

Pennsylvania Interbranch Commission on Juvenile Justice
February 1, 2010

Testimony of Mary Ann Scali
Deputy Director, National Juvenile Defender Center

Judge Cleland and Members of the Commission.

Thank you very much for inviting the National Juvenile Defender Center to share its perspective on the systemic corruption in Luzerne County juvenile court with this Commission. We appreciate your time, your consideration of our comments, and your ultimate recommendations. Our Executive Director, Patricia Puritz, sends her regrets that she cannot be here today but has asked me to share our recommendations with a specific focus on juvenile defense, which reflects our specialized expertise.

The National Juvenile Defender Center serves as a national training, technical assistance and resource center for the juvenile defense bar. Our mission is: *to ensure excellence in juvenile defense and to promote justice for all children*. We believe that all children in conflict with the law must have ready and timely access to capable well-trained legal counsel; with individualized representation that is developmentally appropriate, free from bias, and strength-based. We believe that the juvenile defense bar must build its capacity, develop leadership, and demonstrate a commitment to professionalism.

“Unfortunately, loose procedures, high-handed methods and crowded court calendars, either singly or in combination, all too often, have resulted in depriving some juveniles of fundamental rights that have resulted in a denial of due process.”¹

This is not a statement made about Luzerne County, it is taken from a 1966 report issued by the Pennsylvania Council of Juvenile Court Judges which was quoted in the landmark United

¹ A Juvenile's Right to Counsel in a Delinquency Hearing, 17 Juvenile Court Judges Journal 53, 54 (1966).

States Supreme Court decision, *In re Gault*. Similarly, in 1953, the Chief Justice of the New Jersey Supreme Court held forth that, “The indispensable elements of due process are: first, a tribunal with jurisdiction; second, notice of a hearing to the proper parties, and finally, a fair hearing. All three must be present if we are to treat the child as an individual human being and not to revert . . . to the more primitive days when he was treated as a chattel.”² Fifty-seven years after this observation we are saddened, angered, and compelled to act as we face the reality that in Luzerne County, for half a decade after the year 2000, children were again treated as chattel.

In their 1967 decision in *Gault* the United States Supreme Court recognized that youth had, “the worst of both worlds . . . neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children.” The Court observed the unique and critical role of the juvenile defender, “[t]he probation officer cannot act as counsel for the child. His role is . . . as arresting officer and witness against the child. Nor can the judge represent the child.” The Court found that, “The juvenile needs the assistance of counsel to cope with problems of law, to make skilled inquiry into the facts, to insist upon regularity of the proceedings, and to ascertain whether he has a defense and to prepare and submit it.”³

Despite this clear mandate, forty-three years after this decision it is disheartening to consider that some, if not many, juvenile courts still operate without the procedures set forth in this opinion. Not because the procedures are absent from the law, but because human behavior cannot be separated from the law. And in Luzerne County, human behavior transcended the law.

² Arthur T. Vanderbilt, Chief Justice of the Supreme Court of New Jersey, in a foreword to *Virtue, Basic Structure for Children's Services in Michigan* (1953), p. x.

³ *In re Gault*, 387 U.S. 1 (1967).

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The National Juvenile Defender Center has engaged in assessments of access to and quality of juvenile defense in almost twenty states; and yes, as you heard in previous testimony, Pennsylvania is one of those states. Assessments furnish policy makers and leaders with baseline data and information so they can make informed decisions regarding the nature and structure of the juvenile indigent defense system. Beyond the constitutional mandate to provide children in delinquency courts with counsel, Pennsylvania has a vested interest in ensuring high-quality juvenile defense. When juvenile defense attorneys provide children with effective representation, they can improve the life outcomes of children. The primary goal of each assessment is to encourage excellence in juvenile defense and to promote fairness for children in the juvenile delinquency system.

When we look back at the 2003 findings from *Pennsylvania: An Assessment of Access to and Quality of Representation in Delinquency Proceedings*, while strong leadership has emerged and great progress has been made in numerous areas in Pennsylvania, a few seminal findings are worth noting:

- a. In 2003, Pennsylvania's juvenile indigent defense system was uneven and inadequately funded
 - Juvenile defenders had little supervision, no required training, and minimal practice standards
 - Defenders did not have access to enough resources, including training, support from investigators and experts, basic technology (such as phones and computers), and adequate compensation
- b. In 2003, youth had limited access to counsel

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- Many children did not have counsel at critical stages of the juvenile justice process, despite Pennsylvania law's clear mandate and the harmful consequences of waiving the right to counsel
 - Bureaucratic complications often delayed the appointment of counsel, leaving youth without representation in the crucial early stages of their cases
 - High average caseloads in juvenile public defender offices prevented defenders from adequately serving youth because they lacked the time to talk to clients, investigate cases, or prepare thoroughly for trials and dispositions
- c. In 2003, the quality of counsel varied dramatically from county to county resulting in "justice by geography"
- Many defenders did not have appropriate training in crucial areas such as adolescent development, communicating with children, and the legal implications of mental illness
 - In some areas of the state, defenders did not regularly file pre-trial motions or advocate for their clients' treatment needs at disposition hearings
 - Many defenders rarely filed appeals or represented their clients at post-disposition review hearings
 - Many defenders did not monitor their clients' progress in programs or institutional placements

These 2003 findings: that Pennsylvania's juvenile defense system was uneven and inadequately funded, that children had limited access to counsel, and that quality of counsel varied dramatically; remained true through Luzerne. However, these findings do not hold true across the entire Commonwealth of Pennsylvania. As you know, in April 2005, the

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Pennsylvania Supreme Court adopted uniform rules to govern the conduct of delinquency proceedings. Prior to this time, each county conducted matters according to its local rules. Toward the end of 2006, a new organization, the Juvenile Defender Association of Pennsylvania (JDAP), was formed. JDAP serves as a training, resource center, and advocacy organization for juvenile defenders across the state. JDAP has taken on the issues highlighted in the assessment, and often cites to the assessment as a founding document. Additionally, training resources have been put toward juvenile defense from the Pennsylvania Council on Crime and Delinquency and the Juvenile Court Judges' Commission took immediate action based on the assessment recommendations.

The recommendations were numerous and were directed to various state and local entities. As we look at them today, these recommendations are not new; but we would like to highlight several that are particularly relevant to the work of this Commission. In 2003 we recommended:

- Reworking the indigence determination, so that children are presumed indigent for the purposes of appointing counsel, as a key component of a policy that would not allow any child to go unrepresented at any stage of the juvenile court process.
- Ensuring that no juvenile goes unrepresented at any stage of the juvenile court process.
- Adopting standards for defense attorneys representing children in delinquency proceedings. These standards should establish guidelines for maximum caseloads and minimum compensation levels, allowing defenders to perform their duties in a competent manner.
- Establishing an independent, state-level Indigent Defense Commission.
- Ongoing, comprehensive training for juvenile defense counsel.

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These recommendations from 2003 show us that despite the numerous reforms, hard work, and overall high caliber of juvenile justice in the Commonwealth, there is more to do. Through our assessment work in Pennsylvania and in the other states, the National Juvenile Defender Center has identified ten major systemic issues that impact access to counsel and quality of representation for youth in delinquency proceedings. When you look at Pennsylvania through the lens of these ten systemic issues that must be addressed, it is important to acknowledge that these issues are hard and that Pennsylvania is not alone in its struggle. We continue to see these issues in juvenile courts across the country. The ten issues are:

1. *Timing and Appointment of Counsel*
2. *Waiver of Counsel*
3. *Plea Bargains*
4. *Caseloads*
5. *Inadequate Resources*
6. *Inadequate Training and Supervision*
7. *Inadequate Oversight and Monitoring*
8. *Juvenile Court Culture*
9. *Parity*
10. *Lack of Leadership*

These ten issues reflect both practice and policy concerns; and must be grappled with by any state or agency seeking to establish an effective juvenile defense delivery system. For each of these issues, it is necessary to ask, what would you want if it were your child, your niece or nephew, your cousin, or your neighbor? Through this lens, we would like to offer our observations and recommendations as they relate to how Pennsylvania can emerge as a leader in juvenile defense reform.

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1. *Timing and Appointment of Counsel:* When and how a child gets an attorney is crucial. Although youth are entitled to legal representation “at all stages” of delinquency proceedings, Pennsylvania does not provide statewide funding for indigent defense services so this mandate is often hollow at the initial detention hearing and in post-disposition representation. Important questions to ask about timing and appointment of counsel are: when is counsel actually appointed? What does the appointment process look like? Is the appointment process judge-driven? Do judges appoint only those defenders who suit their needs (e.g., those who will not take up too much court time or advocate too vigorously)? Is there time for a meaningful interview with the client before the initial hearing so that the defender can present detention alternatives that are responsive to the needs of the child and of the community?

RECOMMENDATIONS:

- The General Assembly should amend the Juvenile Act to establish a presumption of indigence for the purpose of appointment of counsel. (Supported in testimony of Bob Schwartz of Juvenile Law Center, Jim Anderson of the Juvenile Court Judges’ Commission, and others.)
- The Juvenile Defenders Association of Pennsylvania should establish a juvenile defense panel of specialized attorneys and work with the Pennsylvania Supreme Court to establish an appointment system independent of juvenile court judges. (Supported in the testimony of Bob Schwartz of Juvenile Law Center and Barbara Krier of the Juvenile Defenders’ Association of Pennsylvania.)

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2. *Waiver of Counsel:* Over 50% of the youth who appeared before Judge Ciavarella waived their right to counsel. This occurred despite the Juvenile Court Judges' Commission mandate in 2004 that no youth was to go unrepresented at any stage of the juvenile court process. Allowing children to waive their right to counsel at any stage of the process leaves a child defenseless and undoes the procedural safeguards set forth in *Gault* so that a child would not have to navigate the court process alone.

RECOMMENDATION:

- The Juvenile Act should be amended to: require a youth to consult with an attorney prior to waiving counsel, require standby counsel if a child waives counsel, and require the use of a developmentally appropriate colloquy in the event a child elects to waive counsel. (Supported in the testimony of Jim Anderson of the Juvenile Court Judges' Commission, Barbara Krier of the Juvenile Defender Association of Pennsylvania, and others.)
3. *Plea Bargains:* The vast majority of juvenile court cases are resolved by plea bargain. Aggravating the problem, judicial colloquies are often inadequate, so that young people do not understand the terms of the plea agreement or the life-long collateral consequences of having a juvenile adjudication on their record – including potential disqualification from military service, ineligibility for student loans and public housing, and, for some children, required registration as sex offenders. Juvenile defenders in Pennsylvania had a general sense of resignation about the outcomes of contested adjudications. In sites across the country, children have been observed entering plea agreements, only to leave the courtroom and ask “what just happened?”

RECOMMENDATIONS:

- The Collateral Consequences Checklist being developed by the Juvenile Defender Association of Pennsylvania should be adopted as part of the Juvenile Defender Performance Standards.
 - This Commission should recommend that the Juvenile Court Judges' Commission and the Department of Public Welfare be allocated sufficient funds to collect, analyze, and publish data as it relates to arrest, detention, pleas, placement, release; and this data should be disaggregated by race and ethnicity. (Supported in testimony of Jim Anderson of the Juvenile Court Judges' Commission, Barbara Krier of the Juvenile Defender Association of Pennsylvania, and others.)
4. *Caseloads:* Juvenile defenders' caseloads are far too high. Juvenile defenders in Pennsylvania reported caseloads between 1 and 620. This number of cases impacts every facet of defense. There is evidence that, because defenders' caseloads are so high, the high rates of waiver of counsel, and of plea bargains, despite their long-term consequences and finality, are being used as case reduction tools. Although a handful of public defender offices have been able to successfully push back, these victories are few and far between.

RECOMMENDATION:

- The Supreme Court of Pennsylvania should adopt Standards for Defense Attorneys Representing Children in Delinquency Proceedings that establish guidelines for maximum caseloads, minimum compensation levels, and baseline performance measures, allowing counsel to perform in a competent

manner. (Supported by testimony of Jim Anderson of the Juvenile Court Judges' Commission, Barbara Krier of the Juvenile Defender Association of Pennsylvania, and others.)

5. *Inadequate Resources:* Juvenile defenders routinely operate without adequate resources. During the Pennsylvania assessment a number of juvenile defenders did not even have the bare minimum necessary to mount a vigorous defense – 15% did not have adequate phone service, 30% did not have access to the internet, and few had adequate computers (with some using outdated computers donated by the district attorneys' office). Access to paralegals, investigators, social workers, and experts was limited in many parts of the Commonwealth. Pennsylvania provides neither state funding for, nor statewide oversight of, indigent defender services.

RECOMMENDATIONS:

- The General Assembly should establish a dedicated funding stream for the juvenile indigent defense. (Supported in the testimony of Bob Schwartz of Juvenile Law Center.)
 - Chief defenders should assure adequate resources, supervision, and mentoring are allocated to juvenile defense.
6. *Inadequate Training and Supervision:* Many juvenile defenders receive little juvenile specific training and have minimum supervision. During the assessment, only 21% of public defender offices in Pennsylvania reported new attorney training on criminal law, and juvenile defense training was virtually non-existent. Appointed counsel and contract defenders were further disconnected from trends and developments in juvenile law generally, but were especially removed from specialized areas of

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juvenile trial advocacy like detention hearings, disposition, competency, and transfer. Even in public defender offices, juvenile defenders often did not have access to specialized juvenile court training. Adequate supervision was also lacking. Juvenile defenders are typically handed files on their first day on the job and told “good luck.”

RECOMMENDATIONS:

- The Pennsylvania Supreme Court should mandate annual training requirements for all attorneys who represent children in juvenile delinquency proceedings. (Supported by testimony of Jim Anderson of the Juvenile Court Judges’ Commission, Barbara Krier of the Juvenile Defender Association of Pennsylvania, and others.)
- Chief defenders must ensure adequate case management and supervision.
- The General Assembly should allocate funding for and mandate the development of an independent state-level Pennsylvania Center for Juvenile Defense Excellence. The Center would develop divisions on Appeals, Training, Policy, Model Units, Law Schools Clinics, and Technical Assistance.

7. *Inadequate Oversight and Monitoring:* Juvenile indigent defense systems are extremely varied and *ad hoc*. Many states do not have juvenile-specific practice standards or guidelines, and some need to amend their juvenile court rules. Pennsylvania’s relatively new juvenile court rules ushered in numerous improvements but they did not create uniform standards for juvenile defense nor provide oversight of the appointment process. Appointed counsel in Pennsylvania realize that if they desire future appointments they must stay in the judges good

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graces; and at times this could hamper zealous defense when docket time is at a premium.

RECOMMENDATIONS:

- As stated in earlier recommendations, the Supreme Court of Pennsylvania should adopt Standards for Defense Attorneys Representing Children in Delinquency Proceedings that establish guidelines for maximum caseloads, minimum compensation levels, and baseline performance measures, allowing counsel to perform in a competent manner.
 - The Pennsylvania Supreme Court should authorize a Juvenile Defense Oversight Commission to be in place for a minimum of five years to monitor improvements and performance, and to report back to the Supreme Court and the General Assembly.
 - The Performance Standards for Defense Attorneys Representing Children in Delinquency Proceedings should be used both as performance measures for attorneys operating in a defender office and as contract measures for appointed counsel.
8. *Juvenile Court Culture:* The culture in many juvenile courts reflects society's persistent ambivalence about what juvenile courts should look like. Forty-three years after the decision, many, if not most, juvenile courts still operate in a pre-*Gault* mode, as if the defense attorney is irrelevant and unnecessary. As a result, real lawyering cannot occur, and the fair administration of justice is impeded. Many juvenile defenders are unclear about their role and their ethical obligations, so that they conflate advocating for their clients' expressed interests with advocating for their

clients' best interests. The "go along to get along" mentality is pervasive. The example of Luzerne could not make this more apparent. But collaboration does not mean pacification. Juvenile court culture is where the law is most impacted by human behavior. Routine activities go on unquestioned at some point. The question is how these activities become routine without anyone questioning their moral turpitude.

RECOMMENDATIONS:

- Again, as stated in prior recommendations, the Pennsylvania Supreme Court should adopt Standards for Defense Attorneys Representing Children in Delinquency Proceedings that establish guidelines for maximum caseloads, minimum compensation levels, and baseline performance measures, allowing counsel to perform in a competent manner.
 - The Pennsylvania Supreme Court should direct each county to establish a court watch program or appoint ombudsman who is responsible for juvenile court oversight. (Supported in testimony of Bob Schwartz of Juvenile Law Center.)
9. *Parity:* There is an overall lack of fairness and equality in the juvenile indigent defense system, for both juvenile defenders and their clients. Often, juvenile defenders are not paid the same salary as criminal defenders, even in the same public defender office. Salary increases are attached to moving "up" from juvenile court into adult criminal court. Some offices also have forced rotations, so that juvenile defenders who want to devote their careers to representing youth are forced to represent adults if they want promotions or raises. Outside of their offices, juvenile

defenders do not have pay parity with juvenile prosecutors. Besides the obvious inequities, the overarching problem with this very common situation is that we must have specialization in juvenile defense to develop a core of excellence, and these practices undermine that goal. Juvenile respondents are also treated unfairly. The impact of fees and surcharges on juvenile respondents is significant. Thousands of dollars in fees and surcharges are assessed against juvenile respondents and their families – to pay for detention, for restitution fees, and for victim funds. The issues of parity are all impacted by funding.

RECOMMENDATIONS:

- As stated earlier, the General Assembly should establish a dedicated funding stream for the juvenile indigent defense.
- Chief defenders should recognize juvenile defense as a specialty and allocate resources accordingly.

10. *Lack of Leadership:* In most states, the juvenile defense bar itself lacks leadership. Since the time of the Pennsylvania assessment we have seen the Juvenile Defender Association of Pennsylvania emerge and establish a voice for juvenile defense in state-level policy discussions. Chief defenders, however, also are key players for defining the values that we as a society wish to project in juvenile court; they are also key to the distribution of resources, and to creating a specialization in juvenile defense; they are also essential to linking frontline defenders with judges, so that there is an open dialogue between the stakeholders who are in juvenile court, observing and critiquing juvenile court as it evolves. Chief Judges are also crucial to

the juvenile defense reform process and can help ensure that juvenile defenders are supported in their efforts to provide a diligent defense.

RECOMMENDATION:

- As stated earlier, the General Assembly should allocate funding for and mandate the development of an independent state-level Pennsylvania Center for Juvenile Defense Excellence. The Center would develop divisions on Appeals, Training, Policy, Model Units, Law Schools Clinics, and Technical Assistance.

Pennsylvania is well within reach of grappling with these ten systemic issues. Our recommendations focus on funding, training and supervision, and oversight and monitoring; all of which impact the practice of juvenile defense as well as policy development.

A lack of well-resourced, well-trained juvenile defense attorneys in the Commonwealth means the due process rights of children are violated; Luzerne is the consequence. Tragic and long-term outcomes can result from deficient children's representation, including the result that children and families are demeaned and devalued in the process. Still, while these issues are serious, they are not intractable.

There are numerous innovations in juvenile defense to draw from; some right here in Pennsylvania. The Juvenile Indigent Defense Action Network, of which Pennsylvania is a part, focuses on juvenile defense reform in eight states. In those states are examples of many of the recommendations we discussed today; standards that address caseloads and performance, data collection at the defender level, pilot projects in both early representation issues and post-disposition, a state funded defender system, and the creation of juvenile defense resource centers. In other states we see examples of additional state-funded systems, state-wide juvenile defender

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positions with oversight and monitoring responsibility, and independent juvenile defender offices where specialization is required. There are many more and we would be happy to point you in their direction.

Given the recent birthday of Martin Luther King we thought it fitting to end with his words, "the time is always right to do the right thing." We hope through the actions and recommendations of your commission, Pennsylvania will be able to do the right thing for juvenile defense; by undoing a culture of indifference as seen in Luzerne, and building upon a solid foundation to create a culture of diligent juvenile defense.

Thank you.