areas that are still undergoing development and change in adolescence are the pre-frontal cortex and the limbic area.¹⁷³ These areas of the brain are responsible for abstract reasoning, foresight, impulse control, and emotional regulation.¹⁷⁴ They develop at varying rates for a variety of reasons. Additionally, developmental immaturity can have a reciprocally complicated relationship with the mental health and intellectual disability factors, as both can be more difficult to accurately diagnose and treat in adolescence.¹⁷⁵ The social and psychological developmental factors impacted by youth and immaturity include risk assessment, impulse control, and independent thinking.¹⁷⁶ These skills generally have not fully materialized in a juvenile, who may still have an unsettled sense of self.¹⁷⁷ Youth may be able to factually grasp the situation such that they are able to identify the people in the court room and their roles, yet still lack the ability to rationally understand the bigger picture, such as the life-long implications of a delinquency adjudication.¹⁷⁸ This makes it vital that competency statutes provide guidance that pertains to the youth's full understanding, rather than just their factual understanding of what is happening, to determine competency.¹⁷⁹

Developmental immaturity is unique to the determination of juvenile competence to stand trial and requires further clarification within the Ohio statute. The statute does provide that a child under 14 is not presumed to be competent to stand trial.¹⁸⁰ This is nearly consistent with the most robust research available on juvenile competency and development.¹⁸¹ However, on a child's fourteenth

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*; Bonnie & Grisso, *supra* note 9, at 90.

¹⁷¹ LARSON et al., *supra* note 12, at 12.

¹⁷² Jay N. Giedd et al., *Brain Development During Childhood and Adolescence: A Longitudinal MRI Study*, 2 NATURE NEUROSCI. 861, 861 (1999) (describing study of 145 children and adolescents scanned up to five times over approximately ten years).

¹⁷³ LARSON ET AL., *supra* note 12, at 13-14.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* at 13-16; STEINBERG & SCHWARTZ, *supra* note 8, at 27; Laurence Steinberg & Elizabeth S. Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 AM. PSYCH. 1009, 1012 (2003).

¹⁷⁷ LARSON ET AL., *supra* note 12, at 13-15; STEINBERG & SCHWARTZ, *supra* note 8, at 27; Steinberg & Scott, *supra* note 176, at 1012.

¹⁷⁸ LARSON ET AL., *supra* note 12, at 32-33.

¹⁷⁹ *Id.*

¹⁸⁰ OHIO REV. CODE ANN. § 2152.52 (LexisNexis 2022).

¹⁸¹ Wall et al., *supra* note 100, at S44 (citing to Thomas Grisso et al., *Juveniles' Competence to Stand Trial: A Comparison of Adolescents' and Adults' Capacities as Trial Defendants*, 27 L. &

birthday, under the current statute, there arises a rebuttable presumption that the child is competent to stand trial.¹⁸² For children who are fourteen and older, age on its own is not enough to predicate a finding that the child is incompetent to stand trial and it becomes harder to establish incompetence, with the focus shifting mostly to mental illness and developmental disability.

The statute does not specify, as the Oklahoma statute discussed above, that the developmental immaturity of the child be considered when determining competence, but rather it mentions mental illness, developmental disability, or other “lack of mental capacity.”¹⁸³ This leaves age-correlated developmental maturity issues above in the grey area of “lack of mental capacity,” if they are considered at all.¹⁸⁴ This allows judges to include or exclude explicit consideration of the developmental maturity issues above to whatever degree they choose. Many of those developmental issues could impact competency as defined in *Dusky*, but they do not meet the diagnostic criteria for an intellectual disability.¹⁸⁵ Inability to meet the standard put forth in *Dusky*—whether caused by mental illness, disability, or immaturity—should support a finding of incompetence to stand trial.¹⁸⁶

iii. Evaluation Report Criteria Undercut the *Dusky* Standard

The specific criteria in the statute for the expert evaluation report of juvenile competence are an important part of the statute. However, these criteria have the potential to significantly lower the bar of competency from the standard set out in *Dusky*. The statute asks that the evaluator assess the child’s capacity in four areas, each of which relates components of a “sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding” and a “rational as well as factual understanding of the proceedings against him.”¹⁸⁷

These four areas are described in the statute as: “comprehend and appreciate the charges or allegations against the child”; “understand the adversarial nature of the proceedings, including the role of the judge, defense counsel, prosecuting attorney, guardian ad litem or court-appointed special assistant, and witnesses”; “assist in the child’s defense and communicate with counsel”; and “comprehend and appreciate the consequences that may be imposed or result from the proceedings.”¹⁸⁸ However, a deficit in one or more of these areas may not lead to a finding of incompetence if the evaluator thinks that the child can be made to understand the “nature and objectives of the proceedings” and assist in their defense with “reasonable accommodations.”

Prior to the statute, in case law showing the application of competency in the juvenile court, Ohio courts specified that the *Dusky* standard is the standard for

HUM. BEHAV. 333 (2003); Deborah K. Cooper, *Juveniles’ Understanding of Trial-Related Information: Are They Competent Defendants?*, 15 BEHAV. SCI. L. 167 (1997)).

¹⁸² OHIO REV. CODE ANN. § 2152.52 (LexisNexis 2022).

¹⁸³ OHIO REV. CODE ANN. § 2152.51 (LexisNexis 2022).

¹⁸⁴ OHIO REV. CODE ANN. § 2152.51(A)(1) (LexisNexis 2022).

¹⁸⁵ LARSON ET AL., *supra* note 12, at 23.

¹⁸⁶ *Id.*

¹⁸⁷ *Dusky v. United States*, 362 U.S. 402, 402 (1960). *See also* OHIO REV. CODE ANN. § 2152.56 (LexisNexis 2022).

¹⁸⁸ OHIO REV. CODE ANN. § 2152.56 (LexisNexis 2022).

juveniles, but that in determining competency, the Court must use juvenile norms.¹⁸⁹ However, these norms have not been explicitly laid out yet. The juvenile competency statute should be updated to reflect the extensive research that is now available on the development of adolescents. To avoid uncertainty, the statute should be amended to include appropriate development benchmarks and criteria relevant to participation in one's own defense to guide evaluator inquiries and judicial decision-making.

iv. Attainment

One of the most notable and concerning differences between the Ohio adult competency statute and the juvenile competency statute are the requirements for the programs to which the court may refer a person who is found not competent but capable of becoming competent through restoration or attainment services. The adult statute provides very specific guidance.

[The defendant] shall be committed to the department of mental health and addiction services for treatment or continuing evaluation and treatment at a hospital, facility, or agency, as determined to be clinically appropriate by the department of mental health and addiction services or shall be committed to a facility certified by the department of mental health and addiction services as being qualified to treat mental illness, to a public or community mental health facility, or to a psychiatrist or another mental health professional for treatment or continuing evaluation and treatment. Prior to placing the defendant, the department of mental health and addiction services shall obtain court approval for that placement following a hearing.¹⁹⁰

That same section provides a provision for who may petition to the court to order the administration of medication and also provides a list of factors to be considered in determining the placement.¹⁹¹ In contrast, the juvenile statute is much less specific about the provision of attainment services.

[T]he court may order the child to participate in services specifically designed to help the child develop competency at county expense. The court shall name a reliable provider to deliver the competency attainment services and shall order the child's parent, guardian, or custodian to contact that provider by a specified date to arrange for services.¹⁹²

The provision goes on to specify that the service provider must create an attainment plan for the child, and have it approved, and like the adult statute, the services must be offered in the least restrictive setting, consistent with the goal of attainment and the safety of the public.¹⁹³

The requirements are notably more relaxed when it comes to the qualifications of juvenile attainment services than adult restoration services. This could allow more flexibility in the provision of services, ensuring that children are getting the help they need, but it could also mean that a licensed mental health counselor with

¹⁸⁹ *In re R.H.*, 8th Dist. Cuyahoga No. 98426, 2013-Ohio-1030, ¶ 10 (citing *In re York*, 142 Ohio App.3d 524, 536, 756 N.E.2d 191 (8th Dist.2001)).

¹⁹⁰ OHIO REV. CODE ANN. § 2945.38 (LexisNexis 2022).

¹⁹¹ *Id.*

¹⁹² OHIO REV. CODE ANN. § 2152.59 (LexisNexis 2022).

¹⁹³ *Id.*

only four hours of training in administering attainment services is providing those services, and then offering a “professional” opinion to the court on whether the child has attained competency.¹⁹⁴

This type of flexibility would be of less concern if the statute provided, as it does for initial competency evaluations, that attainment service provider reports declaring a child competent could face objection and reevaluation from the parties to that case if necessary.¹⁹⁵ However, the statute simply provides that on receipt of that report, the court can hold a hearing and make a final determination as to the competency of the child.¹⁹⁶

Additionally, in the adult restoration process, such a report is to include the “examiner’s findings, the facts in reasonable detail on which the findings are based, and the examiner’s opinion as to the defendant’s capability of understanding the nature and objective of the proceedings against the defendant and of assisting in the defendant’s defense.”¹⁹⁷ The juvenile statute requires only a “report informing the court of that determination within three business days after making the determination. If the provider believes that accommodations would be necessary or desirable, the report shall include recommendations for accommodations.”¹⁹⁸

These differences between the two statutes significantly weaken the due process protections afforded to juveniles in Ohio in the matter of competency to stand trial. In another area of law, such a gap in protection might be filled by case law generated by appeals where the right had been infringed. That is not the case here, unfortunately.

v. In Matters of Discretion, Appeal is Not Enough Protection

As previously discussed in this paper, case law has played a key role in developing the specific due process protections afforded to all criminal defendants and alleged delinquent children. A right is infringed, or ambiguity is grossly misinterpreted, and the harmed individual appeals. The decision of the higher court fills in the details and clarifies the right or the protection. Case law cannot fill the gaps in the juvenile competency statute for two reasons.

First, competency is an area where the original factfinder is given enormous latitude to dictate how well this right is protected. The court has discretion over whether an evaluation by mental health or intellectual disability professionals is even warranted, prior to any input from those professionals.¹⁹⁹ Once the evaluation or evaluations have been filed in a juvenile proceeding, the court is empowered to consider the information presented by all of the experts and other evidence. This evidence includes the “court’s own observations of the child’s conduct and demeanor in the courtroom.”²⁰⁰ The court is also granted the discretion to evaluate the service provider’s attainment report against the

¹⁹⁴ In re D.L., 5th Dist. Stark No. 2016 CA 00125, 2017-Ohio-2823, ¶ 25.

¹⁹⁵ OHIO REV. CODE ANN. § 2152.57 (LexisNexis 2022).

¹⁹⁶ OHIO REV. CODE ANN. § 2152.59 (LexisNexis 2022).

¹⁹⁷ OHIO REV. CODE ANN. § 2945.38(G) (LexisNexis 2022).

¹⁹⁸ OHIO REV. CODE ANN. § 2152.59(F)(4) (LexisNexis 2022).

¹⁹⁹ OHIO REV. CODE ANN. §§ 2152.53, 2945.37 (B)-(C) (LexisNexis 2022).

²⁰⁰ In re D.T.W., 12th Dist. Butler No. CA2014-09-198, 2015-Ohio-2317, ¶ 20. *See also* OHIO REV. CODE ANN. § 2152.58(C) (LexisNexis 2022).

attainment plan approved by that court. At every stage of the process, the statute defers to the final determination to the judge.

This immense discretion contributes to the second reason that appeal is not a sufficient avenue to protect the right of competency to stand trial. This discretion means that each determination, if reviewed on appeal, is reviewed with an abuse of discretion standard, which is one of highest thresholds for a decision to be overruled. Indeed, appeals courts in Ohio have stated that they “will not disturb a competency determination if there is ‘some reliable, credible evidence supporting the trial court’s conclusion that [the defendant] understood the nature and objective of the proceedings against him.’”²⁰¹ The case law suggests there is little chance that a court will ever overturn a competency determination, especially if the court has held any sort of hearing on the matter as “[d]eference on these issues should be given to those ‘who see and hear what goes on in the courtroom.’”²⁰²

B. Attainment: Provider Qualifications and Second Opinions

Many areas of the Ohio juvenile competency statute need to be updated to reflect the current understanding of juvenile development and the landscape of more severe punishments imposed by the modern courts. One area of the statute that is of highest priority is the portion that deals with attainment. This is the largest gap in the statute’s protection of juveniles’ due process rights.

The statute should be amended to require at least as much detail about attainment programming and service providers, as included in the adult competency statute. The statute should include criteria for attainment plans to ensure that they are aimed at the *Dusky* standard of competence at minimum.

The reporting requirements for attainment providers should be more robust, like those found in the adult statute. The facts and reasoning supporting such an assessment are likely more important in a juvenile competency determination, considering the developmental intricacies discussed (briefly) above, of which the court may not be fully informed.

Finally, the statute already recognizes the subjective element involved in the opinions of mental health and intellectual disability treatment professionals by providing for a second opinion at the initial competency evaluation stage. Logically, the same concerns that would make such a provision necessary would also support providing for a second opinion at the child’s last possible opportunity, to prove whether the child is competent to stand trial. However, the statute must be amended to include provisions for objection to the attainment

²⁰¹*Id.* at ¶ 22 (citing *State v. Ramirez*, 12th Dist. Butler No. CA2010-11-305, 2011-Ohio-6531, ¶ 30). *See also In re S.D.*, 8th Dist. Cuyahoga No. 99763, 2014-Ohio-2528 at ¶ 25 (affirming juvenile court’s decision where there was “sufficient credible evidence for the trial court to find that [the subject child] was competent to stand trial.”).

²⁰²*State v. Locke*, 11th Dist. Lake No. 2014-L-053, 2015-Ohio-1067, ¶ 93 (quoting *State v. Vrabel*, 790 N.E.2d 303, 311 (2003)). *See also State v. Cowans*, 717 N.E.2d 298, 313 (1999) (“Limited to reviewing the black-and-white record, we are in no position to second-guess factual determinations made by a trial judge, which may be based on a person’s demeanor, conduct, gestures, tone of voice, or facial expressions.”).

report and for a second attainment assessment at the counties' expense, as it already does for the initial competency assessment.

V. CONCLUSION

There are many reports presenting expert policy recommendations, and a substantial volume of research supporting them, that detail what should shape and guide statutes for juvenile competency to stand trial. Ohio has adopted provisions consistent with some of these recommendations, which is better protection than relying on case law and the adult statutes, as some states have done. However, the Ohio statute should be considered a work in progress.

Since appeals courts are unlikely to provide meaningful review for the substance of a juvenile competency determination, the need for procedures for ensuring that the determination is initially made in a deliberate and informed manner is significantly heightened. Every aspect of the statute should be reviewed considering the research and scholarship that is newly available since it was implemented in 2011. Furthermore, there is one glaring gap in the statute's protection that cannot wait. The provisions for attainment and attainment review must be amended to include substantially detailed requirements and procedures for the statute to ensure that juvenile due process rights are not violated by making children face adjudications while not competent to do so.