

IN THE SUPREME COURT OF OHIO

IN RE: SHARDAI BURT,  
A MINOR CHILD.

:  
:  
:  
:  
:  
:

Case No. 07-1751

On Appeal from the Stark County  
Court of Appeals Fifth Appellate  
District

C.A. Case No. 2006-CA-00328

---

**MERIT BRIEF OF APPELLANT SHARDAI BURT**

---

THE OFFICE OF THE  
OHIO PUBLIC DEFENDER

ANGELA MILLER #0064902  
Assistant State Public Defender  
(Counsel of Record)

8 East Long Street, 11<sup>th</sup> Floor  
Columbus, Ohio 43215  
(614) 466-5394  
(614) 752-5167 (Fax)

COUNSEL FOR APPELLANT

JOHN FERRERO #00188590  
Stark County Prosecutor

RONALD MARK CALDWELL #  
Assistant Prosecuting Attorney  
(Counsel of Record)

110 Central Plaza South, Suite 510  
Canton, Ohio 44702  
(330) 451-7897  
(330) 451-7965 (Fax)

COUNSEL FOR APPELLEE

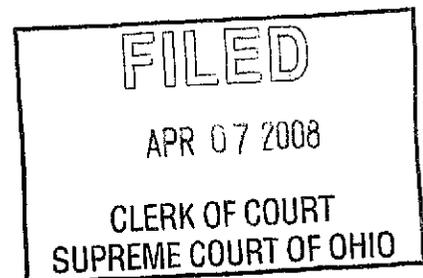


TABLE OF CONTENTS

Page No.

TABLE OF AUTHORITIES .....	iii
PROPOSITIONS OF LAW .....	iv
STATEMENT OF THE CASE AND FACTS .....	1
<b>FIRST PROPOSITION OF LAW:</b>	
<b>The State’s “Violation of Prior Court Order” charge violated Ms. Burt’s Fifth and Fourteenth Amendment rights to due process. ....</b>	<b>4</b>
<b>SECOND PROPOSITION OF LAW:</b>	
<b>Filing a new charge against a juvenile for “violation of a prior court order,” regardless of the original offense, is a violation of the juvenile’s constitutional right to due process under the Fifth and Fourteenth Amendments to the United States Constitution. ....</b>	<b>8</b>
CONCLUSION .....	14
CERTIFICATE OF SERVICE .....	16
<b>APPENDIX:</b>	
<i>City of Shaker Heights v. Hariston</i> , Cuyahoga App. No. 74435, 1998 Ohio App. LEXIS 5955 .....	A-1
<i>In re Burt</i> , Stark App. No. 2006-JCR-03114, 2007-Ohio-4034 .....	A-5
<i>In re: Samara Dillard</i> , Stark App. Nos. 2001CA00093, 2001CA00121, 2001-Ohio-1897 .....	A-13
<i>In re: Ian Douglas Kirby</i> , Richland App. Nos. 06-CA-6, 06-CA-91, 2008-Ohio-876.....	A-17
<i>State v. Smith</i> , Mahoning App. No. 01 CA 187, 2002-Ohio-6710 .....	A-22
<i>State v. Loudon</i> , Champaign App. No. 97-CA-05, 1997 Ohio App. LEXIS 4739 .....	A-25
<i>State v. Smith</i> , Mahoning App. No. 01 CA 187, 2002-Ohio-6710 .....	A-28
Fifth Amendment, United States Constitution.....	A-31

Fourteenth Amendment, United States Constitution .....	A-32
R.C. 1.51 .....	A-33
R.C. 2151.354 .....	A-34
R.C. 2152.02 .....	A-36
R.C. 2921.31 .....	A-37
R.C. 2917.11 .....	A-38
R.C. 2951.09 .....	A-39
Crim R. 3.....	A-40
Juv. R. 10 .....	A-41
Juv. R. 35 .....	A-42
42 U.S.C. 5601.....	A-43
42 U.S.C. 5633.....	A-48

**TABLE OF AUTHORITIES**

**Page No.**

**CASES:**

*City of Shaker Heights v. Hariston*, Cuyahoga App. No. 74435, 1998 Ohio App. LEXIS 5955 .....13

*In re Burt*, Stark App. No. 2006-JCR-03114, 2007-Ohio-4034 ..... *passim*

*In re Cox* (1973), 36 Ohio App.2d 65, 301 N.E.2d 907.....7

*In re: Samara Dillard*, Stark App. Nos. 2001CA00093. 2001CA00121, 2001-Ohio-1897 .....11

*In re: Ian Douglas Kirby*, Richland App. Nos. 06-CA-6, 06-CA-91, 2008-Ohio-876.....11

*In re Norwak* (1999), 133 Ohio App.3d 396, 728 N.e.2d 411 .....12

*In re Trent* (1989), 43 Ohio St.3d 607, 539 N.E.2d 630 .....6,9

*State v. Louden*, Champaign App. No. 97-CA-05, 1997 Ohio App. LEXIS 4739 .....13

*State v. Smith*, Mahoning App. No. 01 CA 187, 2002-Ohio-6710 .....13

**CONSTITUTIONAL PROVISIONS:**

Fifth Amendment, United States Constitution..... *passim*

Fourteenth Amendment, United States Constitution ..... *passim*

**STATUTES:**

R.C. 1.51 .....11

R.C. 2151.354 .....9

R.C. 2152.02 ..... *passim*

R.C. 2921.31 .....1

R.C. 2917.11 .....1

R.C. 2951.09 .....13

**RULES:**

Crim R. 3.....8  
Juv. R. 10 .....8  
Juv. R. 35 .....10,11  
42 U.S.C. 5601.....5  
42 U.S.C. 5633.....5

**OTHER:**

47 Am. Jur.2d., Juvenile Courts and Delinquent and Dependent Children.....5

## **PROPOSITIONS OF LAW**

### **FIRST PROPOSITION OF LAW**

**The State's "Violation of Prior Court Order" charge violated Ms. Burt's Fifth and Fourteenth Amendment rights to due process.**

### **SECOND PROPOSITION OF LAW**

**Filing a new charge against a juvenile for "violation of a prior court order," regardless of the original offense, is a violation of the juvenile's constitutional right to due process under the Fifth and Fourteenth Amendments to the United States Constitution.**

## STATEMENT OF THE CASE AND FACTS

On June 6, 2005, Shardai Burt, age 13, was charged with obstructing official business, a misdemeanor of the second degree if committed by an adult in violation of R.C. 2921.31; and disorderly conduct, a misdemeanor of the fourth degree if committed by an adult in violation of R.C. 2917.11(A). *In re Burt*, Stark County Common Pleas, Case No. 2005 JCR 137265. Ms. Burt pleaded true to each count and was adjudicated a delinquent child. The juvenile court ordered that Ms. Burt exhibit good behavior at home, school, and the community; attend school (absent a medical excuse); and to complete mediation (if not already completed). Ms. Burt was not placed on probation. (Ex. A).

On October 24, 2005, Ms. Burt was charged with "Violation of Prior Court Order," (VOPCO), in violation of R.C. 2152.02(F)(2). *In re Burt*, Stark County Court of Common Pleas, Case No. 2005 JCR 139459. Specifically, the complaint alleged that Ms. Burt was leaving home without permission, staying out at night and that on one occasion she left school and did not return home for two days. On November 18, 2005, Ms. Burt pleaded true to the allegations and the court placed her on probation. In Stark County, VOPCO is treated as a criminal offense and is considered a misdemeanor of the first degree.

Almost one year later, on September 18, 2006, Ms. Burt was arrested and charged again with "Violation of Prior Court Order" for violating the terms of her probation. *In re Burt*, Stark County Court of Common Pleas, Case No. 2006 JCR 3114. (Ex. B). Ms. Burt was specifically charged with leaving home without parental consent or her probation officer's permission and staying away over a weekend.

Prior to trial on the second VOPCO, Ms. Burt moved to dismiss the charge for lack of jurisdiction and as a violation of due process. (Tp. 4). The Magistrate took Ms. Burt's motion to dismiss under advisement. (Tp. 4). At the pretrial hearing, the Magistrate overruled the motion to dismiss and Ms. Burt requested a trial. (Tp. 7). Prior to trial, Ms. Burt filed an objection to the Magistrate's decision and requested that the decision be set aside. The juvenile judge heard oral argument on October 10, 2006 and overruled Ms. Burt's objection. (Tp. 44). At trial, Ms. Burt pled true to the VOPCO without waiving her right to appeal the jurisdictional and constitutional issues. (Tp. 47-49). Ms. Burt then filed a second objection with the judge and stipulated to waiving oral argument. On October 27, 2006, the judge overruled the objection.

On November 2, 2006, Ms. Burt filed an appeal of her adjudication and disposition on the VOPCO charge. Specifically, Ms. Burt argued that the VOPCO charge violated her constitutional rights to due process under the Fifth and Fourteenth Amendments because: 1) charging a juvenile with being delinquent under VOPCO (an M-1) is improper when the violation would otherwise be an unruly charge (a status offense); and 2) charging the juvenile with a new offense is improper where the appropriate remedy is a probation violation hearing. Additionally, Ms. Burt argued that VOPCO constitutes double jeopardy, that she was not given fair notice at the original delinquency disposition that a VOPCO charge was a possible consequence, and that R.C. 2152.02(F)(2), the definition section she was charged under, is void for vagueness and violates due process.

On August 6, 2007, the Court of Appeals issued its decision. In disposing of Shardai's due process claims, the court equated VOPCO to a contempt proceeding. *In re*

*Burt*, Stark App. No. 2006-CA-00328, 2007-Ohio-4034 at ¶32. According to the Fifth District, both contempt and R.C. 2152.02(F)(2) (VOPCO) address disobedience of a court order and were designed to vindicate the authority of the court. Thus, the juvenile court has inherent power to punish a juvenile for disregarding its order resulting in no denial of due process in Ms. Burt's case. *Id* at ¶ 32.

As to Ms. Burt's second due process claim, the court noted that there is a split between the Ohio appellate courts regarding the usage of contempt proceedings where probation revocation is available. *Id* at ¶¶34, 44. It concluded that the juvenile court did not err in applying the VOPCO procedure in Ms. Burt's case as the dispositional alternatives were the same whether the action was filed as a revocation of probation or VOPCO. *Id* at ¶ 47.

Ms. Burt's claim that VOPCO procedure constitutes double jeopardy was rejected as the court found that VOPCO concerned a separate and distinct act for which punishment could be imposed. *Id* at ¶ 62. Ms. Burt's argument that the court failed to provide appropriate notice at disposition that VOPCO was a possible penalty was rejected as the record did not contain the original disposition transcript. *Id* at ¶ 65. Finally, Ms. Burt's void for vagueness claim was rejected as the court found it was not unreasonable to expect persons to realize sanctions would result from failure to abide by a court order. *Id* at ¶ 70.

On September 20, 2007, Ms. Burt filed a Memorandum in Support of Jurisdiction with this Court focusing on the denial of due process claims. This Court accepted Ms. Burt's discretionary appeal and ordered briefing.

## ARGUMENT

### FIRST PROPOSITION OF LAW

**The State's "Violation of Prior Court Order" charge violated Ms. Burt's Fifth and Fourteenth Amendment rights to due process.**

#### I. Background. What is VOPCO?

In Stark County, "Violation of a Prior Court Order" (VOPCO) charges are filed as a new offense for delinquent children who violate good behavior orders or conditions of probation. All that is needed for VOPCO to come into play is a prior dispositional order from any delinquency matter. While R.C. 2152.02 (F)(2) is cited for the complaint, this is simply a definitions section. (Ex. B). The VOPCO "offense" is charged as a misdemeanor of the first degree (M-1).<sup>1</sup>

Notably, the child's alleged disobedience does not need to be egregious to trigger the new M-1, VOPCO charge. Indeed, VOPCO may be charged for the very first infraction, no matter how slight. A variety of problematic teenage behaviors can trigger VOPCO: arguing with a parent, violating "house rules," leaving school early, etc.. There also does not appear to be any type of timeline for VOPCO. Any dispositional order may be used, no matter how dated. For example, in Ms. Burt's case the first VOPCO charge arose for problems within the home a month after the initial delinquency adjudication in 2005. Ms. Burt was not on probation for her two misdemeanor offenses. The second VOPCO charge arose almost a year later in 2006. At this point, Ms. Burt was on probation due to the first VOPCO. She had also acquired two additional M-1 adjudications on her juvenile record.

---

<sup>1</sup>Notably the Complaint (Ex. B), does not put the child on notice as to the offense level charged.

## II. The legislative intent of VOPCO and how it was intended to be applied.

Congress enacted the Juvenile Justice and Delinquency Prevention Act (JJDP A) in an effort to create uniformity and minimum standards among the states. See 42 U.S.C. 5601. Congress required states to comply with the JJDP A standards or risk losing federal funding for juvenile justice proceedings.<sup>2</sup> One such requirement is that status offenders not be detained.

The administrator is authorized to make grants from allocated funds to state and local governments to establish juvenile delinquency programs to improve the juvenile justice system, where the state submits a plan consistent with the purposes of the Act and several enumerated mandates, including prohibitions of commingling status offenders or dependent children with delinquents and detaining juveniles in adult jails.

47 Am. Jur.2d. Juvenile Courts and Delinquent and Dependent Children §35 (2007).

A “status offense” is an act prohibited to a minor, which would not constitute a crime if committed by an adult (i.e., curfew violation). See, Waddington, *Children in the Legal System* (1983), 604.

An exception has been carved out, however for a certain type of status offender. In an attempt to address status offenders who *consistently* ignore dispositions, the JJDP A created an exception to the rule that status offenders are not to be held in detention centers. It reads as follows: “juveniles who are charged with or who have committed an offense that would not be criminal if committed by an adult, *excluding – juveniles who are charged with or who have committed a violation of a court order*, shall not be placed in secure detention facilities or secure correctional facilities. 42 U.S.C. 5633(a)(11)(A)(ii) emphasis added. This federal law was codified in Ohio and is now

---

<sup>2</sup> Ohio applies for and relies upon JJDP A funding. For each area of noncompliance, 20% of the funding from the JJDP A will be withheld.  
<http://www.dys.ohio.gov/dysweb/GRANTSTITLEII.aspx>.

located at R.C. 2152.02(F)(2). The exception carved out for repeat status offenders was explained in a law review article by the Honorable W. Don Reader:

[d]uring the 1980 reauthorization of the Juvenile Justice Act, the National Council of Juvenile and Family Court Judges, together with the Ohio Association of Juvenile Court Judges, sponsored the 'Valid Court Order' amendment, which was carried by Representative John Ashbrook of Ohio. For those states who had not abandoned the status offender, this gave the status offender one bite out of the apple before being treated *in some cases* as a delinquent.

Hon. W. Don Reader, *The Laws of Unintended Results*, 27 *Akron L. Rev.* 477 (Spring, 1996). (Emphasis added).

The VOPCO charge was only intended to be used for status offenders who refused to rehabilitate. In the case of *In re Trent* (1989), 43 Ohio St.3d 607, 539 N.E.2d 630, three Justices from this Court explained the limited circumstances when VOPCOs might be appropriate. While this Court ultimately dismissed the case on procedural grounds, the dissenting opinion is instructive:

[b]efore ...bootstrapping of status from unruly to delinquent occurs for violation of a court order, the following criteria should be met: (1) [t]he juvenile should be given sufficient notice to comply with the order and understand its provision; (2) violation of a court order must be egregious; (3) less restrictive alternatives must be considered and found to be ineffective; and (4) special confinement conditions should be arranged so that the status offender is not put with underage criminals.

*Id.* at 609.

The VOPCO exception is to be used as a last resort for repeat status offenders only. The violation must be egregious and less restrictive alternatives to confinement must have been tried and proven unsuccessful. In Stark County, however, past juvenile delinquents (who may not even be on probation) and status offenders alike are being charged with a VOPCO regardless of whether they are truly repeat offenders who refuse

to rehabilitate. Thus, a juvenile's case is never truly closed. See *In re Cox* (1973), 36 Ohio App.2d 65, 301 N.E.2d 907 (While it is true the juvenile court can retain jurisdiction such a right is not without limitation).

### **III. Ms. Burt's case.**

In the present case, Ms. Burt initially appeared before the juvenile court on two delinquency charges that would constitute misdemeanors if committed by an adult. The two offenses were obstructing official business (M-2) and disorderly conduct (M-4). Ms. Burt pleaded true to both counts. She was not placed on probation. (Ex. A). Rather, Ms. Burt's disposition order stated that she was to attend school, exhibit good behavior and complete counseling.

Almost five months later, Ms. Burt was charged with her first VOPCO when she left home without permission, stayed out late and on one occasion left school and did not return home for two days. This conduct, however, does not give rise to a delinquency action. If Ms. Burt was to be charged, the charge was more appropriately a status offense, i.e., unruly child. Another option was to consider Ms. Burt a dependent child if it was discovered these behaviors stemmed from a problem existed within the home. Regardless, the state filed a VOPCO (M-1) even though there was no prior status offense from which to rehabilitate. Ms. Burt pleaded true and was placed on probation.

Approximately one year later, Ms. Burt was charged with her second VOPCO. This time Ms. Burt allegedly left home without her mother's permission. After Ms. Burt's true plea, she was given alternative placement orders at disposition. She was held in the detention center for months waiting for placement away from her home. The time Ms. Burt spent in the detention center was a violation of her constitutional rights, as her

VOPCO charges should have been status offenses at most. Further, in order for Ms. Burt to be placed on probation, it must have been done during the disposition on her delinquency proceedings, not her first VOPCO disposition. Nevertheless, filing a VOPCO for a probation violation on a juvenile who was adjudicated delinquent is a violation of due process and is contrary to law.

## SECOND PROPOSITION OF LAW

**Filing a new charge against a juvenile for “violation of a prior court order,” regardless of the original offense, is a violation of the juvenile’s constitutional right to due process under the Fifth and Fourteenth Amendments to the United States Constitution.**

**I. There is no legislative authority in Ohio for filing a new charge for violations of probation.**

The Ohio Revised Code does not contain a section authorizing the filing of a *new* charge for probation or community control violations. In Ohio, a complaint must contain notice of the charges and the section of the Ohio Revised Code authorizing the filing of the complaint. See Juv. R. 10(B)(1); Crim R. 3. A charge for “Violation of Prior Court Order” (VOPCO) does not exist in the Ohio Revised Code. Charging a juvenile under R.C. 2152.02 is improper as it is a definitions section. While R.C. 2152.02 (F)(2) merely defines the term “violation of a prior court order” and does nothing more, the state has determined that this “offense” will be considered a misdemeanor of the first degree. It is punishable as any other first degree misdemeanor in juvenile court.

By using the VOPCO charge, the state is able to exercise jurisdiction over juveniles whose conduct does not warrant a delinquency adjudication. There is no need, however, for the state to create this new offense to invoke judicial involvement with juveniles who exhibit problematic behavior. The Ohio Legislature allowed for this when

it codified the “status offender” laws for juveniles. For example, unruly charges are one of the state’s means for exercising jurisdiction over juveniles even though the child has not violated an adult criminal law. Therefore, when a juvenile’s conduct fails to qualify as a violation of an adult criminal law, juvenile courts may exercise jurisdiction over the juvenile by filing a status offender complaint.

If the juvenile is not amenable to the traditional dispositions for status offenders and is a repeat status offender, disposition alternatives for delinquents may be used.

[I]f, after making a disposition under division (A)(1), (2) or (3) of this section, the court finds upon further hearing that the child is not amenable to treatment or rehabilitation under that disposition, make a disposition otherwise authorized under divisions (A)(1), (3), (4), and (7) of section 2152.19 of the Revised Code that is consistent with sections 2151.31.2 and 2156.56 to 2151.61 of the Revised Code.

R.C. 2151.354.

Thus, the Revised Code allows for the VOPCO exception created by the JJDP, but specifically kept the status of the juvenile as a “status offender.” Ohio Revised Code 2151.354 merely allows for status offenders to be given delinquency dispositions when the status offender options have failed. The Ohio Revised Code does not authorize filing a new delinquency complaint in order to give status offenders delinquency dispositions. Therefore, VOPCO, and the additional M-1 adjudication and disposition that it carries is unnecessary.<sup>3</sup> Further, the state lacks jurisdiction to use such a charge.

---

<sup>3</sup> See *In re Trent* (1989), 43 Ohio St.3d 607, 609, Justice Wright dissenting. “Court orders should not be ignored with impunity by children, and violation of a court order may be the basis for a finding of delinquency. R.C. 2151.02(B). However, the contempt powers of a court should not be invoked quickly in this context and a status offender who has departed shelter on one occasion should not be given the ‘taint’ of criminality and adjudicated or treated as a juvenile delinquent. Under R.C. 2151.354 an unruly child may be left in the status of an unruly child but treated as a delinquent and incarcerated in a detention facility because of a failure of ‘treatment or rehabilitation.’ It is this sort of

Ms. Burt was charged with VOPCO in violation of R.C. 2152.02 (F)(2). As a definitions section, 2152.02 fails to state a criminal offense, offense level, elements of the offense, or potential disposition. Without doubt, Ms. Burt was improperly charged in violation of her Fifth and Fourteenth Amendment rights to due process.

**II. If a juvenile is placed on probation, Juvenile Rule 35 requires a probation revocation proceeding. The decision in Ms. Burt's case is in conflict with other Fifth District decisions as well as other Ohio appellate districts.**

When a juvenile violates probation, the proper hearing is a probation revocation hearing. Juvenile Rule 35, titled "Proceedings After Judgment," gives the juvenile court authority to continue jurisdiction to handle violations after final disposition. Juvenile Rule 35(A) states "[t]he continuing jurisdiction of the court shall be invoked by motion filed in the original proceeding, notice of which shall be served in the manner provided for the service of process." Juv. R. 35(A). Due to the court's need for continuing jurisdiction to enter judgment upon an adjudicated juvenile, a violation of probation cannot be a new charge, but a hearing upon a motion to continue jurisdiction pursuant to Juvenile Rule 35(A).

While Juvenile Rule 35(A) establishes that continuing jurisdiction must be induced upon a motion hearing, Juvenile Rule 35(B), titled "Probation Revocation," specifies appropriate procedure for probation violations. Juvenile Rule 35(B) states "[t]he court shall not revoke probation except after a hearing at which the child shall be present and apprised of the grounds on which revocation is proposed." Juv. R. 35 (B). Therefore, a probation revocation hearing is the appropriate process through which to address alleged probation violations.

---

placement situation that is contemplated by the criminal escape statutes when they include 'unruly' children within their purview."

Interestingly in other cases, the Fifth District agreed that VOPCO is not a new charge but a condition of probation. See *In re: Samara Dillard*, Stark App. Nos. 2001CA00093, 2001CA00121, 2001-Ohio-1897. In *Dillard* the Fifth District stated the following:

Appellant's plea of true to the charge of violation of a prior court order stemmed from the conditions of probation placed upon her for the original arson charge. The new charge of violation of a prior court order is a condition of probation, not a separate criminal offense bringing with it a separate sentence. Had the state brought a complaint for contempt of court order for violation of the prior court order that may be considered a new charge, but upon this record it appears the only crime charged against appellant was the original charge of arson.

Id at ¶13.

Recently, in 2008, the Fifth District again confronted the issue of VOPCO. Again, the court held that probation revocation hearings are appropriate where VOPCO is alleged and that the failure to follow Juv. R. 35(B) in this instance constitutes reversible error. See *In re: Ian Douglas Kirby*, Richland App. Nos. 06-CA-6, 06-CA-91, 2008-Ohio-876. The court did *not* find, as it did in Ms. Burt's case, that VOPCO was appropriate as a new charge.

A probation revocation hearing, rather than an M-1, VOPCO charge, is the appropriate process because it is required by the Juvenile Rules and, under statutory construction doctrines, governs. R.C. 1.51. The Juvenile Rules are special provisions and control over general statutory provisions. Id. Further, probation revocation proceedings ensure judicial economy. If VOPCOs are filed instead of motions to revoke probation, then juveniles must be afforded a new arraignment, pretrial hearings, pretrial services, competency evaluations and hearings, and dispositions. While the state may argue that the VOPCO process is preferable because it affords juveniles "more rights," in

actuality juveniles are substantially harmed. With VOPCO, juveniles are made subject to multiple adjudications, dispositions, significant detention center time, additional charges on their juvenile record, court placements, potential Department of Youth Services commitments and other uncertain penalties.

Under her second VOPCO, Ms. Burt was accused of leaving home without her mother's permission. That disobedience, at most, was a probation violation stemming from her first VOPCO. A second VOPCO charge, which resulted in a second misdemeanor of the first degree on her juvenile record, was improper.

### **III. A VOPCO charge is not comparable to contempt.**

The appellate decision issued in Ms. Burt's case spends a great deal of time comparing a VOPCO charge to contempt in an effort to justify Stark County's current practice. *In re Burt*, Stark App. No. 2006-JCR-03114, 2007-Ohio-4034. According to the *Burt* Court, because VOPCO is similar to criminal contempt, and a court has inherent power to punish contempt, the new charge and sentence under VOPCO is appropriate. *Id.* at ¶ 32. This analogy does not fit where a probation revocation hearing was available, if needed, to address the infraction.

The Eleventh District Court of Appeals has determined that the use of contempt proceedings outside cases where there are journalized case plans (abuse, neglect and dependency cases) is improper. *In re Norwak* (1999), 133 Ohio App.3d 396, 728 N.E.2d 411.

This Court finds no authority for the juvenile court to proceed in contempt when the issue is a probation violation allegation. R.C. 2151.412(E)(1) allows the court to proceed in contempt for a violation of a journalized case plan. However, that section specifically applies only to the parties involved in cases of abuse, neglect or dependency, temporary or permanent custody, protective supervision, or long-term foster care.

Further, in the prosecution of the violation of probation terms, the only remedy referred to under R.C. 2151.355 is that of a probation revocation.

Id at 398.

Likewise, in the Second, Seventh and Eighth Appellate Districts, contempt proceedings are not deemed appropriate where probation revocation hearings are available. See *State v. Smith*, Mahoning App. No. 01 CA 187, 2002-Ohio-6710 (“The municipal court treated Smith’s alleged failure to attend the counseling sessions as an act of contempt rather than a violation of probation. This was error by the trial court.”); *City of Shaker Heights v. Hariston*, Cuyahoga App. No. 74435, 1998 Ohio App. LEXIS 5955 at \*13 (“We emphasize that the proper procedure for punishing an offender for a violation of probation is governed by R.C. 2951.09, not a contempt hearing.”); *State v. Loudon*, Champaign App. No. 97-CA-05, 1997 Ohio App. LEXIS 4739 at \* 8 (“Moreover, the proper procedure for punishing an offender for violation of probation is that governed by R.C. 2951.09, not a contempt hearing.”).

In the Tenth Appellate District, the issue of probation violation hearing versus contempt appears to come down to a matter of days. See *State v. Patton*, 10<sup>th</sup> Dist. No. 06AP-665, 2007-Ohio-1296. While contempt proceedings should be used “sparingly in situations where revocation or other sentencing provisions are available,” situations where contempt is used to increase jail time will be closely scrutinized. Id at ¶ 15. With VOPCO, the state is able to obtain substantially more detention time. With a status offense the child may be held for 24 hours. R.C. 2151.312(B). But with VOPCO the state is able to hold the child an additional 90 days for *each* VOPCO count. In Ms. Burt’s case, she was held “for 90 days as no court placement facility was available” on the

second VOPCO charge alone. (Ex. C.) This 90 days was in addition to other time already served on the case.

At the end of its contempt comparison, the *Burt* Court stated that there was no prejudice from the VOPCO proceeding as a probation revocation proceeding would have netted the same delinquency disposition. *Burt* at ¶ 58. According to the court, Ms. Burt's subsequent VOPCO charges did not unfairly turn a status offense case into a delinquency matter due to the initial plea to obstructing official business and disorderly conduct. *Id*

Actually, the VOPCO hearings have caused substantial harm to Ms. Burt. Now, rather than simply a second degree misdemeanor and a fourth degree misdemeanor on her juvenile record, Ms. Burt has two additional first degree misdemeanors. She was also held in a detention center for 90 days (in addition to time already served on the 2005 misdemeanor case) and eventually placed in a group home away from her family. This result is *not* due to the initial delinquency case where probation was never ordered. This result is due to the improper VOPCO charges for status offenses that were brought by the state.

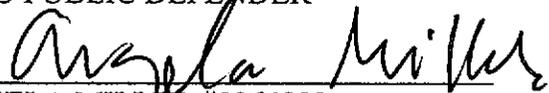
### CONCLUSION

In 2002, this Court held “[t]here is a clear difference between the role and power of the juvenile court in delinquency matters as opposed to matters involving abused or neglected children. The criminal aspects of juvenile delinquency proceedings require greater constraints on juvenile courts.” *In re Cross* (2002), 96 Ohio St.3d 328, 333, 774 N.E.2d 258, 262. VOPCO charges must only be brought when status offenders repeatedly refuse to rehabilitate, and the court needs delinquency options. Indeed, this is

supposed to be the true purpose of VOPCO. Therefore, this Court should adopt Ms. Burt's two propositions of law, reverse the decision of the Fifth District Court of Appeals, and remand the case to the juvenile court.

Respectfully Submitted,

OFFICE OF THE  
OHIO PUBLIC DEFENDER

  
ANGELA MILLER #0064902  
Assistant State Public Defender  
Counsel of Record

8 East Long Street, 11<sup>th</sup> Floor  
Columbus, Ohio 43215  
(614) 466-5394  
(614) 752-5167 (Fax)  
[angela.wilson-miller@opd.ohio.gov](mailto:angela.wilson-miller@opd.ohio.gov)

COUNSEL FOR SHARDAI BURT

**CERTIFICATE OF SERVICE**

I hereby certify that a true copy of the foregoing MERIT BRIEF OF APPELLANT SHARDAI BURT was served by regular U.S. mail upon Ronald Mark Caldwell, Assistant Stark County Prosecutor, 110 Central Plaza South, Suite 510, Canton, Ohio 44702, this 1<sup>st</sup> day of April, 2008.



ANGELA MILLER #0064902  
Assistant State Public Defender

COUNSEL FOR SHARDAI BURT

#275597

IN THE SUPREME COURT OF OHIO

IN RE: SHARDAI BURT,  
A MINOR CHILD.

:  
:  
:  
:  
:  
:

Case No. 07-1751

On Appeal from the Stark County  
Court of Appeals Fifth Appellate  
District

C.A. Case No. 2006-CA-00328

---

**APPENDIX TO MERIT BRIEF OF APPELLANT SHARDAI BURT**

---

Closed

Tape No. 450-4082

COURT OF COMMON PLEAS, FAMILY COURT DIVISION, STARK COUNTY, OHIO

JUDGMENT ENTRY

In Re: Shardai Burt

MAGISTRATE ORDER DECISION

CASE NO. J- 13265

Appearances: Anna Reynolds  
Marilyn Ann Blakely  
Mrs. Julie

Delinquent [ ] Unruly [ ] Traffic

PRECEPT: TO THE CLERK OF COURTS Pursuant to Civil Rule 54(B), you are hereby directed to serve all parties not in default for failure to appear and/or their attorney of record, notice of this judgment and its date of entry upon the journal in the manner prescribed by Civil Rule 5(B).  
 Served in court

This matter came before the court for hearing upon complaint(s) alleging:

Charge(s): Disobeying (M2)  
Disobeying (M4)

Notification of Rights - Juv. R. 29:  Waived [ ] Attorney Requested (Public Defender 330-451-7200)

**Plea of Juvenile:**  Admits [ ] Denies

[ ] Juvenile is ORDERED Released to \_\_\_\_\_

[ ] Juvenile is REMANDED to the Multi-County Juvenile Attention Center pending a Pretrial/Trial which will be held: \_\_\_\_\_

Detention is based upon: [ ] child may abscond [ ] required to protect person and property of self or others  
[ ] no available parent, guardian or custodian to assume custody

**After taking sworn testimony:**

The juvenile is found to be  Delinquent [ ] Unruly [ ] Juvenile Traffic Offender  
[ ] Matter is Dismissed upon motion of \_\_\_\_\_

2008 JUL 15 A 0:30  
STARK COUNTY  
COURT CLERK

**Disposition:**

- [ ] Hearing continued to: \_\_\_\_\_
- [ ] Pretrial Release Program ordered. Juvenile shall cooperate and obey all terms and conditions of the Pretrial Release Program.
- [ ] \_\_\_\_\_

[ ] Fine: \_\_\_\_\_ [ ] Fine Suspended [ ] Court Costs Assessed [ ] Costs waived (Incigent)

EXHIBIT

A

ASSIGNED TO JUDGE HOWARD

X

**Page 2**

- Prior stay on Case No. J-\_\_\_\_\_ is ORDERED rescinded/continued:
- Juvenile is COMMITTED indefinitely to the custody of the Ohio Dept. of Youth Services.
  - for a minimum period of six (6) months     for a minimum period of one (1) year
- \_\_\_\_\_
- Dept. of Youth Services Commitment stayed providing no violation of Court order, probation or any law.
- Remand to Attention Center for Court Placement.
- Remand to Attention Center for \_\_\_\_\_ days; Release on: \_\_\_\_\_
- Attention Center Remand Suspended providing no violation of Court order, probation or any law.

**Court ordered conditions:**

- Community Control ordered. Juvenile shall cooperate participate and obey all terms and conditions set forth by Community Control.
- Ohio Operator's License suspended effective \_\_\_\_\_ to \_\_\_\_\_.
- Restitution Orders  through Restitution Work Program     in amount of \$\_\_\_\_\_ by \_\_\_\_\_.
- House Arrest until \_\_\_\_\_ -Parent (guardian) to report any violation.
- Curfew \_\_\_\_\_
- Juvenile to undergo substance abuse evaluation -
  - screening     assessment     random urinalysis
  - and is ordered to follow any and all recommendations for treatment issued as a result of evaluation.
- Counseling Ordered     Psychological Evaluation Ordered.
- Good Behavior in Home, School, and Community Ordered.
- Mandatory School Attendance Ordered - medical excuse required for absence/tardy.
- \_\_\_\_\_ hours of Community Service to be performed within \_\_\_\_\_ days.
- If not completed, reduction to Probation*

All prior orders of the court shall remain in full force and effect

Date: 7/14/05 Magistrate/Judge:

NOTICE: A party may, pursuant to Ohio Civil Rule 53 or Juvenile Rule 40, file a written motion to set aside a Magistrate Order within ten (10) days of the filing of the order. Objections to a Magistrate Decision may be filed within fourteen (14) days of the filing of the decision. A party shall not assign as error on appeal the Court's adoption of any finding of fact or conclusion of law in this decision unless the party timely and specifically objects to that finding or conclusion as described herein. The Court, having made an independent analysis of the issues and applicable law hereby approves and adopts the Magistrate Decision and orders it to be entered as a matter of record.

Date: 7/15/05 Judge:

**ASSIGNED TO JUDGE HOWARD**

IN THE STARK COUNTY COURT OF COMMON PLEAS  
FAMILY COURT, JUVENILE DIVISION, STARK COUNTY, OHIO

CLERK OF COURTS  
STARK COUNTY, OHIO

2006 JCR 03114

CASE NO. JU \_\_\_\_\_

IN RE: SHARDAI BURT 06 SEP 18 PM 4:19  
Guardian: CONSUELA STRICKLAND  
Residence: 1921 OTTO PLACE NE CANTON, OHIO 44704

COMPLAINT  
VIOLATION OF PRIOR COURT ORDER 1 ct., R.C. 2152.02

Before me, Vicki A. Ruegg, Notary Public, personally came  
VERONICA EARLEY, of the Stark County Family Court, who being duly sworn  
according to the law, deposes and says that to the law, deposes and says that s/he has knowledge that  
the above juvenile, age 14, whose date of birth is October-17-1991, appears to be delinquent  
in that :

- on or about the \_\_\_\_\_
- as a continuous course of conduct from on or about the  
09/15/2006 12.00.00 AM to or on about  
09/17/2006 12.00.00 AM

in the County of Stark, State of Ohio, the juvenile did violate a prior order of the Stark County Court  
of Common Pleas, Juvenile Division, issued in case No. JU 137265, in which the juvenile  
was alleged or adjudicated a(n)  delinquent  unruly child for the offense(s) of

VIOLATION OF PRIOR COURT ORDER violation of Ohio Revised Code Section(s) :  
2152.02

To Wit: The juvenile violated the following conditions of probation and/or the court's order:  
Shardai Burt left home with out permission from her parents or myself on Friday the 15th of  
September. She did not return home until Sunday morning.

In violation of Ohio Revised Code Section 2152.02(F)(2).

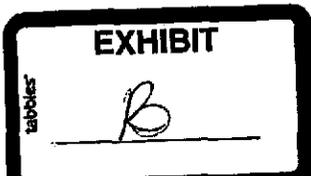
Signed: \_\_\_\_\_  
Address: 110 CENTRAL PLAZA S. STE#625  
CANTON, OHIO 44702  
Telephone: 330-451-7410

Sworn to and signed in my presence this September-18-2006

Vicki A. Ruegg  
Notary Public



VICKI A. RUEGG  
Notary Public, State of Ohio  
My Commission Expires  
October 3, 2007



JUDGMENT ENTRY  
Magistrate's Order / ~~Decision~~

RE: SHARDAI BURT

Record: CR9-59-1607

CASE NO. J-2006-JCR-3114 ADDITIONAL CASE NO. J-

Appearances:

Delinquent [ ] Unruly [ ] Traffic [ ] Child Support  
[ ] Dependent / Neglect / Abuse [ ] Paternity [ ] Custody

JUVENILE, ATTY ABNEY, MOTHER, PROS-MLINAR

L. COLE,

This matter came before the court for hearing upon complaint(s) alleging:  
Violation of Prior Court Order (MI)

Findings of Fact:

Matter was set for a review hearing. The adjudication is on appeal with the 5th District; however, placement has become an issue. There are no beds available at court placement facility (RTC) until January 2007, and Juvenile has been in the AC since 9/18/2006.

After [ ] taking sworn testimony: [ ] admission / stipulation: [X] motion:

The court finds: \_\_\_\_\_

Disposition:

Juvenile to remain placed at the Attention Center until her 90th day (12/17/2006), and she shall remain on the court placement list. Upon her 90th day, she may be released on EMHA (mother to pay) until court placement becomes available.

Date: 11-16-2006

Magistrate Priscilla J. Cunningham

NOTICE: A party may, pursuant to Ohio Juvenile Rule 40 file a written motion to set aside a Magistrate Order within ten (10) days of the order. Objections to a Magistrate Decision may be filed within fourteen (14) days of the filing of the decision.

A party shall not assign as error on appeal the court's adoption of any finding of fact or conclusion of law in this decision unless the party timely and specifically objects to that finding or conclusion as described herein.

The Court, having made an independent analysis of the issues and the applicable by law hereby approves and adopts the Magistrate Decision and orders it to be entered as a matter of record.

Date: \_\_\_\_\_

Judge \_\_\_\_\_



LEXSEE 1998 OHIO APP. LEXIS 5955

**CITY OF SHAKER HEIGHTS, PLAINTIFF-APPELLEE v. CHARLES  
HAIRSTON, DEFENDANT-APPELLANT**

NO. 74435

**COURT OF APPEALS OF OHIO, EIGHTH APPELLATE DISTRICT, CUYA-  
HOGA COUNTY**

1998 Ohio App. LEXIS 5955

December 10, 1998, Date of Announcement of Decision

**PRIOR HISTORY:** [\*1] CHARACTER OF PROCEEDING: Criminal appeal from Shaker Heights Municipal Court. No. 95-CRB-09205.

**DISPOSITION:** JUDGMENT: REVERSED AND REMANDED.

**COUNSEL:** For Plaintiff-Appellee: Gary R. Williams, Esq., Prosecutor, Shaker Heights, Lisa M. Gale, Esq., Assistant Prosecutor, Shaker Heights, OH.

For Defendant-Appellant: Charles C. Hairston, pro se, Cleveland, OH.

**JUDGES:** TERRENCE O'DONNELL, PRESIDING JUDGE, TIMOTHY E. McMONAGLE, JUDGE, JAMES D. SWEENEY, JUDGE.

**OPINION**

ACCELERATED DOCKET

JOURNAL ENTRY AND OPINION

*PER CURIAM:*

Defendant-Appellant, Charles Hairston, appeals the order of the Shaker Heights Municipal Court granting appellant's motion to revoke his probation and ordering him to serve fifteen days in jail. Appellant asserts that the trial court erred in granting his motion without a hearing, increasing his sentence beyond that originally imposed, not crediting him with time served towards his fifteen-day sentence and denying him work release while he was serving his jail time.

The facts pertinent to the issues in this appeal are as follows. On April 10, 1995, appellant was charged with domestic violence in violation of Shaker Heights Codi-

fied Ordinance § 737.14. Appellant entered [\*2] a plea of no contest to the charged offense, and on June 12, 1995, the court sentenced appellant to forty-five days in jail, a \$ 600 fine, active probation for eighteen months and attendance at a program on domestic violence. The trial court suspended \$ 300 of the fine and the entire jail term upon the condition that appellant was not convicted of a similar type offense during the probation period.

On August 7, 1995, appellant completed payment of the \$ 300 fine. On October 27, 1995, however, appellant failed to report for his scheduled appointment with the probation department and the trial court charged him with contempt. On August 2, 1996, appellant appeared in court and pled not guilty to the contempt charge. The trial court found appellant guilty and referred him to the probation department for recommencement of his probation.

On November 14, 1996, appellant wrote to the trial court judge about the problem that his ongoing probation status was creating with his employment. Appellant explained that his job installing and repairing furnaces required him to work long, odd hours that often conflicted with his probation reporting schedule. Appellant stated that he would be fired [\*3] if he continued to leave his job to report for probation and that he had discussed this situation with his probation officer, but they were unable to agree on a solution. Appellant stated that unless other arrangements could be made, he would be willing to serve the forty-five days in jail as originally sentenced. The court did not respond to appellant's letter.

On May 17, 1997, appellant was again charged with contempt for failing to report for a regularly scheduled probation appointment. On December 12, 1997, appellant entered a plea of not guilty to the contempt charge. After a bench trial on February 2, 1998, the trial court found appellant guilty of contempt and sentenced him to fifteen days in jail and a \$ 25 fine. The trial court sus-

pended the jail time on the condition of six months of active probation during which time appellant was required to report once a month. Included in the trial court's journal entry was the notation: "Probation Department to work with defendant to accommodate defendant's work schedule."

On March 30, 1998, appellant filed a motion to revoke his probation, asking the court "to revoke its order of probation and activate the jail time imposed." In [\*4] his motion, appellant argued that the probation department was unwilling to comply with the court's order dated February 2, 1998 and that this noncompliance was placing an undue hardship on him that would likely result in violation of his probation. Appellant also asserted that he would likely be fired from his job if he adhered to the reporting schedule established by the probation department because he would have to leave his job with work undone in order to report. According to appellant, if he was fired, he could then be charged with violation of his county probation, which required him to maintain full-time employment, and if found guilty, he could be sentenced to serve two to ten years in prison. Accordingly, appellant requested that he be allowed to serve the fifteen days in jail, during which time his employer would hold his job for him. Appellant noted that the court had the option of considering work release in lieu of jail time but he did not specifically request it.

Appellant requested that the court hold a hearing on his motion so he could "present evidence of a conflict of interest between himself and the Probation Department and other *misinformation* of which the [\*5] court may be unaware." (Emphasis in original.)

On April 6, 1998, the trial court granted appellant's motion without hearing and journalized the following entry:

Defendant's request to terminate active probation reporting and instead serve 15 days jail is granted. Defendant ordered to report for jail 4/17/98 to serve for 15 days and the costs of jail at \$ 65.00 per day to be paid by Defendant as additional fine. Defendant must still do DV program if not completed at this time, fine payment etc. Probation to go inactive.

On April 6, 1998, the trial court also signed a Commitment Order, which stated, in pertinent part:

Whereas, Charles Hairston, has been arrested on oath and complaint of Domestic Violence 737.14 and before said municipi-

pal court on such charge has been found guilty, and sentenced to pay a fine of \$ and to be imprisoned by Shaker Hts. Police Dept. at Shaker Hts. Jail or Bedford Heights Hts. Jail for a term of 15 days. Said Defendant has been confined for 0 days, and therefore has 15 days remaining to be served.

On April 7, 1998, the trial court journalized an entry ordering appellant to "do time ordered on 4/6/98 at Bedford Heights City [\*6] Jail."

Appellant served the fifteen-day sentence, paid the \$ 25 fine and then timely appealed. Appellant assigns the following assignments of error for our review:

I. THE TRIAL COURT ERRED IN REVOKING DEFENDANT-APPELLANT'S PROBATION WITHOUT A HEARING, THEREBY DENYING HIM DUE PROCESS OF LAW.

II. THE TRIAL COURT ERRED BY INCREASING DEFENDANT-APPELLANT'S SENTENCE BEYOND THAT WHICH WAS ORIGINALLY ADJUDGED, THEREBY SUBJECTING HIM TO DOUBLE JEOPARDY.

III. THE TRIAL COURT ERRED IN NOT CREDITING DEFENDANT-APPELLANT WITH JAIL TIME CREDIT TOWARD SERVICE OF HIS SENTENCE.

IV. THE TRIAL COURT ERRED IN DENYING DEFENDANT-APPELLANT ANY OPPORTUNITY FOR WORK RELEASE.

Appellant's first, third and fourth assignments of error all relate to the imposition of appellant's 15-day jail term. In his first assignment of error, appellant argues that the trial court erred in revoking his probation and imposing the fifteen-day sentence without first holding a hearing because the minimum requirements of due process require notice and a hearing before a court can revoke probation. See *Morrissey v. Brewer* (1972), 408 U.S. 471, 33 L. Ed. 2d 484, 92 S. Ct. 2593; *Gagnon v. Scarpelli* [\*7] (1972), 411 U.S. 778, 36 L. Ed. 2d 656, 93 S. Ct. 1756.

In his third assignment of error, appellant asserts that the trial court erred in not crediting him with time

already served toward his fifteen-day sentence. Appellant alleges that prior to reporting to Bedford Heights City Jail to serve the fifteen-day sentence, he had been incarcerated in the Shaker Heights Jail from April 10, 1995--April 12, 1995; July 31, 1996--August 2, 1996 and December 8, 1997--December 12, 1997 and in the Cuyahoga County Jail from January 16, 1996--July 31, 1996. Appellant alleges that all of these periods of incarceration were related to this case and, therefore, he was entitled to credit for time already served.

In his fourth assignment of error, appellant asserts that the trial court erred in denying him work release while he was serving his fifteen-day sentence. Appellant contends that the trial court's journal entry granting his motion to revoke his probation did not specifically grant or deny his request for work release, but the Jail Time Record form, signed by his probation officer, indicated that appellant was not eligible for work release. Appellant argues that although the availability of [\*8] work release is a discretionary decision for the trial court, in this case it appears that the probation officer, rather than the court, exercised that discretion.

Regardless of the merit or lack thereof of these assignments of error, these alleged errors are now extinct because this court has no power to remedy them. Appellant voluntarily served the fifteen-day jail term imposed by the trial court when it granted his motion for revocation of his probation. Accordingly, a reversal on any of these grounds could not remedy these alleged errors and they are therefore moot.

In his second assignment of error, appellant argues that the trial court imposed an additional sentence beyond what was originally imposed, thus placing him in jeopardy twice for the same offense.<sup>1</sup> Specifically, appellant argues that the court's order dated April 6, 1998 granting his motion to revoke his probation improperly ordered that he also pay an additional fine of \$ 65 per day for the costs of his incarceration, and that he complete a program on domestic violence. Appellant argues that this fine and requirement of rehabilitative therapy were improper because they were in addition to the sentence that was [\*9] originally imposed for his contempt conviction.

1 Appellant apparently alleges violation of the Double Jeopardy Clause of *Article I, Section 10 of the Ohio Constitution* and the *Fifth Amendment to the United States Constitution*.

As an initial matter, we note that there is nothing in the record to indicate that appellant made this objection to the trial court. It is well established that an appellate court is not required to consider an error which a complaining party could have, but did not, call to the atten-

tion of the trial court. *State v. Lancaster (1976), 25 Ohio St. 2d 83, 86, 267 N.E.2d 291. Crim.R. 52(B)* provides, however, that "plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." Thus, a reviewing court has discretion to review errors not raised below in cases of plain error or where the rights and interests involved may warrant it. *Hill v. City of Urbana (1997), 79 Ohio St. 3d 130, 133-134, 679 N.E.2d 1109*. Because [\*10] a claim of double jeopardy involves a fundamental right, this court will address the merits of appellant's claim.

The record reflects that on April 10, 1995, after finding appellant guilty of domestic violence, the trial court ordered appellant to attend a program on domestic violence as part of his sentence. On April 6, 1998, when the trial court granted appellant's motion to revoke his probation and imposed the fifteen-day suspended jail sentence, the trial court ordered that appellant "must still do DV program if not completed at this time." This order was clearly nothing more than a reference to the sentence originally imposed upon appellant upon his conviction for domestic violence. Thus, appellant's argument that this ruling by the trial court was an "additional" sentence is incorrect.

The trial court's order that appellant pay "the costs of jail at \$ 65.00 per day \*\*\* as additional fine," however, was improper. On February 2, 1998, the trial court found appellant guilty of contempt and sentenced him to fifteen days in jail and a \$ 25 fine. All of the jail time was suspended on the condition of six months of active probation during which time appellant was to report one time [\*11] per month. When the trial court granted appellant's motion to revoke his probation, however, it not only ordered him to serve the fifteen days in jail as originally sentenced, it also ordered him to pay \$ 65 per day "as additional fine."

Plaintiff-appellee, the City of Shaker Heights, argues that notwithstanding the trial court's "additional fine" language, *R.C. 2929.223* authorizes a trial court to order a defendant to contribute to the costs of his confinement. *R.C. 2929.223(A)* provides, in pertinent part, that:

If a judge in any jurisdiction in which the appropriate authority or board requires an offender (of) an offense other than a minor misdemeanor to reimburse the costs of confinement \*\*\* then after that person's release from imprisonment, the judge \*\*\* shall hold a hearing to determine the amount of the reimbursement and whether the offender has the ability to pay the reimbursement and the amount the person is able to pay.

This section clearly requires that the court hold a hearing before it may require reimbursement for costs of confinement. In addition, the hearing is to be held after the defendant's release from imprisonment. Here, not only did the trial court [\*12] impose the \$ 65 per day fee prior to appellant's incarceration, it did not hold a hearing. Moreover, the trial court's journal entry makes it clear that the trial court imposed the reimbursement requirement as an "additional fine," and not as an effort to recoup costs. The double jeopardy clause protects from multiple prosecutions and punishments for the same offense. *North Carolina v. Pearce* (1969), 395 U.S. 711, 717, 23 L. Ed. 2d 656, 89 S. Ct. 2072. Accordingly, the trial court's order imposing the \$ 65 per day additional fine is unconstitutional and, therefore, reversed.

Furthermore, we note that because of inconsistencies in the record, it is difficult to determine whether the fifteen days that appellant spent in the Bedford Heights City Jail were for his contempt conviction or his domestic violence conviction. On February 2, 1998, the trial court sentenced appellant to fifteen days in jail and a \$ 25 fine on his contempt conviction, and then suspended the jail time on the condition of six months of active probation. On March 30, 1998, when appellant filed his motion to revoke probation, he asked to serve the fifteen-day sentence in order to eliminate the ongoing problem [\*13] that probation reporting was causing with his employment. Appellant's assumption appears to have been that the fifteen-day jail sentence replaced the forty-five day sentence on his domestic violence conviction.

In the journal entry dated April 6, 1998 granting appellant's motion, however, the trial court ordered appellant to serve the fifteen days in jail and placed him on inactive probation. Thus, this entry appears to order fifteen days jail time on appellant's contempt charge and inactive probation on his underlying domestic violence conviction.

The difficulty with this interpretation of the journal entry, however, is that the Commitment Order dated April 6, 1998 states that the fifteen-day jail sentence is for appellant's domestic violence conviction, not his contempt conviction. Furthermore, the trial court referenced

the Commitment Order in its April 7, 1998 journal entry ordering appellant to serve his time at the Bedford Heights City Jail.

We emphasize that the proper procedure for punishing an offender for violation of probation is that governed by *R.C. 2951.09*, not a contempt hearing. *State v. Loudon*, 1997 Ohio App. LEXIS 4739 (Oct. 24, 1997), Champaign App. No. 97-CA-05, unreported. Accordingly, [\*14] we construe the Commitment Order as the trial court's way of terminating the original forty-five day sentence on the domestic violence charge and imposing a fifteen-day sentence. Appellant served the fifteen-day sentence and paid the \$ 25 fine as ordered. Therefore, we order any inactive probation terminated and appellant discharged.

This cause is reversed and remanded for further proceedings consistent with the opinion herein.

It is, therefore, considered that said appellant recover of said appellee his costs herein.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to *Rule 27 of the Rules of Appellate Procedure*.

TERRENCE O'DONNELL, PRESIDING JUDGE

TIMOTHY E. McMONAGLE, JUDGE

JAMES D. SWEENEY, JUDGE

N.B. This entry is an announcement of the court's decision. See *App.R. 22(D)* and *26(A)*; *Loc.App.R. 22(B)*, *22(D)* and *26(A)*; *Loc.App.R. 27*. This decision will be journalized and will become the judgment and order of the court pursuant to *App.R. 22(E)* unless a motion for reconsideration with supporting brief, per *App.R. 26(A)*, is filed within ten (10) days of the [\*15] announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per *App.R. 22 (E)*. See, also, *S. Ct. Prac.R. II, Section 2(A)(1)*.

LEXSEE 2007 OHIO 4034

## IN RE SHARDAI BURT, JUVENILE

Case No. 2006-CA-00328

## COURT OF APPEALS OF OHIO, FIFTH APPELLATE DISTRICT, STARK COUNTY

2007 Ohio 4034; 2007 Ohio App. LEXIS 3649

August 6, 2007, Date of Judgment Entry

**SUBSEQUENT HISTORY:** Discretionary appeal allowed by *In re Burt*, 2008 Ohio 153, 2008 Ohio LEXIS 83 (Ohio, Jan. 23, 2008)

**PRIOR HISTORY:** [\*\*1]

**CHARACTER OF PROCEEDING:** Civil appeal from the Stark County Court of Common Pleas, Juvenile Division, Case No. 2006-JCR-03114.

**DISPOSITION:** Affirmed.

**COUNSEL:** For Plaintiff-Appellee: JOHN D. FERRERO, PROSECUTORING ATTORNEY, BY: MARK CALDWELL, Assist. Prosecuting Attorney, Canton, OH.

For Defendant-Appellant: ROBERT G. ABNEY, Canton, OH.

**JUDGES:** Hon W. Scott Gwin, P.J., Hon John W. Wise, J., Hon Patricia A. Delaney, J. By Gwin, P.J., Wise, J., and Delaney, J., concur.

**OPINION BY:** W. Scott Gwin

**OPINION**

*Gwin, P.J.*

[\*P1] Defendant-appellant Shardi Burt, a juvenile, appeals her adjudication in the Stark County Court of Common Pleas, Juvenile Division, finding her delinquent on the charge of violating a prior court order. Plaintiff-appellee is the State of Ohio.

**STATEMENT OF THE CASE**

[\*P2] In 2003, Shardai Burt, age 13 at the time, was charged with delinquency as a result of committing the criminal offenses of obstructing official business, a

misdemeanor of the second degree if committed by an adult in violation of R.C. 2921.31, and disorderly conduct, a misdemeanor of the fourth degree if committed by an adult in violation of R.C. 2917.11(A). [*In re Burt*, Stark County Court of Common Pleas, Case No. 2005 JCR 137265]. Appellant pleaded true to these allegations, [\*\*2] and was adjudicated delinquent on each count by the Stark County Juvenile Court. Upon adjudicating her a delinquent child, the court ordered that appellant exhibit good behavior at home, school, and the community; to attend school (absent a medical excuse); and, to complete mediation (if not already completed).

[\*P3] In October 2005, another juvenile complaint was filed against appellant, who had turned 14 by then, charging her with delinquency for violating a prior court order (VPCO), in violation of R.C. 2152.02(F)(2). [*In re Burt*, Stark County Court of Common Pleas, Case No. 2005 JCR 139459]. The complaint alleged that appellant had been leaving home without permission, staying out all night, and that on one occasion she left for school and did not return home until two days later, with her whereabouts being known. On November 18, 2005 Appellant pleaded true to this charge, and was found delinquent by the magistrate based upon her plea and admission. The magistrate's disposition was approved by the trial judge. The disposition for the violation of the prior court order charge was community control; a curfew (home by 7:00 p.m. each night, unless accompanied by an adult), good behavior [\*\*3] at home, school, and the community; mandatory school attendance (except for medical excuse); 10 hours of community service to be performed within 20 days; and, continued counseling at Quest.

[\*P4] In September of 2006, another VPCO complaint was filed against appellant, charging her with violation of a prior court order in violation of R.C. 2152.02(F) (2) for violating the conditions of her probation. [*In re Burt*, Stark County Court of Common Pleas, Case No. 2006 JCR 3114]. Appellant was specifically

charged with leaving home without parental permission or with her probation officer's permission and staying away over the weekend. This complaint gives rise to the instant appeal.

[\*P5] Prior to trial, appellant moved to dismiss the complaint on the ground that the complaint did not allege a valid delinquency claim. According to appellant, a VPCO allegation is not a delinquency charge provided by statute, and thus the court did not have jurisdiction to proceed. Appellant argued that the proper course of proceedings would have been to charge appellant with violation of her probation and to file a motion to revoke or modify her probation. The Magistrate took appellant's motion to dismiss under advisement [\*\*4] (T. at 4). At the pretrial hearing, the Magistrate overruled appellant's motion to dismiss and appellant requested a court trial (T. at 7). In his ruling, Magistrate Nist specifically held:

[\*P6] "Motion to dismiss is denied. Court believes *ORC 2152.02(F) (2)* permits the court to proceed with a violation of court order complaint. This court does not agree with the reasoning set forth within the brief submitted by the juvenile. Court supports the state's position opposing the motion to dismiss."

[\*P7] Prior to the court trial, appellant filed an objection to the Magistrate's decision with the assigned judge and requested the Magistrate's denial of the motion to dismiss be set aside. The judge heard oral argument on October 10, 2006 and overruled appellant's objection (T. at 44). At the court trial, appellant pled true to Violation of Prior Court Order without waiving her right to appeal the jurisdictional and constitutional issues. (T. at 47-49). The [\*\*5] magistrate imposed court placement, remanding appellant to the Juvenile Attention Center for placement until a group home is available, with placement in the home to be immediate; mandatory counseling and compliance with all recommendations for treatment.

[\*P8] Appellant filed another objection with the judge and stipulated to waiving oral argument, as the issues had already been argued before the judge. On October 27, 2006, the judge overruled appellant's objection. Ms. Burt filed her notice of appeal.

[\*P9] It is from the trial court's denial of her motion to dismiss that appellant now appeals raising the following five assignments of error:

[\*P10] "I. WHETHER THE STATE'S 'VIOLATION OF PRIOR COURT ORDER' CHARGE FOR VIOLATING A TERM OF PROBATION, ARISING FROM A DELINQUENCY ADJUDICATION, VIOLATED THE JUVENILE'S *FIFTH* AND *FOURTEENTH AMENDMENT* CONSTITUTIONAL RIGHT TO DUE PROCESS.

[\*P11] "II. WHETHER FILING A NEW CHARGE AGAINST A JUVENILE FOR 'VIOLATION OF PRIOR COURT ORDER,' REGARDLESS OF THE ORIGINAL OFFENSE, IS A VIOLATION OF THE JUVENILE'S CONSTITUTIONAL RIGHT TO DUE PROCESS UNDER THE *FIFTH* AND *FOURTEENTH AMENDMENT*.

[\*P12] "III. WHETHER JUVENILES CHARGED WITH A 'VIOLATION OF PRIOR COURT ORDER' HAVE BEEN IMPROPERLY [\*\*6] CHARGED IN VIOLATION OF THE *FIFTH* AND *FOURTEENTH AMENDMENT DOUBLE JEOPARDY CLAUSE* AND *ARTICLE 1 SECTION 10 OF THE OHIO CONSTITUTION*.

[\*P13] "IV. WHETHER FAILING TO INFORM JUVENILES, AT THE ORIGINAL DISPOSITION, OF THE POTENTIAL PUNISHMENT FOR VIOLATING CONDITIONS OF PROBATION VIOLATES JUVENILES' *FIFTH* AND *FOURTEENTH AMENDMENT* RIGHT TO DUE PROCESS AS WELL AS *ARTICLE 1 SECTION 10 OF THE OHIO CONSTITUTION*.

[\*P14] "V. WHETHER JUVENILES MAY BE ADJUDICATED DELINQUENT UNDER *O.R.C. 2152.02(F)(2)*, AS THE STATUTE IS UNCONSTITUTIONAL, IMPROPER, AND VOID FOR VAGUENESS, THEREFORE VIOLATES JUVENILES' *FIFTH* AND *FOURTEENTH AMENDMENT* RIGHT TO DUE PROCESS."

#### I. & II.

[\*P15] Because we find the issues raised in appellant's first and second assignments of error are closely related for ease of discussion we shall address the assignments of error together.

[\*P16] In her first assignment of error appellant argues that charging a juvenile with being delinquent by reason of violating a prior court order is improper, especially if the basis of the violation would otherwise result in an unruly charge. Appellant contends that an unruly charge is a status offense, i.e. an offense consisting of conduct that would not constitute an offense [\*\*7] if engaged in by an adult.

[\*P17] In her second assignment of error appellant argues that *R.C. 2152.02(F) (2)* which provides for delinquency adjudication for violation of a prior court order is only a definition section and thus any delinquency violation based upon that section violates due process. Appellant contends that the proper course of action is for the State to file a motion to revoke probation pursuant to *Juv. R. 35*.

[\*P18] In Ohio, all crimes are statutory. *Municipal Court of Toledo v. State ex rel. Platter (1933)*, 126 Ohio

*St. 103, 184 N.E. 1; Eastman v. State (1936), 131 Ohio St. 1, 1 N.E.2d 140, appeal dismissed 299 U.S. 505, 57 S. Ct. 21, 81 L. Ed. 374; State v. Fremont Lodge, Loyal Order of Moose (1949), 151 Ohio St. 19, 84 N.E.2d 498; State v. Cimpritz (1953), 158 Ohio St. 490, 492, 110 N.E.2d 416, 417-18.* The elements necessary to constitute the crime must be gathered wholly from the statute and the crime must be described within the terms of the statute. *Davis v. State (1876), 32 Ohio St. 24, 28 State v. Cimpritz, supra.* Moreover, no act is a crime except an act done in violation of the express provisions of a statute or ordinance legally enacted. *Toledo Disposal Co. v. State (1914), 89 Ohio St. 230, 106 N.E. 6.*

[\*P19] [\*\*8] Defining crimes and fixing penalties are legislative, and not judicial, functions. *United States v. Evans (1948), 333 U.S. 483, 486, 68 S. Ct. 634, 636, 92 L. Ed. 823.* "[W]here Congress has exhibited clearly the purpose to proscribe conduct within its power to make criminal and has not altogether omitted provision for penalty, every reasonable presumption attaches to the proscription to require the courts to make it effective in accord with the evident purpose. This is as true of penalty provisions as it is of others". *United States v. Brown (1948), 333 U.S. 18, 68 S. Ct. 376, 92 L. Ed. 442; United States v. Evans, supra 333 U.S. at 486, 68 S. Ct. at 636.*

[\*P20] *R.C. 2152.02* provides in relevant part:

[\*P21] "(F) 'Delinquent child' includes any of the following:

[\*P22] "(1) Any child, except a juvenile traffic offender, who violates any law of this state or the United States, or any ordinance of a political subdivision of the state, that would be an offense if committed by an adult;

[\*P23] "(2) Any child who violates any lawful order of the court made under this chapter or under *Chapter 2151. of the Revised Code* other than an order issued under *section 2151.87 of the Revised Code*;

[\*P24] "(3) Any child who violates division (C) of section 2907.39 [\*\*9] or division (A) of section 2923.211 or division (C) (1) or (D) of section 2925.55 of the Revised Code;

[\*P25] "(4) Any child who is a habitual truant and who previously has been adjudicated an unruly child for being a habitual truant;

[\*P26] "(5) Any child who is a chronic truant".

[\*P27] *Juv. R. 2 (I)* provides "'Delinquent child' has the same meaning as in *section 2152.02 of the Revised Code.*"

[\*P28] In the case at bar, appellant was charged with violating a prior court order pursuant to *R.C. 2152.02(F) (2)*. In the adult context, violation of a court

order is treated as contempt of court. *R.C. 2705.02* states in relevant part:

[\*P29] "A person guilty of any of the following acts may be punished as for a

[\*P30] "(A) Disobedience of, or resistance to, a lawful writ, process, order, rule, judgment, or command of a court or officer. . . ."

[\*P31] In order to be found guilty of contempt it must be shown that the alleged contemtor had actual notice of the court's order and that the alleged contemtor intended to defy the court. *Midland Steel Products Co. v. U.A.W. Local 486 (1991), 61 Ohio St.3d 121, 127, 573 N.E.2d 98, 103.* In its simplest terms, contempt of court is disobedience of an order of a court. Sentences for criminal contempt [\*\*10] are punitive in nature and are designed to vindicate the authority of the court. Accordingly it is the doing of the act which he has been commanded not to do that the contemtor is punished, not the act itself. In the case at bar, the juvenile was not simply disobeying her parent, custodian or guardian by running away from home; rather her actions were a direct affront to the juvenile court's previous orders.

[\*P32] In the case at bar, *R.C. 2152.02(F) (2)* defines a delinquent child as a child who disobeys a court order. Accordingly, the elements of the offense are the same as for contempt pursuant to *R.C. 2705.02*, i.e., actual notice of the order and intent to defy the order. The penalties for a violation of *R.C. 2152.02(F) (2)* are the dispositions available for delinquent children pursuant to *R.C. 2152.19*. The dispositions for a delinquent-misdemeanant and an unruly child are similar. See, *R.C. 2152.19* and *R.C. 2151.354*. We would further note that a court of common pleas has inherent power to punish a contemptuous refusal to comply with its order by imposing appropriate sanctions without regard to any statutory grant of such power. *Harris v. Harris (1979), 58 Ohio St.2d 303, 307, 390 N.E.2d 789, 792; [\*\*11] In re Cox (Nov. 8, 1993), 5th Dist. No. CA-9238, 1993 Ohio App. LEXIS 5461.* In other words a juvenile court has the inherent power to punish a juvenile for disobedience of its lawful orders without regard to *R.C. 2152.02*.

[\*P33] Accordingly, appellant's contention that *R.C. 2152.02* is insufficient to charge an offense is rejected. However, the real issue raised by appellant is whether the juvenile court can punish a violation of a condition of probation as a violation of a prior court order.

[\*P34] Again, using contempt of court as an analogy, "Ohio appellate courts appear to have divided on the issue. Some courts have assumed that probation revocation proceedings are the sole remedy. See, e.g., *State v. Smith, Mahoning App. No. 01 CA 187, 2002 Ohio 6710*

("The municipal court treated Smith's alleged failure to attend the counseling sessions as an act of contempt rather than a violation of probation. This was an error by the trial court."); *City of Shaker Heights v. Hairston* (Dec. 10, 1998), *Cuyahoga App. No. 74435*, 1998 Ohio App. LEXIS 5955. Other courts have assumed that contempt proceedings could be used in such cases. See, e.g. *State v. Daugherty* (2006), 165 Ohio App.3d 115, 2006 Ohio 240, 844 N.E.2d 1236 ("While Daugherty claims that the appropriate [\*\*12] course of action for the court was to consider revocation of probation under *Crim.R.* 32.3, we do not understand him to argue that this was the only course open to the court. In other words, indirect contempt proceedings, if conducted properly, may have been appropriate."); *State v. Deeds* (Apr. 30, 1998), *Coshoccon App. No. 97 CA 21*, 1998 Ohio App. LEXIS 2513". *State v. Patton*, 10th Dist. No. 06AP-665, 2007 Ohio 1296 at P 11.

[\*P35] Jurisdictions other than Ohio that have considered this issue "have come to three different conclusions. If a defendant violates a condition of his probation, Illinois case law states that he may be charged with contempt of court. *People v. Boucher*, 179 Ill. App.3d 832, 834, 128 Ill. Dec. 842, 844, 535 N.E.2d 56, 58 (1989); *People v. Patrick*, 83 Ill. App.3d 951, 953, 39 Ill. Dec. 451, 453, 404 N.E.2d 1042, 1044 (1980); *People v. Cook*, 53 Ill. App.2d 454, 202 N.E.2d 674, 675 (1964). An explanation for this rule may be that prior to 1963, the effective date of Illinois' current Code of Criminal Procedure, 'contempt of court was the only sanction permissible' for violations of conditions of probation. *Patrick*, 39 Ill. Dec. at 453, 404 N.E.2d at 1044. Maryland case law is directly in opposition [\*\*13] to that of Illinois. In Maryland the defendant can be charged only with violation of his probation order, not contempt. *Williams v. State*, 72 Md. App. 233, 528 A.2d 507, 508 (1987). Tennessee has taken a middle ground, allowing the sentencing judge to choose either punishment, *State v. Williamson*, 619 S.W.2d 145, 147 (Tenn.Crim.App.1981), and Alaska allows a court to use its contempt power in such a situation only if the defendant had notice, prior to violating the probation condition, that such a violation could result in a contempt of court charge. *Alfred v. State*, 758 P.2d 130, 132 (Alaska Ct.App.1988).

[\*P36] "In *Williams [v. State]*, the Maryland court reviewed Maryland authority stating the foundations for the probation order and then explained:

[\*P37] "[w]hen a probationer violates a condition of his probation, he is not subject to an additional punishment for that violation; but rather to the forfeiture of his conditional exemption from punishment for the original crime. Because probation involves a conditional exemption from punishment, rather than a part of the pen-

alty, a court may condition probation upon acts or omissions which it otherwise lacks the authority to impose. [528 A.2d at 508; [\*\*14] footnote and citations omitted]". *State v. Williams* (1989), 234 N.J. Super. 84, 92, 560 A.2d 100, 104.

[\*P38] In *State v. Williams, supra*, the court drew "a distinction between an order directed to a defendant or another to do or refrain from doing a particular act (the violation of which could be the basis of a contempt of court citation by a judge or indictment by a grand jury), and a conditional order which either states the ramifications of its violation or has such consequences established by law. This distinction was recognized in an analogous bail-bond case. In *United States v. Hall*, 198 F.2d 726 (2d Cir.1952), cert. den. 345 U.S. 905, 73 S. Ct. 641, 97 L. Ed. 1341 (1953), the defendant was charged with criminal contempt of court for being outside the jurisdiction of the court, and for violating an order requiring him to surrender. The court ruled that the defendant could not be held in contempt for violating the order to remain in the jurisdiction (a condition of the bond which provided its own remedy), but could be held in contempt for not surrendering. 198 F.2d at 731.

[\*P39] "Contempt of court should not be superimposed as an additional remedy in a probation violation setting if the act [\*\*15] that occasions the violation itself is not otherwise criminal". *Williams supra*, 234 N.J. Super. at 91 560 A.2d at 103-104.

[\*P40] We agree that the more logical approach is that the courts should not use the inherent contempt power to punish a violation of a condition of probation that would not otherwise constitute an offense. We do not believe that when the Legislature expressly provided that the sanction for a violation of probation (other than for the inherent criminality of the act) would be a revocation of probation, it intended that a defendant would be subject to a new indictment for contempt in addition to the punishment for the original offense. That being said, we must now recognize that a debate has arisen among the courts as to whether that principal should be applied in the context of a juvenile proceeding.

[\*P41] The Supreme Court of Kentucky has noted:

[\*P42] "The Juvenile Code simply does not allow a court to give up on the rehabilitation of a juvenile who refuses to perform the terms of probation. Thus, the contempt power exists for the purpose of compelling the juvenile to comply with the court's orders and to enable the court to help the juvenile become a productive citizen. 'KRS Chapter 635 [\*\*16] shall be interpreted to promote the best interests of the child through providing treatment and sanctions to reduce recidivism and assist in making the child a productive citizen. . . .' KRS 600.010(2) (e). Nor can it be said that the imposition of

contempt sanctions for violations of specific conditions of probation, violates the Appellant's due process rights of fair treatment and/or double jeopardy. See, *Butts v. Commonwealth*, 953 S.W.2d 943, 44 10 Ky. L. Summary 12 (Ky.1997), and *Commonwealth v. Burge*, 947 S.W.2d 805, 43 9 Ky. L. Summary 12 (Ky.1997)". *A.W. v. Kentucky* (2005), 163 S.W.3d 4, 6-7. See, also *G.S. v. State (Fla. Dist. Ct. App. 1998)*, 709 So.2d 122, 123 (denying habeas petition and holding that courts have the authority to issue a contempt sanction against a juvenile for violating a community control order); *In the Interest of Doe* (2001), 96 Hawaii 73, 26 P.3d 562, 571 (affirming adjudication of delinquency for criminal contempt where chronic truancy had placed the juvenile under protective supervision and juvenile subsequently violated conditions of court order of supervision); *State ex rel. L.E.A. v. Hammergren* (Minn. 1980), 294 N.W.2d 705, 707-08 (affirming dismissal of habeas petition, recognizing juvenile court's [\*\*17] authority to find a juvenile in contempt of court, but cautioning that status offender normally should be placed in a shelter care facility, and only egregious circumstances warranted confinement of status offender in secure detention facility).

[\*P43] The Court of Appeals for the Eleventh District has taken the opposite approach:

[\*P44] "This court finds no authority for the juvenile court to proceed in contempt when the issue is a probation violation allegation. *R.C. 2151.412 (E) (1)* allows the court to proceed in contempt for a violation of a journalized case plan. However, that section specifically applies only to the parties involved in cases of abuse, neglect or dependency, temporary or permanent custody, protective supervision, or long-term foster care.

[\*P45] "Further, in the prosecution of the violation of probation terms, the only remedy referred to under *R.C. 2151.355* is that of a probation revocation". *In re Norwalk* (1999), 133 Ohio App. 3d 396, 398-99, 728 N.E.2d 411, 412-13. (Footnotes omitted). See, also, *A.W. v. Kentucky*, *supra* 163 S.W.3d at 7-11. (Cooper, J. dissenting). ["a trial court's contempt powers should be narrowly defined and employed only when no other remedy is available. . . [\*\*18] ."].

[\*P46] Unquestionably, the preferred method for dealing with actions such as those taken by appellant would be the institution of revocation proceedings. However, in the unique context of delinquency dispositions, the dispositions available to the juvenile court would be the same when, as in the case at bar, the juvenile is originally adjudicated as a delinquent child. However, we agree with the concern expressed by the Tenth Appellate District: "[w]e emphasize that the use of contempt proceedings is not without limitations, and thus should be used sparingly in situations where probation revocation

or other sentencing provisions are available. In particular, we would closely consider any situation in which it appeared that a trial court was using contempt proceedings in an attempt to increase the maximum period of incarceration applicable for the offense in the underlying case. However, since in this case, the 30-days imposed for contempt is less than the maximum penalty of 90-days to which appellant could be sentenced for his underlying offense, that issue is not before us. Nor do we address the issue of whether any time served on a contempt citation in this situation would act to reduce [\*\*19] the amount of time that could be imposed on the underlying sentence". *State v. Patton*, *supra* 2007 Ohio 1296 at P 15.

[\*P47] The issue of whether the juvenile court was using the violation of a prior court order proceedings in an attempt to increase the maximum period of incarceration applicable for the offense in the underlying case is not an issue before us in the case at bar. Nor do we address the issue of whether any time served on a violation of a prior court order citation in this situation would act to reduce the amount of time that could be imposed on the underlying sentence. In the case at bar, appellant was subject to the same dispositional alternatives whether the action was filed as a revocation of probation or as a violation of a prior court order. Detention was permissible because either charge was classified as a delinquency, not as a status offense.

[\*P48] Because delinquency proceedings are fundamentally different from adult criminal proceedings, not all constitutional protections afforded to adult criminals have been extended to juveniles. *Schall v. Martin* (1984), 467 U.S. 253, 263, 104 S. Ct. 2403, 2409, 81 L. Ed. 2d 207. Because a juvenile has a liberty interest in freedom from institutional restraints, [\*\*20] the *due process clause of the Fifth Amendment to the United States Constitution*, applicable to the several states pursuant to the *Fourteenth Amendment* thereto, is applicable to juvenile detention proceedings. *Schall*, 467 U.S. at 263, 104 S. Ct. at 2409; *In re Gault* (1967), 387 U.S. 1, 13-14, 87 S. Ct. 1428, 1436-37, 18 L. Ed. 2d 527. Pretrial detainment of juveniles is thus measured by the "fundamental fairness" due process standard established in *In re Gault*, 387 U.S. at 29-30, 87 S. Ct. at 1444-45, and *In re Winship* (1970), 397 U.S. 358, 365-68, 90 S. Ct. 1068, 1073-75, 25 L. Ed. 2d 368. *Schall*, 467 U.S. at 263, 104 S. Ct. at 2409. Decisions articulating due process standards for evaluating the circumstances wherein a juvenile may be detained have sought to accommodate the goals and philosophies of the juvenile system within the due process framework of fundamental fairness.

[\*P49] The conclusion that liberty interests possessed by juveniles are not fundamental rights is based in part on the fact that unlike an adult, a juvenile is always

subject to some measure of custodial supervision. *Flores*, 507 U.S. at 292, 301-303, 113 S. Ct. at 1447-48; *Schall*, 467 U.S. at 265, 104 S. Ct. at 2410. Juveniles "are assumed to be subject [\*\*21] to the control of their parents, and if parental control falters, the State must play its part as *parens patriae*." *Schall*, 467 U.S. at 265, 104 S. Ct. at 2410; see *New Jersey v. T.L.O.* (1985), 469 U.S. 325, 336, 105 S. Ct. 733, 739-40, 83 L. Ed. 2d 720. In addition, juveniles are not assumed to have the capacity to provide independently for themselves. *Schall*, 467 U.S. at 265, 104 S. Ct. at 2410; see *Flores*, 507 U.S. at 301-303, 113 S. Ct. at 1447-48.

[\*P50] In the case at bar, appellant, prior to entering her admission to the charge, was never remanded to the detention center as a result of any dispositional order of the juvenile court. Rather, any detention of appellant was pre-adjudicatory and pre-dispositional. We note that the juvenile court conducted a detention hearing in accordance with *Juv. R. 7* on September 19, 2006. At that time the juvenile court remanded appellant to the juvenile attention center pending a pre-trial hearing scheduled for October 4, 2006. The juvenile court found pursuant to *Juv. R. 7* (A) (2) and (3) that detention of appellant was necessary because she may abscond and further that appellant had no parent, guardian, custodian, or other person able to provide supervision and care [\*\*22] for her and to return her to court when required. The trial court continued the detention after the pre-trial hearing finding that detention was necessary to protect the appellant and because she may abscond. (Magistrates Order, October 4, 2006). Trial was scheduled for October 11, 2006. On that date appellant entered an admission to the charge.

[\*P51] In the case at bar, it does not appear that the appellant filed a motion for release pursuant to *Juv. R. 7(G)* alleging that she had been held in excess of ninety days in violation of *R.C. 2151.34* at any time prior to entering her admission to the charge. The juvenile court specifically noted that it would review the detention order if appellant's circumstances were to change. (T. at 6). At all times, appellant was represented by appointed counsel. Appellant was notified in writing of the conduct that was alleged to be in violation of the prior court order by the complaint filed September 18, 2006. (T. at 10). The juvenile court informed appellant of her right to a trial in which the State would have to prove the allegations beyond a reasonable doubt. (T. at 11). The court further explained to appellant her right to remain silent or to testify; [\*\*23] to subpoena witnesses; and to cross-examination of the State's witnesses. (Id.). The juvenile court further explained the possible dispositions should appellant admit the violation or be found guilty after trial. (Id.). Accordingly, appellant's due process rights were not violated.

[\*P52] Appellant's main disagreement with the use of delinquency adjudication for violation of a prior court order concerns the balance between the legislative policy of discouraging the incarceration of status offenders and the assurance of sufficient authority for courts to enforce orders. This view was espoused by Justices Sweeney, Wright and Herbert R. Brown in a case that the Ohio Supreme Court declined to decide:

[\*P53] "Court orders should not be ignored with impunity by children, and violation of a court order may be the basis for a finding of delinquency. *R.C. 2151.02(B)*. However, the contempt powers of a court should not be invoked quickly in this context and a status offender who has departed a shelter on one occasion should not be given the 'taint' of criminality and adjudicated or treated as a juvenile delinquent. Under *R.C. 2151.354* an unruly child may be left in the status of an unruly child but treated [\*\*24] as a delinquent and incarcerated in a detention facility because of failure of 'treatment or rehabilitation'. . . Before such a detention placement of an unruly child or the bootstrapping of status from unruly to delinquent occurs for violation of a court order, the following criteria should be met:

[\*P54] "(1) The juvenile should be given sufficient notice to comply with the order and understand its provision;

[\*P55] "(2) violation of a court order must be egregious;

[\*P56] "(3) less restrictive alternatives must be considered and found to be ineffective; and

[\*P57] "(4) special confinement conditions should be arranged so that the status offender is not put with underage criminals. See *Juv.R. 7(H)* and *In Interest of D.L.D.* (1983), 110 Wis.2d 168, 182, 327 N.W.2d 682, 689". *In re Trent* (1989), 43 Ohio St. 3d 607, 609, 539 N.E.2d 630, 632.

[\*P58] In the case at bar, it must first be observed that appellant was initially detained on the basis of allegations that she committed the offenses of obstructing official business, a misdemeanor of the second degree if committed by an adult and disorderly conduct, a misdemeanor of the fourth degree if committed by an adult. These offenses are not status offenses. To the extent [\*\*25] the juvenile's analysis is focused exclusively on the assumption that appellant was detained on the basis of an alleged status offense, the analysis is fundamentally flawed. Had the State pursued a motion to revoke probation as appellant suggests was the proper course of action, the sentence imposed on appellant would be as a reinstatement of her original sentence as punishment for the offenses of obstructing official business and disorderly conduct --not for running away from home. An

initial sentence of probation is deemed to be conditional and not final. *In re Kelly* (Nov. 7, 1995), *Franklin App. No. 95-APF05-613*, 1995 Ohio App. LEXIS 4961. (Citations omitted). Thus, where probation is conditioned on certain terms, the sentence can be modified for noncompliance with those terms. *Id.* Upon revocation of probation a court may impose any sentence that it could have originally imposed. *In re Herring* (July 10, 1996), *Summit App. No. 17553*, 1996 Ohio App. LEXIS 3017; *In the Matter of: Cordale R.* (Jan. 10, 1997), *Erie App. No. E-96-019*, 1997 Ohio App. LEXIS 18. In the case at bar, upon revocation of appellant's probation the juvenile court would be free to impose any of the dispositions available for a delinquent-misdemeanant pursuant to *R.C. 2152.19*. Having previously [\*\*26] been adjudicated as a delinquent child at the original adjudicatory hearing, the subsequent adjudication for violation of a prior court order did not transform a status offender into a delinquent. The legislative policy, and the related procedures, to discourage incarceration of status offenders are not invoked with delinquent juveniles. The legislature intended to treat status offenders differently than delinquents. The legislature's intent was demonstrated by requiring application of distinct criteria before a status offender may be incarcerated. Appellant is not a status offender, and thus does not fall within the legislative concerns regarding the dispositions available for status offenders codified in *R.C. 2151.354*.

[\*P59] Accordingly, appellant's first and second assignments of error are overruled.

### III.

[\*P60] In her third assignment of error appellant claims that the trial court's actions in prosecuting her for violating a prior court order constitute multiple punishments in violation of his right to freedom from double jeopardy under the *Fifth and Fourteenth Amendments to the United States Constitution* and *Section 16, Article I, of the Ohio Constitution*.

[\*P61] Application of the *Double Jeopardy Clause* [\*\*27] depends upon the legitimacy of a defendant's expectation of finality in the judgment. *In re Kelly* (Nov. 7, 1995), *Franklin App. No. 95APF05-613*. In the instant case, as in *Kelly*, appellant did not have a legitimate expectation that her sentence of community control sanctions was complete at the time the court prosecuted the second violation of a prior court order charge because her sentence placing her under community control sanctions was conditioned upon his compliance with the terms and conditions of the community control sanctions and the orders of the court.

[\*P62] In addressing the authority of a court to commit a juvenile to DYS for a probation violation, it

has been held that a court may properly commit a delinquent minor to DYS for a probation violation, even though the minor was originally given only probation and a suspended commitment was not imposed at the time of the initial disposition. *In re Herring* (July 10, 1996), *Summit App. No. 17553*, 1996 Ohio App. LEXIS 3017, at \*6-7. Further, committing a juvenile to a detention center after a probation violation does not punish that juvenile twice for the same offense. *In re Kelly*, *supra*, 1995 Ohio App. LEXIS 4961, at \*10-11. A violation of a prior court order is a separate and distinct [\*\*28] act for which punishment can be imposed. Such punishment does not constitute multiple punishments for the same offense.

[\*P63] Appellant's third assignment of error is overruled.

### IV.

[\*P64] The appellant's contention in her fourth assignment of error that her due process rights were violated because the juvenile court failed to inform her at the time of her original disposition of the consequences of a violation of court's order is not properly before this court. Appellant has failed to provide a transcript of the original dispositional hearing and the 2005 dispositional hearing for appellant's first violation of a prior court order charge. "The duty to provide a transcript for appellate review falls upon the appellant. This is necessarily so because an appellant bears the burden of showing error by reference to matters in the record." *Knapp v. Edwards Laboratories* (1980), 61 Ohio St.2d 197, 199, 400 N.E.2d 384, citing *State v. Skaggs* (1978), 53 Ohio St.2d 162, 163, 372 N.E.2d 1355. This requirement is set forth in *App.R. 9(B)*, which provides, in pertinent part, as follows: " \* \* \* the appellant shall in writing order from the reporter a complete transcript or a transcript of such parts of the proceedings not already on file as he [\*\*29] deems necessary for inclusion in the record \* \* \*." Further, "[w]hen portions of the transcript necessary for resolution of assigned errors are omitted from the record, the reviewing court has nothing to pass upon and thus, as to those assigned errors, the court has no choice but to presume the validity of the lower court's proceedings, and affirm." *Knapp at 199*.

[\*P65] In the case sub judice, appellant did not meet her burden, under *App.R. 9(B)*, and supply this Court with a transcripts of the proceedings from her original admission and the original disposition. Nor were transcripts provided from the 2005 adjudication for appellant's first violation of a prior court order charge. If such transcripts were unavailable other options were available to appellant in order to supply this Court with a transcript for purposes of review. Specifically, under *App.R. 9(C)*, appellant could have submitted a narrative

transcript of the proceedings, subject to objections from appellee and approval from the trial court. Also, under *App.R. 9(D)*, the parties could have submitted an agreed statement of the case in lieu of the record. The record in this matter indicates appellant did not attempt to avail herself [\*\*30] of either *App.R. 9(C)* or *9(D)*.

[\*P66] We further note that appellant was previously charged with violation of a prior court order on October 24, 2005 and plead true to that charge on November 18, 2005. Appellant did not appeal this sentence, which she could have, and challenged the trial court's failure to inform her of the potential punishment for violating the terms of her probation or of any of the court's orders. The filing of a timely notice of appeal is a prerequisite to establishing jurisdiction in a court of appeals. Therefore, while in the general sense, this court has jurisdiction to hear appeals in juvenile cases, that jurisdiction must be invoked by the timely filing of a notice of appeal. The failure to file a timely notice of appeal is a jurisdictional requirement that cannot be ignored. *State v. Alexander, 10th Dist. Nos. 05AP-129, 05AP-245, 2005 Ohio 5997 at P17.*

[\*P67] Having previously been adjudicated a delinquent for violating a prior court order the appellant was keenly aware that her disregard for the terms of her probation or any court order would result in additional sanctions.

[\*P68] Finally we would note that failure of the trial court to notify an offender of the potential prison [\*\*31] sentence that may be imposed for a violation of community control sanctions only prohibits the court from sentencing the offender to prison; it does not prohibit the trial court from any other dispositional alternative in response to a defendant's violation of the terms of his or her community control sanctions. In the case at bar, appellant was not remanded to a term of detention in either the juvenile attention center or the Department of Youth Services.

[\*P69] Accordingly, appellant's fourth assignment of error is overruled.

V.

[\*P70] Appellant's argument in her fifth assignment of error that *R.C. 2152.02* is void for vagueness must also fail. It is not unreasonable to expect persons of ordinary intelligence to realize that disobedience of an order of the court will result in sanctions. As we have noted the State must prove that the individual had actual

notice of the court's order, and further that the individual intended to defy the order. Criminal contempt must be proved beyond a reasonable doubt. *Brown v. Executive 200, Inc. (1980), 64 Ohio St.2d 250, 416 N.E.2d 610 at syllabus.* No where does the record reflect that appellant ever raised the defense that she did not know about the court's orders [\*\*32] or that she was required to abide by the orders. The filing of a timely notice of appeal is a prerequisite to establishing jurisdiction in a court of appeals. Therefore, while in the general sense, this court has jurisdiction to hear appeals in juvenile cases, that jurisdiction must be invoked by the timely filing of a notice of appeal. The failure to file a timely notice of appeal is a jurisdictional requirement that cannot be ignored. *State v. Alexander, 10th Dist. Nos. 05AP-129, 05AP-245, 2005 Ohio 5997 at P17.*

[\*P71] No appeal having been taken by appellant from the original delinquency adjudication and disposition or the prior adjudication for violation of a prior court order, appellant can not now challenge the juvenile court's orders in those respective cases. *Boggs v. Boggs (1997), 118 Ohio App.3d 293, 692 N.E.2d 674.*

[\*P72] Accordingly, appellant's fifth assignment of error is overruled.

[\*P73] The judgment of the Stark County Court of Common Pleas, Juvenile Division, is affirmed.

By Gwin, P.J.,

Wise, J., and

Delaney, J., concur

HON. W. SCOTT GWIN

HON. JOHN W. WISE

HON. PATRICIA A. DELANEY

JUDGMENT ENTRY

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Stark County [\*\*33] Court of Common Pleas, Juvenile Division, is affirmed. Costs to appellant.

HON. W. SCOTT GWIN

HON. JOHN W. WISE

HON. PATRICIA A. DELANEY

LEXSEE 2001 OHIO 1897

IN RE: SAMARA DILLARD

Case Nos. 2001CA00093, 2001CA00121

COURT OF APPEALS OF OHIO, FIFTH APPELLATE DISTRICT, STARK COUNTY

2001 Ohio 1897; 2001 Ohio App. LEXIS 5555

December 3, 2001, Date of Judgment Entry

**PRIOR HISTORY:** [\*1] CHARACTER OF PROCEEDING: Civil appeal from the Stark County Court of Common Pleas, Juvenile Division, Case Nos. JU108926 and JU115287.

**DISPOSITION:** Trial court judgments reversed; cause remanded.

**COUNSEL:** For STATE OF OHIO: ROBERT D. HOROWITZ, Canton, OH.

For SAMARA DILLARD: DAVID H. BODIKER, MOLLY J. BRUNS, Columbus, OH.

**JUDGES:** Hon. W. Scott Gwin, P.J. Hon. Sheila G. Farmer, J. Hon. John W. Wise, J. Gwin, P. J., Gwin, P.J., Farmer, J., and Wise, J., concur.

**OPINION BY:** W. ScottGwin

**OPINION**

Gwin, P. J.,

Samara Dillard, a juvenile, appeals two judgments of the Court of Common Pleas, Juvenile Division, of Stark County, Ohio. In Juvenile Case No. 108926, the court found appellant delinquent for committing the crime of arson in violation of *R.C. 2909.03*. That case is appealed to us in Appellate No. 2001CA00121. In Juvenile Case No. 111705, the court found appellant was delinquent for violation of a prior order entered in the earlier case. That appeal comes before us in Appellate No. 2001CA00093. Appellant assigns four errors to the trial court:

**ASSIGNMENTS OF ERROR**

**ASSIGNMENT OF ERROR NO. 1**

SAMARA DILLARD'S ADMISSION TO THE CHARGE OF ARSON WAS NOT KNOWING, INTELLIGENT, AND VOLUNTARY IN VIOLATION OF THE *FIFTH AND FOURTEENTH AMENDMENTS [\*2] TO THE UNITED STATES CONSTITUTION, ARTICLE I, SECTIONS 10 AND 16 OF THE OHIO CONSTITUTION, AND JUV. R. 29.*

**ASSIGNMENT OF ERROR NO. 2**

THE TRIAL COURT VIOLATED SAMARA DILLARD'S RIGHT TO NOTICE AND DUE PROCESS OF LAW AS GUARANTEED BY THE *FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 16 OF THE OHIO CONSTITUTION* WHEN IT DID NOT FOLLOW THE PROPER PROCEDURES FOR PROBATION REVOCATION.

**ASSIGNMENT OF ERROR NO. 3**

SAMARA DILLARD'S ADMISSION TO THE VIOLATION OF COURT ORDER WAS NOT KNOWING, INTELLIGENT, AND VOLUNTARY IN VIOLATION OF THE *FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, ARTICLE I, SECTIONS 10 AND 16 OF THE OHIO CONSTITUTION AND JUV. R. 29.*

**ASSIGNMENT OF ERROR NO. 4**

THE TRIAL COURT ERRED WHEN IT FAILED TO CREDIT THE DAYS SAMARA DILLARD SERVED IN THE DETENTION CENTER AND THE MULTI-COUNTY RESIDENTIAL TREATMENT CENTER TOWARD THE BALANCE OF HER COMMITMENT.

The record indicates on September 29, 1999, an officer of the Canton Fire Department filed a complaint against appellant, who was at the time age 13, alleging she had set fire to the curtains of her parent's home,

which damaged the walls and window frame, and did smoke [\*3] damage to the home. Appellant had been admitted to the hospital for smoke inhalation. On October 29, 1999, the Juvenile Court held a dispositional hearing, and granted temporary custody of appellant to the Stark County Department of Human Services. The court imposed a minimum six month commitment to the Department of Youth Services, stayed on condition she not violate any court order, probation, or law. In addition, the court ordered participation in an intensive fire starter program, mandatory school attendance, and good behavior in the home, school, and community. On April 25, 2000, appellant appeared in the Juvenile Court charged with violating the court's order. Appellant admitted the violation and disposition was set for May 25, 2000. At the dispositional hearing, appellant was released to the Stark County Department of Human Services, but on July 21, 2000, appellant was placed at the Multi-County Residential Treatment Center until further order of the court. The order also provided appellant could be charged with escape if she left the residential treatment center without permission. On December 27, 2000, appellant appeared in court and admitted to violating the court's prior [\*4] order again. On January 24, the court conducted a dispositional hearing, and committed appellant to the Department of Youth Services for a minimum of six months and the maximum period not to exceed her 21st birthday.

## I

In her first assignment of error, appellant challenges the court's acceptance of her plea of true to the charge of arson. *Juv. R. 29 (D)* requires that a court shall not accept an admission of true without addressing the juvenile personally and determining both that the party is making the admission voluntarily, with understanding of the nature of the allegations and the consequences of admitting them, and also that the juvenile understands an admission waives various rights, including the right to challenge witnesses and evidence, the right to remain silent, and the right to introduce evidence at the hearing. At the hearing on October 5, 1999, the magistrate conducted an exchange with appellant regarding her plea. The magistrate first inquired whether appellant understood she had a right to a trial, and appellant responded "yes." The magistrate inquired whether appellant understood that if there was a trial she would have the right to call and subpoena witnesses and [\*5] the right to cross examine and question the State's witnesses. Appellant responded "yes." The magistrate then inquired whether appellant understood her right to offer evidence on her own behalf or find what information the State has against her, and appellant once again answered "yes." The magistrate asked appellant if she understood that if her plea was accepted, the court could sentence her to the Department

of Youth Services, and appellant responded "yes." Finally, the magistrate asked if she willingly and voluntarily wished to enter a plea of true, and appellant responded "yes." Thereupon the court accepted appellant's plea. Tr. of Proceedings of October 5, 1999, pages 5 and 6. Appellant signed a *Juv. R. 29* form, which listed appellant's rights and the charges against her. The State concedes the magistrate did not strictly comply with *Juv. R. 29*, but nevertheless asserts the magistrate substantially complied with the rule. In the case of *In Re: Royal (1999)*, 132 Ohio App. 3d 496, 725 N.E.2d 685, the Mahoning County Court of Appeals held a waiver form is not a valid substitute for court's duty to personally address a juvenile and determine that the admission was being [\*6] made voluntarily and with an understanding of the juvenile's rights. Daniel Royal was 14 years old at the time of his hearing, as was appellant at the time of hers. In the case of *In Re: West (1998)*, 128 Ohio App. 3d 356, 714 N.E.2d 988, the Court of Appeals for Cuyahoga County discussed the concept of substantial compliance as it pertained to *Juv. R. 29*. The court found substantial compliance with the Juvenile Rule means that under the totality of the circumstances, the record demonstrates the juvenile subjectively understood the implications of his admission and the rights being waived. *West at 359*, citing *State v. Nero (1990)*, 56 Ohio St. 3d 106, 564 N.E.2d 474. The West court found absent a showing of prejudice, if there is substantial compliance with the rule, the court may conclude the plea was voluntarily and intelligently entered. The test for prejudice is whether the plea would otherwise have been made, see *State v. Stewart (1977)*, 51 Ohio St. 2d 86, 5 Ohio Op. 3d 52, 364 N.E.2d 1163. It is clear, then, that substantial compliance is less than complete compliance with the Rule, but sufficient to satisfy the purposes of the Rule, considering the entire [\*7] exchange between the parties. The purpose in the Rule here is explicit; it is intended to ensure a juvenile does not enter a plea of true unless he or she understands the charges, the penalties, and the juvenile's rights before the court. In the case at bar, the court did not explain the nature of the allegations against appellant. In fact, a review of the entire transcript of the hearing on October 5, 1999 discloses the charge of arson was never mentioned. At the outset, the trial court expressed confidence appellant's attorney had spent a great deal of time with her explaining her rights, but we find that it is insufficient to demonstrate on the record the court's independent knowledge that appellant knew of the nature and seriousness of the allegation. Secondly, the court did not explain appellant had the right to remain silent, and that an admission of true to the charge would waive that right. The court did not explain to appellant the State had the burden of proving the charges beyond a reasonable doubt. Finally, the court did not fully explain the penalties appellant faced, other than by advising her she could

be sentenced to the Department of Youth Services. In conclusion, [\*8] we find the dialogue between the court and appellant does not constitute substantial compliance with *Juv. R. 29*. While it is entirely possible the court's previous contact with appellant made it privy to further information about the case and appellant's understanding of proceedings, this court is limited to the record before us. Under the totality of the circumstances, we must find the court should not have accepted appellant's plea of true to the charge of arson. The first assignment of error is sustained.

## II

In her second assignment of error, appellant argues the court did not follow the proper procedures for probation revocation when, after hearings on December 27, 2000, and January 24, 2001, the court committed appellant to the Department of Youth Services. *Juv. R. 35 (B)* directs a court not to revoke probation except after a hearing at which the juvenile is present and has been informed of the grounds on which the revocation is proposed. The court must find the child has violated a condition of probation before the court may revoke the probation. At the hearing on December 27, 2000, it is apparent appellant was distraught, asserting she had been locked up for 7 months, including [\*9] over Christmas. At the outset, appellant asserted she would rather plead true than sit and wait around. The court then addressed appellant, asking her if she understood that if she wanted to, she could continue with her "not true" plea. The court advised her with a "not true" plea she would preserve her right to a trial, and the right to have the State prove the charges against her by proof beyond a reasonable doubt. The court explained to appellant the State would call witnesses, and her attorney could challenge the evidence. Appellant could also take the stand on her own behalf, or remain silent. The court also advised appellant her attorney could call witnesses to testify on her behalf, if she continued her "not true" plea. The court advised appellant on the other hand, if she changed her plea to true there would not be a trial and she would be admitting to the court she had violated the prior court order. The court advised if she pled true it would find her delinquent and could send her to the Department of Youth Services for a minimum period of six months and not to exceed her 21st birthday. The court advised appellant she could be ordered to attend various community action programs, [\*10] sent to the Attention Center, or released to the Department of Job and Family Services. Appellant indicated she understood all that, and wished to plead true. The court then inquired whether anyone was forcing appellant to make the true plea, and appellant responded her lawyer was forcing her. The court responded her attorney was not forcing her to plead true, but was rather telling her if she wanted to have a trial she could. There-

upon appellant asserted she did not know what to plead because she wanted to go home and not to the Department of Youth Services. The court reminded her if she pled "not true" she would be denying the allegations and they would proceed to trial. Appellant then responded "Well if I was denying it that would be lying right there. You know what I did. So I plead true." However, appellant then asked what happened if she pled true, and the court advised her she could be sent to DYS for a minimum of six months not to exceed her 21st birthday. Appellant became upset at the prospect of remaining in custody until her 21st birthday, approximately 7 years. Appellant indicated her caseworker thought she should plead true and appellant wished to know if she could find [\*11] out immediately whether she could go home or not. When the court advised appellant to speak to her attorney, she responded she did not wish to, because her attorney was trying to keep her locked up. Thereupon, appellant pled true and the court accepted the plea. Finally, the court inquired whether appellant had anything to say before it entered sentence. Appellant again expressed distress over being locked up over Thanksgiving and Christmas, and explained to the court she thought she would be released to her family. Once again, it appears the court did not discuss with appellant the specific court orders the State was alleging she had violated. We find the Juvenile Court erred in accepting appellant's plea of true before advising her of the probation conditions she was accused of violating, and ascertaining she understood the implications of pleading true. The second assignment of error is sustained.

## III

In her third assignment of error, appellant asserts her admission to the charge of violating the court order was not made knowingly, intelligently, and voluntarily. Inasmuch we have found in II, supra, that the court failed to notify appellant at the start of the hearing what court [\*12] order she was charged with violating, we must also find her admission to the charge was not made knowingly, intelligently, and voluntarily, especially upon review of the dialogue discussed above in II. The third assignment of error is overruled.

## IV

In her fourth assignment of error, appellant urges the court should have credited her with time served at the Attention Center and Multi-County Residential Treatment Center towards the balance of her commitment. *R.C. 2151.355* requires the court to state in its order of commitment the total number of days that the child has been held in detention in connection with the complaint upon which the order of commitment is based. The State argues appellant did receive 51 days credit for the time she spent in detention between October 5, when she en-

tered a plea of true to the arson charge, until November 19, 1999, when she was released. Appellant, however, asked for time served between May 13, 2000 and February 15, 2001. The State's response is that appellant had pled true to a charge of violation of a prior court order in April of 2000, and it was a result of this charge that she received the disposition placing her [\*13] back into detention. We find the State's argument is flawed. Appellant's plea of true to the charge of violation of a prior court order stemmed from the conditions of probation placed upon her for the original arson charge. The new charge of violation of a prior court order is a condition of probation, not a separate criminal offense bringing with it a separate sentence. Had the State brought a complaint for contempt of court for violation of the prior court or-

der, that may be considered a new charge, but upon this record, it appears the only criminal charge against appellant was the original charge of arson. We find the trial court erred in not giving appellant credit for time served after she pled true to the charge of violating a prior order. Accordingly, the fourth assignment of error is sustained.

For the foregoing reasons, the judgments of the Court of Common Pleas, Juvenile Division, of Stark County, Ohio, are reversed, and the cause is remanded to that court for further proceedings in [\*14] accord with law and consistent with this opinion.

By Gwin, P.J., Farmer, J., and Wise, J., concur

LEXSEE 2008 OHIO 876

IN RE: IAN DOUGLAS KIRBY

Case Nos. 06-CA-6 &amp; 06-CA-91

COURT OF APPEALS OF OHIO, FIFTH APPELLATE DISTRICT, RICHLAND  
COUNTY

2008 Ohio 876; 2008 Ohio App. LEXIS 739

February 29, 2008, Date of Judgment Entry

**PRIOR HISTORY:** [\*\*1]

CHARACTER OF PROCEEDING: Civil Appeal From Richland County Court Of Common Pleas, Juvenile Division, Case Nos. 2002-DEL-02277 & 2005-TR-00810.

**DISPOSITION:** Reversed and Remanded.

**COUNSEL:** For The State of Ohio: JAMES J. MAYER, JR., Richland County Prosecutor, Mansfield, Ohio.

For Ian Douglas Kirby: DAVID H. BODIKER, Ohio Public Defender, AMANDA J. POWELL, Assistant State Public Defender, Office of the Ohio Public Defender, Columbus, Ohio.

**JUDGES:** Julie A. Edwards, P.J., Sheila G. Farmer, J., Patricia A. Delaney, J. Farmer, J. and Delaney, J. concur.

**OPINION BY:** Julie A. Edwards

**OPINION**

*Edwards, J.*

[\*P1] Appellant Ian Douglas Kirby appeals from the December 19, 2005, Judgment Entry of the Richland County Court of Common Pleas, Juvenile Division, in Case No. 2005-TR-00810 and the December 20, 2005, Judgment Entry of the Richland County Court of Common Pleas, Juvenile Division, in Case No. 2002-DEL-02277.

**STATEMENT OF THE FACTS AND CASE**

[\*P2] On December 9, 2002, a complaint was filed in Case No. 2002-DEL02277 alleging that appellant Ian Douglas Kirby (DOB 5/15/89) was a delinquent child. The complaint alleged that appellant had committed one count of rape in violation of *R.C. 2907.02(A)(1)(b)* and *2152.02(F)(1)*, a felony of the first degree if committed

[\*2] by an adult, and one count of gross sexual imposition in violation of *R.C. 2907.05(A)(4)* and *2152.02(F)(1)*, a felony of the third degree if committed by an adult. On January 7, 2003, appellant entered an admission to both counts. A dispositional hearing was set for February 18, 2003.

[\*P3] At the hearing on February 18, 2003, the trial court granted the State's motion to dismiss the charge of gross sexual imposition. Pursuant to a Judgment Entry filed on the same day, appellant was committed to the legal custody of the Ohio Department of Youth Services (DYS) for an indeterminate period of one year to age twenty-one. The sentence was then suspended and appellant was placed on probation. As a condition of probation, appellant was prohibited from viewing or possessing any sexually explicit material or having the same in his home and from using the Internet unsupervised.

[\*P4] Subsequently, on November 28, 2005, a complaint was filed in Case No. 2005-TR-00810 alleging that appellant operated a motor vehicle without a valid license in violation of *R.C. 4510.12(A)* and failed to comply with signal or order of a police officer in violation of *R.C. 2921.331*. At a hearing held on November 29, 2005, a denial [\*\*3] to both charges was entered on behalf of appellant and a pretrial was scheduled for December 14, 2005.

[\*P5] On December 7, 2005, a complaint was filed against appellant in Case No. 2002-DEL-02277 alleging that appellant had violated his probation in such case on or about November 23, 2005, "by virtue of failure to comply with Court order, To Wit: BY VIEWING AND POSSESSING SEXUALLY EXPLICIT MATERIALS, in violation of *Section 2152.02(F)(2) of the ORC.*" An adjudicatory hearing was scheduled for December 14, 2005.

[\*P6] Thereafter, on December 14, 2005, appellant admitted to both counts of the complaint filed in Case

No. 2005-TR-00810 and was deemed to be a juvenile traffic offender. On the same date, appellant admitted to violating his probation in Case No. 2002-DEL-02277 by viewing and possessing sexually explicit materials and was found to be delinquent. A dispositional hearing in both cases was scheduled for December 19, 2005.

[\*P7] Pursuant to a Judgment Entry filed on December 19, 2005 in Case No. 2005-TR-00810, the trial court suspended appellant's right to apply for a driver's license or permit until further order of court, ordered appellant to serve ninety days (90) in detention and then suspended [\*\*4] the same, and ordered appellant to submit to random urinalysis.

[\*P8] As memorialized in a Judgment Entry filed on December 20, 2005, in Case No. 2002-DEL-02277, the trial court committed appellant to DYS for an indeterminate period of one year to age twenty-one.

[\*P9] Appellant now appeals from the trial court's December 19, 2005 Judgment Entry in Case No. 2005-TR-00810. Such case has been assigned Case No. 06-CA-91. Appellant also appeals from the trial court's December 20, 2005 Judgment Entry in Case No. 2002-DEL-02277. Such case has been assigned Case No. 06-CA-06. The two cases were consolidated by this Court.

[\*P10] Appellant specifically raises the following assignments of error on appeal

[\*P11] "I. THE JUVENILE COURT VIOLATED IAN KIRBY'S RIGHT TO DUE PROCESS OF LAW AS GUARANTEED BY THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION; ARTICLE I, SECTION SIXTEEN OF THE OHIO CONSTITUTION; AND JUV.R. 35, WHEN IT FAILED TO FOLLOW THE REQUIREMENTS OF JUV.R. 35(B).

[\*P12] "II. THE TRIAL COURT ERRED WHEN IT DEPRIVED IAN DOUGLAS KIRBY OF HIS RIGHT TO APPLY FOR DRIVING PRIVILEGES, WHEN IT ORDERED IAN TO SERVE NINETY DAYS IN DETENTION, AND WHEN IT ORDERED IAN TO SUBMIT TO RANDOM URINALYSIS, BECAUSE [\*\*5] THE OHIO REVISED CODE DOES NOT PROVIDE FOR SUCH SANCTIONS AS DISPOSITIONAL OPTIONS FOR IAN'S OFFENSE. R.C. 2152.21; *IN RE SPEARS*, 5TH DIST. NO 2005-CA-93, 2006 OHIO 1920; (A-8).

[\*P13] "III. IAN KIRBY WAS DENIED HIS CONSTITUTIONAL RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL UNDER THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 10 AND 16 OF THE OHIO CONSTITUTION."

## I

[\*P14] Appellant, in his first assignment of error, argues that the trial court violated his right to due process in Case No. 2002-DEL-02277 by failing to comply with the requirements of *Juv.R. 35(B)*. We agree.

[\*P15] In *In re Gault* (1967), 387 U.S. 1, 87 S.Ct. 1428, 18 L. Ed. 2d 527, the United States Supreme Court held that juveniles facing possible commitment must be afforded the protections of the *Due Process Clause of the Fourteenth Amendment*. As noted by the court in *In re Royal* (1999), 132 Ohio App.3d 496, 507, 725 N.E.2d 685, "*Juv.R. 35(B)* recognizes a juvenile's due process rights through its requirements."

[\*P16] Revocation of probation proceedings are governed by *Juv.R. 35(B)*. Such section reads: "Revocation of probation. The court shall not revoke probation except after a hearing at which the child shall be present [\*\*6] and apprised of the grounds on which revocation is proposed. The parties shall have the right to counsel and the right to appointed counsel where entitled pursuant to *Juv. R. 4(A)*. Probation shall not be revoked except upon a finding that the child has violated a condition of probation of which the child had, pursuant to *Juv.R. 34(C)*, been notified."

[\*P17] As noted by this Court in *In re Samara Dillard*, Stark App. No. 2001 CA 00121, 2001 Ohio 1897, "*Juv. R. 35(B)* directs a court not to revoke probation except after a hearing at which the juvenile is present and has been informed of the grounds on which the revocation is proposed." 2001 Ohio 1897[slip op] at 3. A court commits reversible error if it fails to comply with the requirements of *Juv.R. 35(B)*. 2001 Ohio 1897 [slip op] at 3. See *In re Royal*, supra.

[\*P18] We find, upon our review of the record in the case sub judice, that the trial court did not adequately apprise appellant of the grounds upon which probation revocation was proposed. As is stated above, on December 7, 2005, a complaint was filed against appellant in Case No. 2002-DEL-02277 alleging that appellant had violated his probation in such case "by virtue of failure to comply with Court order, To Wit: BY VIEWING AND POSSESSING [\*\*7] SEXUALLY EXPLICIT MATERIALS." An adjudicatory hearing was scheduled for December 14, 2005.

[\*P19] At the hearing on December 14, 2005, the trial court stated that "this is the probation violation adjudicatory hearing for uh, uh probation violation # 7, failure to comply with rules of probation,..." Transcript of Dec. 14, 2005 hearing at 2. The trial court further stated on the record, in relevant part, as follows:

[\*P20] "The Court: I don't seem to have the probation violation charge before me, but it's [sic] failure to comply with uh probation rules.

[\*P21] "Mr. Fry [appellant's counsel]: I don't have that either, Judge.

[\*P22] "Ms. Pitzer: Rules of probation.

[\*P23] "The Court: So the question is whether there needs to be any explanation on that, Attorney Fry.

[\*P24] "Mr. Fry: No, Your Honor, we'll waive any kind of explanation or reading on the probation violation.

[\*P25] "The Court: All right. So noted as a matter of record. So you have the probation violation, you have the receiving stolen property, <sup>1</sup> and then you have the fleeing case and operating without a license. Do you understand that?

<sup>1</sup> Appellant was charged with receiving stolen property in Case No. 2005-DEL-01210 and was committed to the Ohio Department of Youth Services <sup>1</sup> on such charge for an indeterminate period of time of 6 months to age 21. The trial court further ordered that such commitment run consecutively to the imposed commitment in Case No. 2002-DEL-02277. The court suspended disposition of such commitment under specified terms and conditions. Appellant has not appealed Case No. 2005-DEL-01210.

[\*P26] "Ian Douglas Kirby: Yes, sir." Transcript of Dec. 14, 2005, hearing at 5.

[\*P27] In accepting appellant's admission to the probation violation, the trial court asked appellant if "for the probation violation in Case No. 2002-DEL-02277, probation violation # 7, failure to comply with rules of probation, do you admit or deny?" Transcript of Dec. 14, 2005, hearing at 11. Appellant then admitted the same.

[\*P28] Based on the foregoing, we find that the trial court did not advise appellant of the grounds upon which revocation of his probation was proposed. As noted by appellee, the trial court never mentioned the condition of probation that appellant allegedly violated at any time during the hearing. The trial court did not have the probation violation charge before him at the time of the hearing and thus failed to explain the same to appellant. We find, therefore, that <sup>1</sup> *Juv.R. 35(B)* was not complied with and that appellant's due process rights were violated.

[\*P29] Appellant's first assignment of error is, therefore, sustained.

II

[\*P30] Appellant, in his second assignment of error, argues that, in Case No. 2005-TR-00810, the trial court erred when it imposed sanctions on him that are not provided for in *R.C. 2152.21*. We agree. We note that appellee State of Ohio, in its brief, concedes that the trial court erred in imposing the challenged sanctions on appellant.

[\*P31] Appellant was found to be a juvenile traffic offender in Case No. 2005-TR00810. Pursuant to a Judgment Entry filed on December 19, 2005 in such case, the trial court suspended appellant's right to apply for a driver's license or permit until further order of court, ordered appellant to serve ninety days (90) in detention and then suspended the same, and ordered appellant to submit to random urinalysis.

[\*P32] *R.C. 2152.21* states, in relevant part, as follows: (A) Unless division (C) of this section applies, if a child is adjudicated a juvenile traffic offender, the court may make any of the following orders of disposition:

[\*P33] "(1) Impose costs and one or more financial sanctions in accordance with *section 2152.20 of the Revised Code*;

[\*P34] <sup>1</sup> "(2) Suspend the child's driver's license, probationary driver's license, or temporary instruction permit for a definite period not exceeding two years or suspend the registration of all motor vehicles registered in the name of the child for a definite period not exceeding two years. A child whose license or permit is so suspended is ineligible for issuance of a license or permit during the period of suspension. At the end of the period of suspension, the child shall not be reissued a license or permit until the child has paid any applicable reinstatement fee and complied with all requirements governing license reinstatement.

[\*P35] "(3) Place the child on community control;

[\*P36] "(4) If the child is adjudicated a juvenile traffic offender for an act other than an act that would be a minor misdemeanor if committed by an adult and other than an act that could be disposed of by the juvenile traffic violations bureau serving the court under *Traffic Rule 13.1* if the court has established a juvenile traffic violations bureau, require the child to make restitution pursuant to *division (A)(3) of section 2152.20 of the Revised Code*;..."

[\*P37] While appellant's right to apply for a driver's license or permit was <sup>1</sup> suspended by the trial court, we find that the trial court did not have authorization to do so. *R.C. 2152.21(A)(2)* permits a trial court to suspend a child's driver's license, probationary driver's license, or temporary instruction permit. Appellant did not have a driver's license or a permit. The trial court could not suspend appellant's right to apply for

driving privileges under such section. See *In re Spears*; *Licking App. No. 2005-CA93*, 2006 Ohio 1920, reversed on other grounds 115 Ohio St.3d 267, 2007 Ohio 4919, 874 N.E.2d 1177. This Court, in *Spears*, noted that the legislature, in R.C. 2152.19, had granted juvenile courts the right to suspend a juvenile's driver's license or ability to obtain the same in certain specific situations. This Court held that, because none of the situations applied, the trial court had no authority to suspend the appellant's future right to obtain a driver's license.

[\*P38] We further find that the trial court lacked authority to sentence appellant to ninety days in detention. R.C. 2152.21(A)(5)(a) gives a trial court authority to commit a child to a detention facility for no longer than five days if the "child is adjudicated a juvenile traffic offender for [\*\*12] committing a violation of division (A) of section 4511.19 of the Revised Code or of a municipal ordinance that is substantially equivalent to that division..." In addition, R.C. 2152.21(A)(6) states as follows: "(6) If, after making a disposition under divisions (A)(1) to (5) of this section, the court finds upon further hearing that the child has failed to comply with the orders of the court and the child's operation of a motor vehicle constitutes the child a danger to the child and to others, the court may make any disposition authorized by divisions (A)(1), (4), (5), and (8) of section 2152.19 of the Revised Code, except that the child may not be committed to or placed in a secure correctional facility unless authorized by division (A)(5) of this section, and commitment to or placement in a detention facility may not exceed twenty-four hours."

[\*P39] R.C. 2152.21(A)(5)(a) and 2152.21(A)(6) are inapplicable. Appellant was not adjudicated a traffic offender for committing a violation of R.C. 4511.19(A) and, since this was the initial disposition of the court as to the traffic offenses, the court could not find that appellant had violated prior orders of the court for these offenses.

[\*P40] Finally, [\*\*13] while the trial court, in its December 19, 2005, Judgment Entry, ordered appellant to submit to random urine screens, we note that there is no such sanction authorized by R.C. 2152.21. We further note that the trial court did not place appellant on community control and, therefore, could not have ordered random urine screens as a condition of community control.

[\*P41] Appellant's second assignment of error is, therefore, sustained.

### III

[\*P42] Appellant, in his third assignment of error, argues that he was deprived of his right to effective assistance of trial counsel.

[\*P43] "A claim of ineffective assistance of counsel requires a two-prong analysis. The first inquiry is whether counsel's performance fell below an objective standard of reasonable representation involving a substantial violation of any of defense counsel's essential duties to appellant. The second prong is whether the appellant was prejudiced by counsel's ineffectiveness. *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674; *State v. Bradley* (1989), 42 Ohio St.3d 136, 538 N.E.2d 373.

[\*P44] "In determining whether counsel's representation fell below an objective standard of reasonableness, judicial scrutiny of counsel's [\*\*14] performance must be highly deferential. *Bradley, supra* at 142, 538 N.E.2d 373. Because of the difficulties inherent in determining whether effective assistance of counsel was rendered in any given case, there is a strong presumption that counsel's conduct fell within the wide range of reasonable, professional assistance. *Id.*

[\*P45] "In order to warrant a reversal, appellant must additionally show he was prejudiced by counsel's ineffectiveness. 'Prejudice from defective representation sufficient to justify reversal of a conviction exists only where the result of the trial was unreliable or the proceeding fundamentally unfair because of the performance of trial counsel.' *State v. Carter* (1995), 72 Ohio St.3d 545, 558, 1995 Ohio 104, 651 N.E.2d 965, (citing *Lockhart v. Fretwell* (1993), 506 U.S. 364, 370, 113 S.Ct. 838, 122 L.Ed.2d 180). Further, both the United States Supreme Court and the Ohio Supreme Court have held that a reviewing court 'need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies.' *Bradley, supra* at 143, 538 N.E.2d 373 (quoting *Strickland, supra* at 697)." *State v. Rembert, Richland App. No. 04 CA 66*, 2005 Ohio 4718, at PP 18-20.

[\*P46] [\*\*15] In the case sub judice, appellant specifically contends that his trial counsel was ineffective in failing, in Case No. 2002-DEL-02277, to object to the trial court's failure to adhere to *Juv.R. 35(B)* and, in Case No. 2005-TR-00810, to object to the trial court's imposition of sanctions that were not authorized by R.C. 2152.21.

[\*P47] Having sustained both of appellant's assignments of errors, appellant's third assignment of error is moot. See *State v. Redman, Stark App. No. 2002CA00097*, 2003 Ohio 646.

[\*P48] Accordingly, the judgment of the Richland County Court of Common Pleas, Juvenile Division, is reversed and this matter is remanded to the trial court for further proceedings.

By: Edwards, P. J.  
Farmer, J. and  
Delaney, J. concur  
s/ Julie A. Edwards  
s/ Sheila G. Farmer  
s/ Patricia A. Delaney  
JUDGES  
JUDGMENT ENTRY

For the reasons stated in our accompanying Memorandum-Opinion on file, the judgment of the Richland County Court of Common Pleas, Juvenile Division, is reversed and remanded. Costs assessed to appellee.

s/ Julie A. Edwards  
s/ Sheila G. Farmer  
s/ Patricia A. Delaney  
JUDGES

LEXSEE 43 OS.3D 607

## IN RE TRENT, ALLEGED DELINQUENT CHILD

No. 88-944

Supreme Court of Ohio

43 Ohio St. 3d 607; 539 N.E.2d 630; 1989 Ohio LEXIS 121

April 26, 1989, Submitted

June 14, 1989, Decided

**PRIOR HISTORY:** [\*\*\*1]

APPEAL from the Court of Appeals for Ross County, No. 1380.

**DISPOSITION:** This appeal is dismissed, *sua sponte*, as having been improvidently allowed.

**HEADNOTES**

*Appeal dismissed as improvidently allowed.*

**COUNSEL:** Alfred E. Baerkircher, for appellant.

Richard G. Ward, prosecuting attorney, and Christine B. Henthorne, for appellee.

Alice C. Shotton and Mark I. Soler, urging reversal for *amicus curiae*, the Youth Law Center.

**JUDGES:** MOYER, C.J., HOLMES, DOUGLAS and RESNICK, JJ., concur. SWEENEY, WRIGHT and H. BROWN, JJ., dissent.

**OPINION**

NONE

**DISSENT BY: WRIGHT****DISSENT**

[\*607] [\*\*630] WRIGHT, J., dissenting.

I respectfully dissent from my colleagues' vote that this appeal was improvidently allowed. I would hear this case on its merits because it involves important issues concerning the well-being of the hundreds of children in our state who run away from their homes -- an act which is not a crime for an adult, but because of the child's status, *i.e.*, being underage, brings him or her within the jurisdiction of the juvenile court. What does happen and what should happen under Ohio law to these "status of-

fenders" is what this case is about. This is a subject which has never been adequately addressed by this court and one [\*\*\*2] which has been considered important enough to be addressed by numerous other state supreme courts.<sup>1</sup>

1 State statutory schemes vary, but most states have the same overall purposes as the Ohio statutory scheme and provide for separate custody of differently classified juveniles. The California Supreme Court in *In re Michael G* (1988), 44 Cal. 3d 283, 243 Cal. Rptr. 224, 747 P. 2d 1152, cited opinions from seven other states and adopted the standards first set forth in *In Interest of D.L.D.* (1983), 110 Wis. 2d 168, 327 N.W. 2d 682. These standards are summarized *infra*.

The salutary purpose of the Juvenile Code is to "provide for the care, protection, and mental and physical development of children \* \* \* [and to] \* \* \* remov[e] the consequences of criminal behavior and the taint of criminality from children committing delinquent acts and to substitute therefor a program of supervision, care and rehabilitation[.] \* \* \*" (Emphasis added.) R.C. 2151.01; see, also, [\*\*631] *Juv. R. 1(B)*; *In re M.D.* (1988), 38 [\*\*\*3] *Ohio St. 3d 149*, 527 N.E. 2d 286. The record in this case shows that Tina, at age sixteen, was adjudicated an "unruly" child as a result of running away from a clearly abusive home situation. "Unruly" is defined in R.C. 2151.022, and it encompasses the status-offender runaway. There is no indication in this record that Tina was notified of her statutory right to counsel during that "adjudication." Such a silent record has been held to constitute reversible error. See *In re Kriak* (1986), 30 *Ohio App. 3d 83*, 30 *OBR 140*, 506 N.E. 2d 556. Indeed, the record indicates that counsel was not appointed until long [\*608] after the "adjudication." However, this unhappy problem is not the focus of my disagreement with my colleagues.

43 Ohio St. 3d 607, \*, 539 N.E.2d 630, \*\*;  
1989 Ohio LEXIS 121, \*\*\*

Construing the applicable juvenile statutes liberally and the criminal statutes at issue narrowly, as is clearly required by law, I must conclude that the shelter where Tina was placed was *not* a place of detention for the purposes of the criminal escape statute, *R.C. 2921.34*, violation of which is a felony of the fourth degree. "Custody" or "care" under the Juvenile Code must *not* be confused with "arrest" or "confinement," the terms used in defining [\*\*\*4] "detention" and "detention facility" as they appear in *R.C. 2921.34*. See *R.C. 2921.01(E)* and *(F)*. The order that adjudicated Tina as unruly stated that she should "remain in the *temporary shelter care* of the Ross County Children's Services," in order for that agency to conduct a "pre-dispositional investigation \* \* \*," (Emphasis added.) The Committee Comment to *R.C. 2921.34* refers to escape from a "lock-up, jail, workhouse, *juvenile detention home*, or penal or reformatory institution." (Emphasis added.) Furthermore, the criminal escape statute and the Committee Comment clearly indicate that the defendant must have "kn[own] [s]he was under detention." The order herein certainly does *not* supply that notice.

Local Rule II(3) of the Ross County Juvenile Court lists three facilities for juveniles:

"The South Central Ohio Regional Detention Center is hereby designated as a proper place of *detention* for juveniles.

"The Children's Service Center, located at Western Avenue and Locust Street in the City of Chillicothe, Ohio, is hereby designated as an emergency *shelter care* facility for juveniles.

"The residential facility operated as Roweton's Boy's Ranch, Inc., is [\*\*\*5] hereby designated as a *non-secure detention* facility for juveniles." (Emphasis added.)

Tina was sent to the second facility noted above which is, of course, a *shelter*. The Executive Secretary of Ross County Children's Services testified that the *shelter* is *not* a "detention facility."

*R.C. 2151.011(B)(4)* defines a "shelter" for purposes of the Juvenile Code as follows:

"Shelter" means the temporary care of children in physically unrestricted facilities pending court adjudication or disposition."

By rule children who are alleged to be neglected are not to be put in any facility where there are children who are alleged to be delinquent, unless upon order of the court. *Juv. R. 7(H)*. Given the three choices for placement of children in Ross County, the shelter is by elimination the facility where neglected and unruly children should be placed, since *R.C. 2151.354* mandates that

unruly children be treated, initially at least, as neglected children.

Furthermore, *Juv. R. 7* uses the words "detention or shelter care" throughout as the choices for children in custody. *R.C. 2921.34*, the basis of the warrant that was issued to arrest Tina after she walked away [\*\*\*6] from the shelter clearly contemplates a "juvenile detention" facility. Accordingly, I can only conclude that *R.C. 2921.34* does not apply under the facts in this case.

In addition, I must conclude that adjudicating Tina a juvenile delinquent for walking away from a shelter runs counter to *R.C. 2151.354*, the statute dealing with disposition of an unruly child.

The statutory classification of an unruly child has been in existence only [\*609] since 1969. The General Assembly provided specific [\*\*632] statutory classifications of children and limited the court's discretion in dealing with them. Court disposition of unruly children is set forth in *R.C. 2151.354*, which requires the court to treat unruly children as set forth therein or as neglected children. The statute further provides:

"If after making such disposition the court finds, upon further hearing, that the *child is not amenable to treatment or rehabilitation under such disposition*, the court may make a disposition otherwise authorized in section 2151.355." (Emphasis added.) In other words, only after such a showing can an unruly child be treated as a juvenile delinquent and be placed in a detention facility for delinquents.

[\*\*\*7] No treatment or rehabilitation had yet been undertaken for Tina at the time she walked away from the shelter and was then adjudicated a delinquent. The court certainly did not set forth such findings as required by *R.C. 2151.354*. The General Assembly emphasized its preference that unruly children, *i.e.*, status offenders, at the outset at least, be treated as neglected children.

What Tina was found guilty of is in some measure akin to a probation violation or even contempt when she did not "subject herself to the reasonable control of the staff" of the shelter. This was required under the first condition listed in the court's entry placing her in the shelter after she was adjudicated as "unruly."

Court orders should not be ignored with impunity by children, and violation of a court order may be the basis for a finding of delinquency. *R.C. 2151.02(B)*. However, the contempt powers of a court should not be invoked quickly in this context and a status offender who has departed a shelter on one occasion should not be given the "taint" of criminality and adjudicated or treated as a juvenile delinquent. Under *R.C. 2151.354* an unruly child may be left in the status of an unruly [\*\*\*8] child but treated as a delinquent and incarcerated in a detention

43 Ohio St. 3d 607, \*; 539 N.E.2d 630, \*\*;  
1989 Ohio LEXIS 121, \*\*\*

facility because of failure of "treatment or rehabilitation." It is this sort of placement situation that is contemplated by the criminal escape statutes when they include "unruly" children within their purview. Before such a detention placement of an unruly child or the bootstrapping of status from unruly to delinquent occurs for violation of a court order, the following criteria should be met:

(1) The juvenile should be given sufficient notice to comply with the order and understand its provisions;

(2) violation of a court order must be egregious;

(3) less restrictive alternatives must be considered and found to be ineffective; and

(4) special confinement conditions should be arranged so that the status offender is not put with underage criminals. See *Juv. R. 7(H)* and *In Interest of D.L.D.* (1983), 110 Wis. 2d 168, 182, 327 N.W. 2d 682, 689. The

facts in this case obviously do not meet the above criteria.

Bootstrapping of a status offender into a juvenile delinquent has been rightly termed a "vicious practice."<sup>2</sup> We have tacitly approved a result that seems to allow such "bootstrapping." I believe that [\*\*\*9] reading *in pari materia* all the statutes applicable to juveniles requires a holding that the bootstrapping that occurred here was too hasty, contrary to law, and not in the best interest of anyone.

<sup>2</sup> *In re Ronald S.* (1977), 69 Cal. App. 3d 866, 871, 138 Cal. Rptr. 387, 391.

SWEENEY and H. BROWN, JJ., concur in the foregoing dissenting opinion.

LEXSEE 1997 OHIO APP. LEXIS 4739

STATE OF OHIO, Plaintiff-Appellee v. KIMBERLY S. LOUDEN, Defendant-Appellant

C.A. Case No. 97-CA-05

COURT OF APPEALS OF OHIO, SECOND APPELLATE DISTRICT, CHAMPAIGN COUNTY

1997 Ohio App. LEXIS 4739

October 24, 1997, Rendered

**PRIOR HISTORY:** [\*1] T.C. Case No. 96-TRC-3129.

**DISPOSITION:** Judgment reversed.

**COUNSEL:** GIL S. WEITHMAN, Urbana, Ohio, Attorney for Plaintiff-Appellee.

DARRELL L. HECKMAN, Urbana, Ohio, Attorney for Defendant-Appellant.

**JUDGES:** BROGAN, J. FAIN, J., and GRADY, J., concur.

**OPINION BY:** BROGAN

**OPINION**

OPINION

BROGAN, J.

Appellant, Kimberly S. Loudon, appeals from a judgment of the Champaign County Municipal Court finding her in contempt and sentencing her to thirty days in jail. We find that the contempt procedure followed by the lower court was insufficient under *R.C. 2705.03*. We further find that the court was without power to issue the sentence condition that appellant was held in contempt for disobeying. Therefore, that condition was void and resulting contempt citation was invalid. Accordingly, we reverse.

I.

Appellee has not filed a brief in this appeal. Consequently, we may accept the appellant's statement of the facts as correct under *App.R. 18(C)*. According to appellant's statement of facts, she was convicted in the Cham-

paign County Municipal Court of driving while intoxicated in violation of *R.C. 4511.19* on December 30, 1996. She was sentenced to seventy-two hours in jail and a fine of \$ 450 plus court [\*2] costs. Appellant was also required, as an additional penalty, to attend thirty Alcoholics Anonymous (AA) meetings within ninety days of the judgment. On March 5, 1997, appellant came before the Champaign Municipal Court in connection with a different case. At that time, the court directly questioned her on her compliance with the earlier sentencing. When appellant admitted she had not been attending AA meetings as ordered, she was sentenced to an immediate thirty days in jail and required to attend thirty AA meetings within ninety days of her release. Appellant was released pending appeal on her own recognizance by order of this court on March 21, 1997.

II.

Appellant's first assignment of error states:

THE TRIAL COURT ERRED IN PUNISHING DEFENDANT-APPELLANT SUMMARILY FOR INDIRECT CONTEMPT OF COURT.

The validity of this assignment of error turns on the distinction between direct and indirect contempt. *R.C. 2705.01* recognizes the power of courts to summarily punish direct contempt, defined in the Code as "misbehavior in the presence of or so near the court or judge as to obstruct the administration of justice." See *State ex rel. Seventh Urban, Inc. v. McFaul (1983)*, 5 [\*3] *Ohio St. 3d 120, 122, 449 N.E.2d 445* (defining "direct contempt" by reference to *R.C. 2705.01*). It is said that due process does not require a hearing for a finding of direct contempt. *In re Purolo (1991)*, 73 *Ohio App. 3d 306, 312, 596 N.E.2d 1140*. In contrast, indirect contempt, which is governed by *R.C. 2705.03*, requires a written charge, sufficient notice, an adversarial hearing upon the issues, and an opportunity for the accused to be repre-

sented by counsel. *In re Guardianship of Jadwisiak* (1992), 64 Ohio St. 3d 176, 182, 593 N.E.2d 1379. An indirect contempt is defined as "one committed outside the presence of the court but which also tends to obstruct the due and orderly administration of justice." *In re Lands, Lots or Parts of Lots Omitted From Foreclosure Proceedings-1944*, 146 Ohio St. 589, 595, 67 N.E.2d 433.

In the case *sub judice*, the activity--or, more properly, non-activity--which caused the appellant to be cited for contempt occurred entirely outside the presence of the court. Just as failure to pay child support, see *Courtney v. Courtney* (1984), 16 Ohio App. 3d 329, 475 N.E.2d 1284, and failure to appear at a hearing, see *Oakwood v. Wuliger*, (1982) 69 Ohio St. 2d 453, 432 N.E.2d 809, constitute indirect contempt, so does failure to attend court-ordered [\*4] AA meetings. Because we find that the charge in this case was for indirect contempt, we agree with the appellant that the summary procedure provided by the court below was insufficient.

The appellant was entitled to be served with a written charge. *R.C. 2705.03*. Appellant states that she was not so served before being found in contempt. Because no appellee's brief was filed with this court, we are permitted to accept the appellant's statement of the facts as correct. *App.R. 18(C)*. On this basis alone, a reversal of the contempt judgment is warranted. Moreover, although a show-cause order does appear in the municipal court's journal, it was filed on the same day on which the order required the appellant to appear at 8:00 a.m. We believe that the notice provided by such an order is insufficient as a matter of law. A party charged with indirect contempt must have adequate notice, adequate time to prepare a defense, and an opportunity to be heard. *Culberson v. Culberson* (1978), 60 Ohio App. 2d 304, 306, 397 N.E.2d 1226. We recognize that a trial court's determination of the adequacy of time between the issuance of a show cause order and the commencement of a hearing is a matter committed to its sound [\*5] judgment, reviewable only as an abuse of discretion. *Pease v. Local Union 1787* (1978), 59 Ohio App. 2d 238, 240, 393 N.E.2d 504. In this case, however, where the order was filed on the same day as the judgment and where it is not even clear which came first, such an abuse of discretion is indicated. Therefore, we sustain appellant's first assignment of error.

### III.

Appellant asserts as her second assignment of error the following:

The trial court erred in imposing sentence for a violation of a void sentence condition.

It is axiomatic that a no court can punish as for contempt the disobedience of an order which the court lacked the power to issue. *Cincinnati Metro. Hous. Auth. v. Cincinnati Dist. Council No. 51, Am. Fed. of State, Cty. and Mun. Emp., AFL-CIO* (1969), 22 Ohio App. 2d 39, 44, 257 N.E.2d 410; see also 17 Ohio Jurisprudence 3d (1980) 364, Contempt, Section 44. It is a corollary of this rule that orders of a court which are void will not support a contempt finding, while those which are merely voidable may support such a finding. *State v. Sandlin* (1983), 11 Ohio App. 3d 84, 88, fn. 3, 463 N.E.2d 85. Appellant argues in support of her second assignment of error that the additional penalty [\*6] requiring her to attend thirty AA meetings was void. The distinction between a void order and a voidable one is an elusive one, but an essential one to draw in this context. A voidable order is one that is defective or irregular; whereas, a void order is one entered by a court without the jurisdiction to enter it. *City of Parma v. Hudgeons* (1979), 61 Ohio App. 2d 148, 153, 400 N.E.2d 913. An order that is merely voidable is not subject to a collateral attack, such as an appeal from contempt of that order. It has the same efficacy as a valid order until overturned by direct attack. *Sandlin, supra*. Conversely, a void order is a mere nullity, without force or effect, and may be disregarded or subjected to collateral attack. *Rondy v. Rondy* (1983), 13 Ohio App. 3d 19, 21-22, 468 N.E.2d 81. Consequently, only if the additional penalty in this case was void was the appellant under no obligation to observe it and not subject to contempt for her disobedience.

The first step in making this determination is to review the statutes governing the penalty for the crime of which the appellee was convicted. *R.C. 4511.99* provides the statutory sentence for violations of *R.C. 4511.19*. Where, as in the instant case, the [\*7] violation is the first within a six year period, that section requires a court to impose a mandatory three-day sentence and a fine of not less than two-hundred and not more than one-thousand dollars. It also permits a court, at its discretion, to impose a longer sentence of up to six months in accordance with *R.C. 2929.21*, the statute governing the penalties for misdemeanors. *R.C. 4511.99* further provides that a court may suspend the execution of any part of the mandatory sentence if the court places the offender in a qualified drivers' intervention program. The statute permits the court to require "as a condition of probation" that the offender attend a qualified treatment program in addition to the drivers' intervention program. Finally, it permits the court to "impose any other conditions of probation on the offender that it considers necessary. Nowhere, however, does it allow attendance in a treatment program to form a part of the sentence itself. Thus, the "additional penalty" imposed on the appellant was not authorized by statute. Where a sentence lacks statutory authorization, it is jurisdictionally defective and, there-

fore, void. See *State ex rel. Dallman v. Court of Common Pleas* (1972), 32 Ohio App. 2d 102, 109, 288 N.E.2d 303. Accordingly, we find that the contempt citation in this case was invalid because it rested upon disobedience of a void order.

We recognize that the lower court may have intended that the "additional penalty" assessed in this case act as a condition of probation. Without question, it had the power to order such a condition. Nevertheless, a lower court speaks only through its journal. *State ex rel. Hanley v. Roberts* (1985), 17 Ohio St. 3d 1, 4, 476 N.E.2d 1019. The journal entry indicates clearly that mandatory attendance of AA meetings was an "additional penalty" and not a condition of probation. Moreover the proper procedure for punishing an offender for

violation of probation is that governed by R.C. 2951.09, not a contempt hearing. Thus, it is apparent that the penalty in this case was not assessed as a condition of probation. Accordingly, we find the appellant's second assignment of error well taken.

Because we find that the contempt procedure followed in this case failed to give the process required by law and the order upon which the contempt rested was void, appellant's remaining assignments of error are moot. We need not reach the issues raised in [\*9] those assignments to determine the outcome of this appeal.

Judgment of the municipal court is reversed.

FAIN, J., and GRADY, J., concur.

LEXSEE 2002 OHIO 6710

## STATE OF OHIO, PLAINTIFF-APPELLEE, - VS - TIMOTHY SMITH, DEFENDANT-APPELLANT.

CASE NO. 01 CA 187

## COURT OF APPEALS OF OHIO, SEVENTH APPELLATE DISTRICT, MAHONING COUNTY

2002 Ohio 6710; 2002 Ohio App. LEXIS 6494

December 6, 2002, Decided

**PRIOR HISTORY:** **[\*\*1]** CHARACTER OF PROCEEDINGS: Criminal Appeal from Campbell Municipal Court, Case No. CRB0000229.

**DISPOSITION:** Trial court's judgment was reversed and cause was remanded.

**COUNSEL:** For Plaintiff-Appellee: Attorney Brian Macala, Prosecuting Attorney, Campbell, Ohio.

For Defendant-Appellant: Attorney John Juhasz, Youngstown, Ohio.

**JUDGES:** Hon. Joseph J. Vukovich, Hon. Gene Donofrio, Hon. Cheryl L. Waite. Donofrio, and Waite, JJ., concur.

**OPINION BY:** Joseph J. Vukovich

**OPINION**

VUKOVICH, P.J.

**[\*P1]** Defendant-appellant Timothy Smith appeals the judgment of the Campbell Municipal Court. The issue before this court is whether the trial court violated Smith's due process rights by failing to provide notice of the alleged violations and the hearing. For the following reasons, the decision of the trial court is reversed and this cause is remanded for further proceedings.

**STATEMENT OF THE CASE**

**[\*P2]** The state did not file a brief in this matter and therefore, in accordance with *App.R. 18(C)*, we may accept Smith's statement of facts as correct.

**[\*P3]** Smith was charged with one count of public indecency, a violation of Campbell Municipal Ordinance

§ 133.05. He initially entered a plea of not guilty, but later pled guilty to an amended **[\*\*2]** charge of disorderly conduct, per a Rule 11 plea agreement.

**[\*P4]** The trial court sentenced Smith to a suspended 30 days in the city jail, fined him \$ 250 plus court costs, and placed him on six months reporting probation. As a condition of the probation, Smith was ordered to resume counseling with the Eastern Behavioral Health Center.

**[\*P5]** Approximately four months later, Smith appeared in court. The record is unclear as to how or why Smith was in the presence of the court. Further, the record is devoid of any evidence that Smith received written notice of the hearing prior to its occurrence. Due to the lack of prior notice, Smith's counsel was not present at the hearing. No transcript of the proceeding was filed. Smith was found in contempt of the trial court's previous orders. The docket stated in part, "Sentence of 6/19/01 is reinstated. Def must serve 30 days in county jail and order for counseling to continue after released from jail." Smith timely appealed from that order.

**ASSIGNMENT OF ERROR NUMBER ONE**

**[\*P6]** Smith raises two assignments of error. The first assignment of error alleges:

**[\*P7]** "THE TRIAL COURT DENIED APPELLANT DUE PROCESS, THE **[\*\*3]** ABILITY TO MEANINGFULLY DEFEND LIBERTY, EQUAL PROTECTION, A REMEDY IN THE COURTS BY DUE COURSE OF LAW, AND THE ADMINISTRATION OF JUSTICE WITHOUT DENIAL WHEN THE COURT REVOKED APPELLANT'S PROBATION WITHOUT PRIOR NOTICE OF THE CHARGES AND A TWO-STEP HEARING PROCESS TO DETERMINE WHETHER THE REVOCATION WAS JUSTIFIED.

*U.S. CONST. AMEND. XIV AND OHIO CONST. ART. I, §§ 1, 2, AND 17, RESPECTIVELY.*"

[\*P8] The municipal court treated Smith's alleged failure to attend the counseling sessions as an act of contempt rather than a violation of probation. This was an error by the trial court. *State v. Jacobs*, 3rd Dist. No. 9-2000-15, 2000 Ohio 1903. It is undisputed that Smith was placed on probation after entering a plea. A term of that probation was that Smith attend counseling sessions. Smith failed to attend these sessions. As such, he violated the terms of his probation. The proper action would have been a motion to terminate Smith's probation, not a contempt of court action. *Id.* However, due to the trial court's action of treating the alleged violation as a contemptuous act, we will discuss the requirement for both contempt and probation revocation hearings.

[\*P9] A person guilty [\*\*4] of "disobedience of, or resistance to, a lawful writ, process, order, rule, judgment or command of a court or officer" may be punished for contempt." *R.C. 2705.02(A)*. There are two types of contempt: indirect contempt and direct contempt. "Direct contempt usually involves some misbehavior which takes place in the actual courtroom." *In re Purola (1991)*, 73 Ohio App.3d 306, 310, 596 N.E.2d 1140. For that reason, the violator may be summarily punished because the facts are directly known to the court. *In re Davis (1991)*, 77 Ohio App.3d 257, 263-264, 602 N.E.2d 270. Indirect contempt, on the other hand, is committed outside the presence of the court but which also tends to obstruct the due and orderly administration of justice. *State v. Belcastro (2000)*, 139 Ohio App.3d 498, 501, 744 N.E.2d 271, citing *In re Land (1946)*, 146 Ohio St. 589, 595, 33 Ohio Op. 80, 67 N.E.2d 433. The court generally has no personal knowledge of the alleged contemptuous behavior and, as such, it must afford the accused procedural safeguards such as a written charge, an adversary hearing, and the opportunity for legal representation. *Belcastro, supra*, citing *R.C. 2705.03 [\*\*5]* ; *State ex rel. Seventh Urban, Inc. v. McFaul (1983)*, 5 Ohio St.3d 120, 122, 5 Ohio B. 255, 449 N.E.2d 445; *State v. Moody (1996)*, 116 Ohio App.3d 176, 180, 687 N.E.2d 320.

[\*P10] Smith's failure to attend the counseling sessions occurred outside the presence of the court and therefore it would be indirect contempt. As such, Smith was entitled to the procedural safeguards of having written notice of the charge and hearing, and the opportunity for legal representation. *Belcastro, supra*. The record is devoid of any evidence that written charges or notice of the hearing were sent to Smith. Smith was not provided the procedural safeguards required for an indirect contempt hearing.

[\*P11] The requirements for a contempt hearing are similar to those for a probation revocation hearing. The end result still fell short of due process. The United States Supreme Court has held that due process requirements apply to probationers. *Gagnon v. Scarpelli (1973)*, 411 U.S. 778, 36 L. Ed. 2d 656, 93 S. Ct. 1756; *Morrissey v. Brewer (1972)*, 408 U.S. 471, 33 L. Ed. 2d 484, 92 S. Ct. 2593. These requirements include: (1) written notice of the violations alleged, (2) the disclosure of evidence against the probationer, (3) the [\*\*6] right to be heard and present evidence, (4) the right to cross-examine the witnesses testifying against probationer, (5) the right to appear before a neutral and detached hearing officer, and (6) a written statement from the hearing officer relaying what evidence was relied upon in reaching the decision. *State v. Myers (Jun. 21, 1996)*, 7th Dist. No. 95-CO-29, 1996 Ohio App. LEXIS 2608 citing *Morrissey, 408 U.S. 471, 33 L. Ed. 2d 484, 92 S. Ct. 2593*. This serves as an elaboration of *Crim.R. 32.3(A)*, which states in part that "the court shall not revoke probation, except after a hearing at which the defendant shall be present and apprised of the grounds on which such action is proposed." Additionally, it was held that, like parolees, probationers are entitled to both preliminary and final revocation hearings. *Gagnon*, 418 U.S. at paragraph one of the syllabus.

[\*P12] It is these requirements Smith alleges were not met, specifically the steps of notification and dual phases of hearings. As stated above, there is no evidence of written notification in the file, nor is there documentation of such notice in the docket. Also, there is only one hearing recorded in the docket. Although the two hearings may be merged without [\*\*7] violating the probationer's rights, *Myers, supra*, this is only permissible when the probationer has had ample notice, is prepared for the components of both hearings, cannot show prejudice due to the combining, and does not object to the merger. *Id.* at \*5. As there was no notice, Smith was not prepared to proceed with both phases. Smith's procedural due process rights were violated.

[\*P13] Regardless of whether the trial court erroneously treated the violation as contemptuous conduct or a probation violation, Smith was entitled to notice of the charges against him and notice of hearing. The lack of notice resulted in due process violations. As such, this assignment of error is meritorious.

#### ASSIGNMENT OF ERROR NUMBER TWO

[\*P14] "THE TRIAL COURT DENIED APPELLANT THE ABILITY TO MEANINGFULLY DEFEND LIBERTY, EQUAL PROTECTION, A REMEDY IN THE COURTS BY DUE COURSE OF LAW, THE ADMINISTRATION OF JUSTICE WITHOUT DENIAL, AND THE ASSISTANCE OF COUNSEL

WHEN THE COURT REVOKED APPELLANT'S PROBATION WITHOUT EITHER ALLOWING APPELLANT THE OPPORTUNITY TO CONTACT RETAINED COUNSEL, OR APPOINTED COUNSEL. U.S. CONST. AMEND. VI AND XIV; OHIO CONST. ART. I, §§ 1, 2, 10 AND 16; OHIO [\*\*8] CRIM.R. 32.2."

[\*P15] Due to our resolution of the first assignment of error, this assignment of error is moot.

[\*P16] For the foregoing reasons, the decision of the trial court is hereby reversed and this case is remanded for further proceedings according to law and consistent with this court's opinion.

Donofrio, and Waite, JJ., concur.

1 of 7 DOCUMENTS

UNITED STATES CODE SERVICE  
Copyright © 2008 Matthew Bender & Company, Inc.,  
one of the LEXIS Publishing (TM) companies  
All rights reserved

CONSTITUTION OF THE UNITED STATES OF AMERICA  
AMENDMENTS  
AMENDMENT 5

**Go to the United States Code Service Archive Directory**

*USCS Const. Amend. 5*

THE CASE NOTES SEGMENT OF THIS DOCUMENT HAS BEEN SPLIT INTO 7 DOCUMENTS.  
THIS IS PART 1.  
USE THE BROWSE FEATURE TO REVIEW THE OTHER PART(S).

**Criminal actions--Provisions concerning--Due process of law and just compensation clauses.**

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence 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.

1 of 11 DOCUMENTS

UNITED STATES CODE SERVICE  
Copyright © 2008 Matthew Bender & Company, Inc.,  
one of the LEXIS Publishing (TM) companies  
All rights reserved

CONSTITUTION OF THE UNITED STATES OF AMERICA  
AMENDMENTS  
AMENDMENT 14

**Go to the United States Code Service Archive Directory**

*USCS Const. Amend. 14, § 1*

Sec. 1. [Citizens of the United States.]

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

LEXSTAT ORC 1.51

PAGE'S OHIO REVISED CODE ANNOTATED  
Copyright (c) 2008 by Matthew Bender & Company, Inc  
a member of the LexisNexis Group  
All rights reserved.

\*\*\* CURRENT THROUGH LEGISLATION PASSED BY THE 127TH OHIO GENERAL ASSEMBLY AND FILED  
WITH THE SECRETARY OF STATE THROUGH MARCH 12, 2008 \*\*\*

\*\*\* ANNOTATIONS CURRENT THROUGH JANUARY 1, 2008 \*\*\*

\*\*\* OPINIONS OF ATTORNEY GENERAL CURRENT THROUGH MARCH 19, 2008 \*\*\*

OHIO REVISED CODE GENERAL PROVISIONS  
CHAPTER 1. DEFINITIONS; RULES OF CONSTRUCTION  
CONSTRUCTION

**Go to the Ohio Code Archive Directory**

*ORC Ann. 1.51 (2008)*

§ 1.51. Special or local provision prevails over general; exception

If a general provision conflicts with a special or local provision, they shall be construed, if possible, so that effect is given to both. If the conflict between the provisions is irreconcilable, the special or local provision prevails as an exception to the general provision, unless the general provision is the later adoption and the manifest intent is that the general provision prevail.

**HISTORY:**

134 v H 607. Eff 1-3-72.

## LEXSTAT ORC ANN. 2151.354

PAGE'S OHIO REVISED CODE ANNOTATED  
 Copyright (c) 2008 by Matthew Bender & Company, Inc  
 a member of the LexisNexis Group  
 All rights reserved.

\*\*\* CURRENT THROUGH LEGISLATION PASSED BY THE 127TH OHIO GENERAL ASSEMBLY AND FILED  
 WITH THE SECRETARY OF STATE THROUGH MARCH 12, 2008 \*\*\*

\*\*\* ANNOTATIONS CURRENT THROUGH JANUARY 1, 2008 \*\*\*

\*\*\* OPINIONS OF ATTORNEY GENERAL CURRENT THROUGH MARCH 19, 2008 \*\*\*

TITLE 21. COURTS -- PROBATE -- JUVENILE  
 CHAPTER 2151. JUVENILE COURT  
 DISTRICT DETENTION HOMES

Go to the Ohio Code Archive Directory

ORC Ann. 2151.354 (2008)

§ 2151.354. Disposition of unruly child

(A) If the child is adjudicated an unruly child, the court may:

(1) Make any of the dispositions authorized under *section 2151.353 [2151.35.3] of the Revised Code*;

(2) Place the child on community control under any sanctions, services, and conditions that the court prescribes, as described in division (A)(3) of *section 2152.19 of the Revised Code*, provided that, if the court imposes a period of community service upon the child, the period of community service shall not exceed one hundred seventy-five hours;

(3) Suspend the driver's license, probationary driver's license, or temporary instruction permit issued to the child for a period of time prescribed by the court and suspend the registration of all motor vehicles registered in the name of the child for a period of time prescribed by the court. A child whose license or permit is so suspended is ineligible for issuance of a license or permit during the period of suspension. At the end of the period of suspension, the child shall not be reissued a license or permit until the child has paid any applicable reinstatement fee and complied with all requirements governing license reinstatement.

(4) Commit the child to the temporary or permanent custody of the court;

(5) Make any further disposition the court finds proper that is consistent with *sections 2151.312 [2151.31.2] and 2151.56 to 2151.61 of the Revised Code*;

(6) If, after making a disposition under division (A)(1), (2), or (3) of this section, the court finds upon further hearing that the child is not amenable to treatment or rehabilitation under that disposition, make a disposition otherwise authorized under divisions (A)(1), (3), (4), and (7) of *section 2152.19 of the Revised Code* that is consistent with *sections 2151.312 [2151.31.2] and 2151.56 to 2151.61 of the Revised Code*.

(B) If a child is adjudicated an unruly child for committing any act that, if committed by an adult, would be a drug abuse offense, as defined in *section 2925.01 of the Revised Code*, or a violation of division (B) of *section 2917.11 of the Revised Code*, in addition to imposing, in its discretion, any other order of disposition authorized by this section, the court shall do both of the following:

(1) Require the child to participate in a drug abuse or alcohol abuse counseling program;

(2) Suspend the temporary instruction permit, probationary driver's license, or driver's license issued to the child for a period of time prescribed by the court. The court, in its discretion, may terminate the suspension if the child attends and satisfactorily completes a drug abuse or alcohol abuse education, intervention, or treatment program specified

by the court. During the time the child is attending a program as described in this division, the court shall retain the child's temporary instruction permit, probationary driver's license, or driver's license, and the court shall return the permit or license if it terminates the suspension.

(C) (1) If a child is adjudicated an unruly child for being an habitual truant, in addition to or in lieu of imposing any other order of disposition authorized by this section, the court may do any of the following:

(a) Order the board of education of the child's school district or the governing board of the educational service center in the child's school district to require the child to attend an alternative school if an alternative school has been established pursuant to *section 3313.533 [3313.53.3] of the Revised Code* in the school district in which the child is entitled to attend school;

(b) Require the child to participate in any academic program or community service program;

(c) Require the child to participate in a drug abuse or alcohol abuse counseling program;

(d) Require that the child receive appropriate medical or psychological treatment or counseling;

(e) Make any other order that the court finds proper to address the child's habitual truancy, including an order requiring the child to not be absent without legitimate excuse from the public school the child is supposed to attend for five or more consecutive days, seven or more school days in one school month, or twelve or more school days in a school year and including an order requiring the child to participate in a truancy prevention mediation program.

(2) If a child is adjudicated an unruly child for being an habitual truant and the court determines that the parent, guardian, or other person having care of the child has failed to cause the child's attendance at school in violation of *section 3321.38 of the Revised Code*, in addition to any order of disposition authorized by this section, all of the following apply:

(a) The court may require the parent, guardian, or other person having care of the child to participate in any community service program, preferably a community service program that requires the involvement of the parent, guardian, or other person having care of the child in the school attended by the child.

(b) The court may require the parent, guardian, or other person having care of the child to participate in a truancy prevention mediation program.

(c) The court shall warn the parent, guardian, or other person having care of the child that any subsequent adjudication of the child as an unruly or delinquent child for being an habitual or chronic truant may result in a criminal charge against the parent, guardian, or other person having care of the child for a violation of division (C) of *section 2919.21 or section 2919.24 of the Revised Code*.

#### **HISTORY:**

133 v H 320 (Eff 11-19-69); 142 v H 643 (Eff 3-17-89); 143 v H 330 (Eff 6-30-89); 143 v H 381 (Eff 7-1-89); 143 v S 131 (Eff 7-25-90); 143 v S 258 (Eff 8-22-90); 144 v H 154 (Eff 7-31-92); 146 v H 274 (Eff 8-8-96); 146 v H 265 (Eff 3-3-97); 147 v S 35 (Eff 1-1-99); 148 v S 181 (Eff 9-4-2000); 148 v S 179, § 3 (Eff 1-1-2002); 149 v H 57 (Eff 2-19-2002\*); 149 v H 393 (Eff 7-5-2002); 149 v H 400, § 1. Eff 4-3-2003; 149 v S 123, § 1, eff. 1-1-04.

LEXSTAT ORC ANN. 2921.31

PAGE'S OHIO REVISED CODE ANNOTATED  
Copyright (c) 2008 by Matthew Bender & Company, Inc  
a member of the LexisNexis Group  
All rights reserved.

\*\*\* CURRENT THROUGH LEGISLATION PASSED BY THE 127TH OHIO GENERAL ASSEMBLY AND FILED  
WITH THE SECRETARY OF STATE THROUGH MARCH 12, 2008 \*\*\*  
\*\*\* ANNOTATIONS CURRENT THROUGH JANUARY 1, 2008 \*\*\*  
\*\*\* OPINIONS OF ATTORNEY GENERAL CURRENT THROUGH MARCH 19, 2008 \*\*\*

TITLE 29. CRIMES -- PROCEDURE  
CHAPTER 2921. OFFENSES AGAINST JUSTICE AND PUBLIC ADMINISTRATION  
OBSTRUCTING AND ESCAPE

**Go to the Ohio Code Archive Directory**

*ORC Ann. 2921.31 (2008)*

§ 2921.31. Obstructing official business

(A) No person, without privilege to do so and with purpose to prevent, obstruct, or delay the performance by a public official of any authorized act within the public official's official capacity, shall do any act that hampers or impedes a public official in the performance of the public official's lawful duties.

(B) Whoever violates this section is guilty of obstructing official business. Except as otherwise provided in this division, obstructing official business is a misdemeanor of the second degree. If a violation of this section creates a risk of physical harm to any person, obstructing official business is a felony of the fifth degree.

**HISTORY:**

134 v H 511 (Eff 1-1-74); 148 v H 137. Eff 3-10-2000.

LEXSTAT ORC ANN. 2917.11

PAGE'S OHIO REVISED CODE ANNOTATED  
Copyright (c) 2008 by Matthew Bender & Company, Inc  
a member of the LexisNexis Group  
All rights reserved.

\*\*\* CURRENT THROUGH LEGISLATION PASSED BY THE 127TH OHIO GENERAL ASSEMBLY AND FILED  
WITH THE SECRETARY OF STATE THROUGH MARCH 12, 2008 \*\*\*

\*\*\* ANNOTATIONS CURRENT THROUGH JANUARY 1, 2008 \*\*\*

\*\*\* OPINIONS OF ATTORNEY GENERAL CURRENT THROUGH MARCH 19, 2008 \*\*\*

TITLE 29. CRIMES -- PROCEDURE  
CHAPTER 2917. OFFENSES AGAINST THE PUBLIC PEACE  
DISORDERLY CONDUCT

**Go to the Ohio Code Archive Directory**

*ORC Ann. 2917.11 (2008)*

§ 2917.11. Disorderly conduct

(A) No person shall recklessly cause inconvenience, annoyance, or alarm to another by doing any of the following:

(1) Engaging in fighting, in threatening harm to persons or property, or in violent or turbulent behavior;

(2) Making unreasonable noise or an offensively coarse utterance, gesture, or display or communicating unwarranted and grossly abusive language to any person;

(3) Insulting, taunting, or challenging another, under circumstances in which that conduct is likely to provoke a violent response;

(4) Hindering or preventing the movement of persons on a public street, road, highway, or right-of-way, or to, from, within, or upon public or private property, so as to interfere with the rights of others, and by any act that serves no lawful and reasonable purpose of the offender;

(5) Creating a condition that is physically offensive to persons or that presents a risk of physical harm to persons or property, by any act that serves no lawful and reasonable purpose of the offender.

(B) No person, while voluntarily intoxicated, shall do either of the following:

(1) In a public place or in the presence of two or more persons, engage in conduct likely to be offensive or to cause inconvenience, annoyance, or alarm to persons of ordinary sensibilities, which conduct the offender, if the offender were not intoxicated, should know is likely to have that effect on others;

(2) Engage in conduct or create a condition that presents a risk of physical harm to the offender or another, or to the property of another.

(C) Violation of any statute or ordinance of which an element is operating a motor vehicle, locomotive, watercraft, aircraft, or other vehicle while under the influence of alcohol or any drug of abuse, is not a violation of division (B) of this section.

(D) If a person appears to an ordinary observer to be intoxicated, it is probable cause to believe that person is voluntarily intoxicated for purposes of division (B) of this section.

(E) (1) Whoever violates this section is guilty of disorderly conduct.

(2) Except as otherwise provided in division (E)(3) of this section, disorderly conduct is a minor misdemeanor.

(3) Disorderly conduct is a misdemeanor of the fourth degree if any of the following applies:

(a) The offender persists in disorderly conduct after reasonable warning or request to desist.

(b) The offense is committed in the vicinity of a school or in a school safety zone.

(c) The offense is committed in the presence of any law enforcement officer, firefighter, rescuer, medical person, emergency medical services person, or other authorized person who is engaged in the person's duties at the scene of a fire, accident, disaster, riot, or emergency of any kind.

(d) The offense is committed in the presence of any emergency facility person who is engaged in the person's duties in an emergency facility.

(F) As used in this section:

(1) "Emergency medical services person" is the singular of "emergency medical services personnel" as defined in *section 2133.21 of the Revised Code*.

(2) "Emergency facility person" is the singular of "emergency facility personnel" as defined in *section 2909.04 of the Revised Code*.

(3) "Emergency facility" has the same meaning as in *section 2909.04 of the Revised Code*.

(4) "Committed in the vicinity of a school" has the same meaning as in *section 2925.01 of the Revised Code*.

**HISTORY:**

134 v H 511 (Eff 1-1-74); 143 v H 51 (Eff 11-8-90); 146 v S 2 (Eff 7-1-96); 148 v S 1 (Eff 8-6-99); 148 v H 137 (Eff 3-10-2000); 149 v S 40. Eff 1-25-2002.

LEXSTAT ORC ANN. 2951.09

PAGE'S OHIO REVISED CODE ANNOTATED  
Copyright (c) 2008 by Matthew Bender & Company, Inc  
a member of the LexisNexis Group  
All rights reserved.

\*\*\* CURRENT THROUGH LEGISLATION PASSED BY THE 127TH OHIO GENERAL ASSEMBLY AND FILED  
WITH THE SECRETARY OF STATE THROUGH MARCH 12, 2008 \*\*\*

\*\*\* ANNOTATIONS CURRENT THROUGH JANUARY 1, 2008 \*\*\*

\*\*\* OPINIONS OF ATTORNEY GENERAL CURRENT THROUGH MARCH 19, 2008 \*\*\*

TITLE 29. CRIMES -- PROCEDURE  
CHAPTER 2951. PROBATION

**Go to the Ohio Code Archive Directory**

*ORC Ann. 2951.09 (2008)*

§ 2951.09. Repealed

Repealed, 149 v H 490, § 2 [GC § 13452-7; 113 v 123(202), ch 31, § 7; 115 v 532; Bureau of Code Revision, 10-1-53; 143 v S 258 (Eff 11-20-90); 146 v S 2. Eff 7-1-96]. Eff 1-1-04.

[Repealed]

1 of 1 DOCUMENT

OHIO RULES OF COURT SERVICE  
Copyright © 2008 by Matthew Bender & Company, Inc.  
a member of the LexisNexis Group.  
All rights reserved.

\*\*\* RULES CURRENT THROUGH FEBRUARY 25, 2008 \*\*\*  
\*\*\* ANNOTATIONS CURRENT THROUGH JANUARY 1, 2008 \*\*\*

Ohio Rules Of Criminal Procedure

*Ohio Crim. R. 3 (2008)*

Review Court Orders which may amend this Rule.

**Rule 3. Complaint**

The complaint is a written statement of the essential facts constituting the offense charged. It shall also state the numerical designation of the applicable statute or ordinance. It shall be made upon oath before any person authorized by law to administer oaths.

1 of 1 DOCUMENT

OHIO RULES OF COURT SERVICE  
Copyright © 2008 by Matthew Bender & Company, Inc.  
a member of the LexisNexis Group.  
All rights reserved.

\*\*\* RULES CURRENT THROUGH FEBRUARY 25, 2008 \*\*\*  
\*\*\* ANNOTATIONS CURRENT THROUGH JANUARY 1, 2008 \*\*\*

Ohio Rules Of Juvenile Procedure

*Ohio Juv. R. 10 (2008)*

Review Court Orders which may amend this Rule.

**Rule 10. Complaint**

1 of 1 DOCUMENT

OHIO RULES OF COURT SERVICE  
Copyright © 2008 by Matthew Bender & Company, Inc.  
a member of the LexisNexis Group.  
All rights reserved.

\*\*\* RULES CURRENT THROUGH FEBRUARY 25, 2008 \*\*\*  
\*\*\* ANNOTATIONS CURRENT THROUGH JANUARY 1, 2008 \*\*\*

Ohio Rules Of Juvenile Procedure

*Ohio Juv. R. 35 (2008)*

Review Court Orders which may amend this Rule.

**Rule 35. Proceedings after judgment**

**(A) Continuing jurisdiction; invoked by motion.**

The continuing jurisdiction of the court shall be invoked by motion filed in the original proceeding, notice of which shall be served in the manner provided for the service of process.

**(B) Revocation of probation.**

The court shall not revoke probation except after a hearing at which the child shall be present and apprised of the grounds on which revocation is proposed. The parties shall have the right to counsel and the right to appointed counsel where entitled pursuant to *Juv. R. 4(A)*. Probation shall not be revoked except upon a finding that the child has violated a condition of probation of which the child had, pursuant to *Juv. R. 34(C)*, been notified.

**(C) Detention.**

During the pendency of proceedings under this rule, a child may be placed in detention in accordance with the provisions of Rule 7.

**HISTORY:** Amended, eff 7-1-94.

## LEXSTAT 42 USC 5601

UNITED STATES CODE SERVICE  
 Copyright © 2008 Matthew Bender & Company, Inc.,  
 one of the LEXIS Publishing (TM) companies  
 All rights reserved

\*\*\* CURRENT THROUGH P.L. 110-198, APPROVED 3/24/2008 \*\*\*

TITLE 42. THE PUBLIC HEALTH AND WELFARE  
 CHAPTER 72. JUVENILE JUSTICE AND DELINQUENCY PREVENTION  
 GENERALLY

Go to the United States Code Service Archive Directory

42 USCS § 5601

§ 5601. Findings

(a) The Congress finds the following:

(1) Although the juvenile violent crime arrest rate in 1999 was the lowest in the decade, there remains a consensus that the number of crimes and the rate of offending by juveniles nationwide is still too high.

(2) According to the Office of Juvenile Justice and Delinquency Prevention, allowing 1 youth to leave school for a life of crime and of drug abuse costs society \$ 1,700,000 to \$ 2,300,000 annually.

(3) One in every 6 individuals (16.2 percent) arrested for committing violent crime in 1999 was less than 18 years of age. In 1999, juveniles accounted for 9 percent of murder arrests, 17 percent of forcible rape arrests, 25 percent of robbery arrest, 14 percent of aggravated assault arrests, and 24 percent of weapons arrests.

(4) More than 1/2 of juvenile murder victims are killed with firearms. Of the nearly 1,800 murder victims less than 18 years of age, 17 percent of the victims less than 13 years of age were murdered with a firearm, and 81 percent of the victims 13 years of age or older were killed with a firearm.

(5) Juveniles accounted for 13 percent of all drug abuse violation arrests in 1999. Between 1990 and 1999, juvenile arrests for drug abuse violations rose 132 percent.

(6) Over the last 3 decades, youth gang problems have increased nationwide. In the 1970's, 19 States reported youth gang problems. By the late 1990's, all 50 States and the District of Columbia reported gang problems. For the same period, the number of cities reporting youth gang problems grew 843 percent, and the number of counties reporting gang problems increased more than 1,000 percent.

(7) According to a national crime survey of individuals 12 years of age or older during 1999, those 12 to 19 years old are victims of violent crime at higher rates than individuals in all other age groups. Only 30.8 percent of these violent victimizations were reported by youth to police in 1999.

(8) One-fifth of juveniles 16 years of age who had been arrested were first arrested before attaining 12 years of age. Juveniles who are known to the juvenile justice system before attaining 13 years of age are responsible for a disproportionate share of serious crimes and violence.

(9) The increase in the arrest rates for girls and young juvenile offenders has changed the composition of violent offenders entering the juvenile justice system.

(10) These problems should be addressed through a 2-track common sense approach that addresses the needs of individual juveniles and society at large by promoting--

(A) quality prevention programs that--

(i) work with juveniles, their families, local public agencies, and community-based organizations, and take into consideration such factors as whether or not juveniles have been the victims of family violence (including child abuse and neglect); and

(ii) are designed to reduce risks and develop competencies in at-risk juveniles that will prevent, and reduce the rate of, violent delinquent behavior; and

## 42 USCS § 5601

(B) programs that assist in holding juveniles accountable for their actions and in developing the competencies necessary to become responsible and productive members of their communities, including a system of graduated sanctions to respond to each delinquent act, requiring juveniles to make restitution, or perform community service, for the damage caused by their delinquent acts, and methods for increasing victim satisfaction with respect to the penalties imposed on juveniles for their acts.

(11) Coordinated juvenile justice and delinquency prevention projects that meet the needs of juveniles through the collaboration of the many local service systems juveniles encounter can help prevent juveniles from becoming delinquent and help delinquent youth return to a productive life.

(b) Congress must act now to reform this program by focusing on juvenile delinquency prevention programs, as well as programs that hold juveniles accountable for their acts and which provide opportunities for competency development. Without true reform, the juvenile justice system will not be able to overcome the challenges it will face in the coming years when the number of juveniles is expected to increase by 18 percent between 2000 and 2030.

**HISTORY:**

(Sept. 7, 1974, P.L. 93-415, Title I, § 101, 88 Stat. 1109; Dec. 8, 1980, P.L. 96-509, § 3, 94 Stat. 2750; Oct. 12, 1984, P.L. 98-473, Title II, Ch VI, Division II, Subdiv A, § 611, 98 Stat. 2107; Nov. 4, 1992, P.L. 102-586, § 1(a), 106 Stat. 4982.)

(As amended Nov. 2, 2002, P.L. 107-273, Div C, Title II, Subtitle B, § 12202, 116 Stat. 1869.)

**HISTORY; ANCILLARY LAWS AND DIRECTIVES****Amendments:**

1980. Act Dec. 8, 1980, in subsec. (a), in para. (4), inserted "alcohol or other", in para. (6), deleted "and" following the semicolon, in para. (7), substituted "; and" for the concluding period, and added para. (8).

1984. Act Oct. 12, 1984 (effective 10/12/84, as provided by § 670(a) of such Act, which appears as a note to this section), in subsec. (a), in para. (1), substituted "accounted" for "account" and substituted "in 1974 and for less than one-third of such arrests in 1983" for "today", in para. (2), inserted "and inadequately trained staff in such courts, services, and facilities", in para. (3), deleted "the countless, abandoned, and dependent" following "meet the needs of", and in para. (5), substituted "reduced" for "prevented".

1992. Act Nov. 4, 1992, in subsec. (a), redesignated paras. (2)-(8) as paras. (4)-(10), respectively, added new paras. (2) and (3), in para. (4) as redesignated, inserted "prosecutorial and public defender offices," in para. (9) as redesignated, deleted "and" after the concluding semicolon, in para. (10) as redesignated, substituted the concluding semicolon for a period, and added paras. (11) and (12).

2002. Act Nov. 2, 2002 (effective on 10/1/2003, and applicable only with respect to fiscal years beginning on or after 10/1/2003, pursuant to § 12223 of such Act, which appears as a note to this section), substituted this section for one which read:

"Congressional statement of findings

"(a) The Congress hereby finds that--

"(1) juveniles accounted for almost half the arrests for serious crimes in the United States in 1974 and for less than one-third of such arrests in 1983;

"(2) recent trends show an upsurge in arrests of adolescents for murder, assault, and weapon use;

"(3) the small number of youth who commit the most serious and violent offenses are becoming more violent;

"(4) understaffed, overcrowded juvenile courts, prosecutorial and public defender offices, probation services, and correctional facilities and inadequately trained staff in such courts, services, and facilities are not able to provide individualized justice or effective help;

"(5) present juvenile courts, foster and protective care programs, and shelter facilities are inadequate to meet the needs of children, who, because of this failure to provide effective services, may become delinquents;

"(6) existing programs have not adequately responded to the particular problems of the increasing numbers of young people who are addicted to or who abuse alcohol and other drugs, particularly nonopiate or polydrug abusers;

"(7) juvenile delinquency can be reduced through programs designed to keep students in elementary and secondary schools through the prevention of unwarranted and arbitrary suspensions and expulsions;

"(8) States and local communities which experience directly the devastating failures of the juvenile justice system do not presently have sufficient technical expertise or adequate resources to deal comprehensively with the problems of juvenile delinquency;

"(9) existing Federal programs have not provided the direction, coordination, resources, and leadership required to meet the crises of delinquency;

"(10) the juvenile justice system should give additional attention to the problem of juveniles who commit serious crimes, with particular attention given to the areas of sentencing, providing resources necessary for informed dispositions, and rehabilitation;

"(11) emphasis should be placed on preventing youth from entering the juvenile justice system to begin with; and

"(12) the incidence of juvenile delinquency can be reduced through public recreation programs and activities designed to provide youth with social skills, enhance self esteem, and encourage the constructive use of discretionary time.

"(b) Congress finds further that the high incidence of delinquency in the United States today results in enormous annual cost and immeasurable loss of human life, personal security, and wasted human resources and that juvenile delinquency constitutes a growing threat to the national welfare requiring immediate and comprehensive action by the Federal Government to reduce and prevent delinquency."

#### Short titles:

Act Sept. 7, 1974, P.L. 93-415, § 1, 88 Stat. 1109, provides: "This Act [42 USCS §§ 5601 et seq. generally; for full classification, consult USCS Tables volumes] may be cited as the 'Juvenile Justice and Delinquency Prevention Act of 1974'."

Act Sept. 7, 1974, P.L. 93-415, Title III, § 301, 88 Stat. 1129; Dec. 8, 1980, P.L. 96-509, § 18(b), 94 Stat. 2762, provides: "This Title [42 USCS §§ 5701 et seq.] may be cited as the 'Runaway and Homeless Youth Act'."

Act Sept. 7, 1974, P.L. 93-415, Title IV, § 401, as added Oct. 12, 1984, P.L. 98-473, Title II, § 660, 98 Stat. 2125 provides: "This Title may be cited as the 'Missing Children's Assistance Act'". For full classification of such Title, consult USCS Tables volumes.

Act Sept. 7, 1974, P.L. 93-415, Title V, § 501, as added Nov. 4, 1992, P.L. 102-586, § 5(a), 106 Stat. 5027; Nov. 2, 2002, P.L. 107-273, Div C, Title II, Subtitle B, § 12222(a), 116 Stat. 1894, provides: "This title [42 USCS §§ 5781 et seq.] may be cited as the 'Incentive Grants for Local Delinquency Prevention Programs Act of 2002'."

Act Oct. 3, 1977, P.L. 95-115, § 1, 91 Stat. 1048, provides: "This Act [42 USCS §§ 5611 et seq. generally; for full classification, consult USCS Tables volumes] may be cited as the 'Juvenile Justice Amendments of 1977'."

Act Dec. 8, 1980, P.L. 96-509, § 1, 94 Stat. 2750, provided: "This Act may be cited as the 'Juvenile Justice Amendments of 1980'". For full classification of such Act, consult USCS Tables volumes.

Act Oct. 12, 1984, P.L. 98-473, Title II, Ch VI, Division II, Subdiv A, § 610, 98 Stat. 2107, provides: "This Division [amending 42 USCS §§ 5601 et seq. generally; for full classification, consult USCS Tables volumes] may be cited as the 'Juvenile Justice, Runaway Youth, and Missing Children's Act Amendments of 1984'."

Act Oct. 12, 1984, P.L. 98-473, Title II, Ch VI, Division II, Subdiv D, § 660, 98 Stat. 2125; Dec. 7, 1989, P.L. 101-204, Title X, § 1004(1), 103 Stat. 1828, provides: "This title [42 USCS §§ 5771 et seq. generally; for full classification, consult USCS Tables volumes] may be cited as the 'Missing Children's Assistance Act'."

Act Nov. 18, 1988, P.L. 100-690, Title VII, Subtitle F, § 7250(a), 102 Stat. 4434, provides: "This subtitle may be cited as the 'Juvenile Justice and Delinquency Prevention Amendments of 1988'". For full classification of such Subtitle, consult USCS Tables volumes.

Act Nov. 4, 1992, P.L. 102-586, Title V, § 501, 102 Stat. 5027, provides: "This Title [42 USCS §§ 5781 et seq. generally; for full classification, consult USCS Tables volumes] may be cited as the 'Incentive Grants for Local Delinquency Prevention Programs Act'."

Act Sept. 13, 1994, P.L. 103-322, Title XVII, Subtitle C, § 170301, 108 Stat. 2043, which formerly appeared as a note to this section, was repealed by Act Oct 30, 1998, P.L. 105-314, Title VII, § 703(g), 112 Stat. 2989. Such note provided for citation of former Subtitle C of of Title XVII of Act Sept. 13, 1994 as the "Morgan P. Hardiman Task Force on Missing and Exploited Children Act".

Act Oct. 12, 1999, P.L. 106-71, § 1, 113 Stat. 1032, provides: "This Act may be cited as the 'Missing, Exploited, and Runaway Children Protection Act'". For full classification of such Act, consult USCS Tables volumes.

Act Nov. 2, 2002, P.L. 107-273, Div C, Title II, Subtitle B, § 12201, 116 Stat. 1869, provides: "This subtitle may be cited as the 'Juvenile Justice and Delinquency Prevention Act of 2002'". For full classification of such Subtitle, consult USCS Tables volumes.

Act April 30, 2003, P.L. 108-21, Title III, Subtitle D, § 361, 117 Stat. 665, provides: "This subtitle [42 USCS §§ 5792, 5792a] may be cited as the 'Code Adam Act of 2003'".

Act Oct. 10, 2003, P.L. 108-96, § 1, 117 Stat. 1167, provides: "This Act may be cited as the 'Runaway, Homeless, and Missing Children Protection Act'". For full classification of such Act, consult USCS Tables volumes.

#### Other provisions:

**Effective dates of Act Sept. 7, 1974.** Act Sept. 7, 1974, P.L. 93-415, Title II, Part D, § 263, 88 Stat. 1129; April 21, 1976, P.L. 94-273, § 32(a), 90 Stat. 380, Oct. 3, 1977, P.L. 95-115, § 6(d), 91 Stat. 1058, was repealed by Act Nov. 18, 1988, P.L. 100-690, Title VII, Subtitle F, § 7266(2), 102 Stat. 4449. Such section provided:

"(a) Except as provided by subsections (b) and (c), the foregoing provisions of this Act [5 USCS § 5108; 42 USCS §§ 5601 et seq.] shall take effect on the date of enactment of this Act.

"(b) Section 204(b)(5) and 204(b)(6) [42 USCS § 5614(b)(5), (6)] shall become effective at the close of the thirty-first day of the twelfth calendar month of 1974. Section 204(l) [42 USCS § 5614(l)] shall become effective at the close of the thirtieth day of the eleventh calendar month of 1976.

"(c) Except as otherwise provided by the Juvenile Justice Amendments of 1977 [Act Oct. 3, 1977, P.L. 95-115, 91 Stat. 1048; for full classification of such Act, consult USCS Tables volumes], the amendments made by the Juvenile Justice Amendments of 1977 [Act Oct. 3, 1977, P.L. 95-115, 91 Stat. 1048; for full classification of such Act, consult USCS Tables volumes] shall take effect on October 1, 1977."

**Effective date and application of Division II of Chapter VI of Title II of Act Oct. 12, 1984.** Act Oct. 12, 1984, P.L. 98-473, Title II, Ch VI, Division II, Subdiv D, § 670, 98 Stat. 2129, provides:

"(a) Except as provided in subsection (b), this division and the amendments made by this division [for full classification, consult USCS Tables volumes] shall take effect on the date of the enactment of this joint resolution or October 1, 1984, whichever occurs later.

"(b) Paragraph (2) of section 331(c) of the Runaway and Homeless Youth Act [42 USCS § 5751(c)(2)], as added by section 657(d) of this division, shall not apply with respect to any grant or payment made before the effective date of this joint resolution."

**Effective date and application of Subtitle F of Title VII of Act Nov. 18, 1988.** Act Nov. 18, 1988, P.L. 100-690, Title VII, Subtitle F, Ch 4, § 7296, 102 Stat. 4463; Dec. 7, 1989, P.L. 101-204, Title X, § 1001(d), 103 Stat. 1827 provides:

"(a) Effective date. Except as provided in subsection (b), this subtitle and the amendments made by this [subtitle] shall take effect on October 1, 1988.

"(b) Application of amendments.

(1) The amendments made by section 7258(a) [amending 42 USCS § 5633(a)(5)(8)] shall not apply to a State with respect to a fiscal year beginning before the date of the enactment of this Act if the State plan is approved before such date by the Administrator for such fiscal year.

"(2) The amendments made by section 7253 [(b)(1)] and section 7278 [amending 42 USCS § 5715; enacting 42 USCS § 5732] shall not apply with respect to fiscal year 1989.

"(3) Notwithstanding the 180-day period provided in--

"(A) section 207 of the Juvenile Justice and Delinquency Prevention Act of 1974 (42 U.S.C. 5611 et seq.), as added by section 7255;

## 42 USCS § 5601

"(B) section 361 of the Runaway and Homeless Youth Act (42 U.S.C. 5701 et seq.), as redesignated by section 7273(e)(2) and amended by section 7274; and

"(C) section 404(a)(5) of the Missing Children's Assistance Act (42 U.S.C. 5773(a)(5)), as amended by section 7285(a)(3);

the reports required by such sections to be submitted with respect to fiscal year 1988 shall be submitted not later than August 1, 1989."

**Effective date and application of Subtitle B of Title II of Division C of Act Nov. 2, 2002.** Act Nov. 2, 2002, P.L. 107-273, Div C, Title II, Subtitle B, § 12223, 116 Stat. 1896; Feb. 20, 2003, P.L. 108-7, Div B, Title I, § 110(2), (3), 117 Stat. 67, provides:

"(a) Effective date. Except as provided in subsection (b), this subtitle and the amendments made by this subtitle [for full classification, consult USCS Tables volumes] shall take effect on the effective date provided in section 12102(b) [42 USCS § 3796ee note].

"(b) Application of amendments. The amendments made by this subtitle [for full classification, consult USCS Tables volumes] shall apply only with respect to fiscal years beginning on or after the effective date provided in subsection (a) [effective Oct. 1, 2003]."

## LEXSTAT 42 USCS § 5633

UNITED STATES CODE SERVICE  
 Copyright © 2008 Matthew Bender & Company, Inc.,  
 one of the LEXIS Publishing (TM) companies  
 All rights reserved

\*\*\* CURRENT THROUGH P.L. 110-198, APPROVED 3/24/2008 \*\*\*

TITLE 42. THE PUBLIC HEALTH AND WELFARE  
 CHAPTER 72. JUVENILE JUSTICE AND DELINQUENCY PREVENTION  
 PROGRAMS AND OFFICES  
 FEDERAL ASSISTANCE FOR STATE AND LOCAL PROGRAMS

Go to the United States Code Service Archive Directory

42 USCS § 5633

§ 5633. State plans

(a) Requirements. In order to receive formula grants under this part, a State shall submit a plan for carrying out its purposes applicable to a 3-year period. Such plan shall be amended annually to include new programs, projects, and activities. The State shall submit annual performance reports to the Administrator which shall describe progress in implementing programs contained in the original plan, and shall describe the status of compliance with State plan requirements. In accordance with regulations which the Administrator shall prescribe, such plan shall--

(1) designate the State agency described in section 299(c)(1) [42 USCS § 5671(c)(1)] as the sole agency for supervising the preparation and administration of the plan;

(2) contain satisfactory evidence that the State agency designated in accordance with paragraph (1) has or will have authority, by legislation if necessary, to implement such plan in conformity with this part;

(3) provide for an advisory group that--

(A) shall consist of not less than 15 and not more than 33 members appointed by the chief executive officer of the State--

(i) which members have training, experience, or special knowledge concerning the prevention and treatment of juvenile delinquency, the administration of juvenile justice, or the reduction of juvenile delinquency;

(ii) which members include--

(I) at least 1 locally elected official representing general purpose local government;

(II) representatives of law enforcement and juvenile justice agencies, including juvenile and family court judges, prosecutors, counsel for children and youth, and probation workers;

(III) representatives of public agencies concerned with delinquency prevention or treatment, such as welfare, social services, mental health, education, special education, recreation, and youth services;

(IV) representatives of private nonprofit organizations, including persons with a special focus on preserving and strengthening families, parent groups and parent self-help groups, youth development, delinquency prevention and treatment, neglected or dependent children, the quality of juvenile justice, education, and social services for children;

(V) volunteers who work with delinquents or potential delinquents;

(VI) youth workers involved with programs that are alternatives to incarceration, including programs providing organized recreation activities;

(VII) persons with special experience and competence in addressing problems related to school violence and vandalism and alternatives to suspension and expulsion; and

(VIII) persons with special experience and competence in addressing problems related to learning disabilities, emotional difficulties, child abuse and neglect, and youth violence;

(iii) a majority of which members (including the chairperson) shall not be full-time employees of the Federal, State, or local government;

(iv) at least one-fifth of which members shall be under the age of 24 at the time of appointment; and

## 42 USCS § 5633

(v) at least 3 members who have been or are currently under the jurisdiction of the juvenile justice system;

(B) shall participate in the development and review of the State's juvenile justice plan prior to submission to the supervisory board for final action;

(C) shall be afforded the opportunity to review and comment, not later than 30 days after their submission to the advisory group, on all juvenile justice and delinquency prevention grant applications submitted to the State agency designated under paragraph (1);

(D) shall, consistent with this title--

(i) advise the State agency designated under paragraph (1) and its supervisory board; and

(ii) submit to the chief executive officer and the legislature of the State at least annually recommendations regarding State compliance with the requirements of paragraphs (11), (12), and (13); and

(iii) contact and seek regular input from juveniles currently under the jurisdiction of the juvenile justice system;

and

(E) may, consistent with this title--

(i) advise on State supervisory board and local criminal justice advisory board composition; [and]

(ii) review progress and accomplishments of projects funded under the State plan.

(4) provide for the active consultation with and participation of units of local government or combinations thereof in the development of a State plan which adequately takes into account the needs and requests of units of local government, except that nothing in the plan requirements, or any regulations promulgated to carry out such requirements, shall be construed to prohibit or impede the State from making grants to, or entering into contracts with, local private agencies or the advisory group;

(5) unless the provisions of this paragraph are waived at the discretion of the Administrator for any State in which the services for delinquent or other youth are organized primarily on a statewide basis, provide that at least 66 2/3 per centum of funds received by the State under section 222 [42 USCS § 5632] reduced by the percentage (if any) specified by the State under the authority of paragraph (25) and excluding funds made available to the State advisory group under section 222(d) [42 USCS § 5632(d)], shall be expended--

(A) through programs of units of local government or combinations thereof, to the extent such programs are consistent with the State plan;

(B) through programs of local private agencies, to the extent such programs are consistent with the State plan, except that direct funding of any local private agency by a State shall be permitted only if such agency requests such funding after it has applied for and been denied funding by any unit of local government or combination thereof; and

(C) to provide funds for programs of Indian tribes that perform law enforcement functions (as determined by the Secretary of the Interior) and that agree to attempt to comply with the requirements specified in paragraphs (11), (12), and (13), applicable to the detention and confinement of juveniles, an amount that bears the same ratio to the aggregate amount to be expended through programs referred to in subparagraphs (A) and (B) as the population under 18 years of age in the geographical areas in which such tribes perform such functions bears to the State population under 18 years of age.[:]

(6) provide for an equitable distribution of the assistance received under section 222 [42 USCS § 5632] within the State, including in rural areas;

(7) (A) provide for an analysis of juvenile delinquency problems in, and the juvenile delinquency control and delinquency prevention needs (including educational needs) of, the State (including any geographical area in which an Indian tribe performs law enforcement functions), a description of the services to be provided, and a description of performance goals and priorities, including a specific statement of the manner in which programs are expected to meet the identified juvenile crime problems (including the joining of gangs that commit crimes) and juvenile justice and delinquency prevention needs (including educational needs) of the State; and

(B) contain--

(i) an analysis of gender-specific services for the prevention and treatment of juvenile delinquency, including the types of such services available and the need for such services;

(ii) a plan for providing needed gender-specific services for the prevention and treatment of juvenile delinquency;

(iii) a plan for providing needed services for the prevention and treatment of juvenile delinquency in rural areas;

and

(iv) a plan for providing needed mental health services to juveniles in the juvenile justice system, including information on how such plan is being implemented and how such services will be targeted to those juveniles in such system who are in greatest need of such services;

## 42 USCS § 5633

(8) provide for the coordination and maximum utilization of existing juvenile delinquency programs, programs operated by public and private agencies and organizations, and other related programs (such as education, special education, recreation, health, and welfare programs) in the State;

(9) provide that not less than 75 percent of the funds available to the State under section 222 [42 USCS § 5632], other than funds made available to the State advisory group under section 222(d) [42 USCS § 5632(d)], whether expended directly by the State, by the unit of local government, or by a combination thereof, or through grants and contracts with public or private nonprofit agencies, shall be used for--

(A) community-based alternatives (including home-based alternatives) to incarceration and institutionalization including--

(i) for youth who need temporary placement: crisis intervention, shelter, and after-care; and

(ii) for youth who need residential placement: a continuum of foster care or group home alternatives that provide access to a comprehensive array of services;

(B) community-based programs and services to work with--

(i) parents and other family members to strengthen families, including parent self-help groups, so that juveniles may be retained in their homes;

(ii) juveniles during their incarceration, and with their families, to ensure the safe return of such juveniles to their homes and to strengthen the families; and

(iii) parents with limited English-speaking ability, particularly in areas where there is a large population of families with limited-English speaking ability;

(C) comprehensive juvenile justice and delinquency prevention programs that meet the needs of youth through the collaboration of the many local systems before which a youth may appear, including schools, courts, law enforcement agencies, child protection agencies, mental health agencies, welfare services, health care agencies, and private nonprofit agencies offering youth services;

(D) programs that provide treatment to juvenile offenders who are victims of child abuse or neglect, and to their families, in order to reduce the likelihood that such juvenile offenders will commit subsequent violations of law;

(E) educational programs or supportive services for delinquent or other juveniles--

(i) to encourage juveniles to remain in elementary and secondary schools or in alternative learning situations;

(ii) to provide services to assist juveniles in making the transition to the world of work and self-sufficiency; and

(iii) enhance coordination with the local schools that such juveniles would otherwise attend, to ensure that--

(I) the instruction that juveniles receive outside school is closely aligned with the instruction provided in school;

and

(II) information regarding any learning problems identified in such alternative learning situations are communicated to the schools;

(F) expanding the use of probation officers--

(i) particularly for the purpose of permitting nonviolent juvenile offenders (including status offenders) to remain at home with their families as an alternative to incarceration or institutionalization; and

(ii) to ensure that juveniles follow the terms of their probation;

(G) counseling, training, and mentoring programs, which may be in support of academic tutoring, vocational and technical training, and drug and violence prevention counseling, that are designed to link at-risk juveniles, juvenile offenders, or juveniles who have a parent or legal guardian who is or was incarcerated in a Federal, State, or local correctional facility or who is otherwise under the jurisdiction of a Federal, State, or local criminal justice system, particularly juveniles residing in low-income and high-crime areas and juveniles experiencing educational failure, with responsible individuals (such as law enforcement officials, Department of Defense personnel, individuals working with local businesses, and individuals working with community-based and faith-based organizations and agencies) who are properly screened and trained;

(H) programs designed to develop and implement projects relating to juvenile delinquency and learning disabilities, including on-the-job training programs to assist community services, law enforcement, and juvenile justice personnel to more effectively recognize and provide for learning disabled and other juveniles with disabilities;

(I) projects designed both to deter involvement in illegal activities and to promote involvement in lawful activities on the part of gangs whose membership is substantially composed of youth;

(J) programs and projects designed to provide for the treatment of youths' dependence on or abuse of alcohol or other addictive or nonaddictive drugs;

(K) programs for positive youth development that assist delinquent and other at-risk youth in obtaining--

(i) a sense of safety and structure;

(ii) a sense of belonging and membership;

- (iii) a sense of self-worth and social contribution;
- (iv) a sense of independence and control over one's life; and
- (v) a sense of closeness in interpersonal relationships;

(L) programs that, in recognition of varying degrees of the seriousness of delinquent behavior and the corresponding gradations in the responses of the juvenile justice system in response to that behavior, are designed to--

(i) encourage courts to develop and implement a continuum of post-adjudication restraints that bridge the gap between traditional probation and confinement in a correctional setting (including expanded use of probation, mediation, restitution, community service, treatment, home detention, intensive supervision, electronic monitoring, and similar programs, and secure community-based treatment facilities linked to other support services such as health, mental health, education (remedial and special), job training, and recreation); and

(ii) assist in the provision [by the provision] by the Administrator of information and technical assistance, including technology transfer, to States in the design and utilization of risk assessment mechanisms to aid juvenile justice personnel in determining appropriate sanctions for delinquent behavior;

(M) community-based programs and services to work with juveniles, their parents, and other family members during and after incarceration in order to strengthen families so that such juveniles may be retained in their homes;

(N) programs (including referral to literacy programs and social service programs) to assist families with limited English-speaking ability that include delinquent juveniles to overcome language and other barriers that may prevent the complete treatment of such juveniles and the preservation of their families;

(O) programs designed to prevent and to reduce hate crimes committed by juveniles;

(P) after-school programs that provide at-risk juveniles and juveniles in the juvenile justice system with a range of age-appropriate activities, including tutoring, mentoring, and other educational and enrichment activities;

(Q) community-based programs that provide follow-up post-placement services to adjudicated juveniles, to promote successful reintegration into the community;

(R) projects designed to develop and implement programs to protect the rights of juveniles affected by the juvenile justice system; and

(S) programs designed to provide mental health services for incarcerated juveniles suspected to be in need of such services, including assessment, development of individualized treatment plans, and discharge plans.

(10) provide for the development of an adequate research, training, and evaluation capacity within the State;

(11) shall, in accordance with rules issued by the Administrator, provide that--

(A) juveniles who are charged with or who have committed an offense that would not be criminal if committed by an adult, excluding--

(i) juveniles who are charged with or who have committed a violation of *section 922(x)(2) of title 18, United States Code*, or of a similar State law;

(ii) juveniles who are charged with or who have committed a violation of a valid court order; and

(iii) juveniles who are held in accordance with the Interstate Compact on Juveniles as enacted by the State; shall not be placed in secure detention facilities or secure correctional facilities; and

(B) juveniles--

(i) who are not charged with any offense; and

(ii) who are--

(I) aliens; or

(II) alleged to be dependent, neglected, or abused;

shall not be placed in secure detention facilities or secure correctional facilities;

(12) provide that--

(A) juveniles alleged to be or found to be delinquent or juveniles within the purview of paragraph (11) will not be detained or confined in any institution in which they have contact with adult inmates; and

(B) there is in effect in the State a policy that requires individuals who work with both such juveniles and such adult inmates, including in collocated facilities, have been trained and certified to work with juveniles;

(13) provide that no juvenile will be detained or confined in any jail or lockup for adults except--

(A) juveniles who are accused of nonstatus offenses and who are detained in such jail or lockup for a period not to exceed 6 hours--

(i) for processing or release;

(ii) while awaiting transfer to a juvenile facility; or

(iii) in which period such juveniles make a court appearance;

## 42 USCS § 5633

and only if such juveniles do not have contact with adult inmates and only if there is in effect in the State a policy that requires individuals who work with both such juveniles and adult inmates in collocated facilities have been trained and certified to work with juveniles;

(B) juveniles who are accused of nonstatus offenses, who are awaiting an initial court appearance that will occur within 48 hours after being taken into custody (excluding Saturdays, Sundays, and legal holidays), and who are detained in a jail or lockup--

(i) in which--

(I) such juveniles do not have contact with adult inmates; and

(II) there is in effect in the State a policy that requires individuals who work with both such juveniles and adults inmates in collocated facilities have been trained and certified to work with juveniles; and

(ii) that--

(I) is located outside a metropolitan statistical area (as defined by the Office of Management and Budget) and has no existing acceptable alternative placement available;

(II) is located where conditions of distance to be traveled or the lack of highway, road, or transportation do not allow for court appearances within 48 hours (excluding Saturdays, Sundays, and legal holidays) so that a brief (not to exceed an additional 48 hours) delay is excusable; or

(III) is located where conditions of safety exist (such as severe adverse, life-threatening weather conditions that do not allow for reasonably safe travel), in which case the time for an appearance may be delayed until 24 hours after the time that such conditions allow for reasonable safe travel;

(14) provide for an adequate system of monitoring jails, detention facilities, correctional facilities, and non-secure facilities to insure that the requirements of paragraphs (11), (12), and (13) are met, and for annual reporting of the results of such monitoring to the Administrator, except that such reporting requirements shall not apply in the case of a State which is in compliance with the other requirements of this paragraph, which is in compliance with the requirements in paragraphs (11) and (12), and which has enacted legislation which conforms to such requirements and which contains, in the opinion of the Administrator, sufficient enforcement mechanisms to ensure that such legislation will be administered effectively;

(15) provide assurance that youth in the juvenile justice system are treated equitably on the basis of gender, race, family income, and disability;

(16) provide assurance that consideration will be given to and that assistance will be available for approaches designed to strengthen the families of delinquent and other youth to prevent juvenile delinquency (which approaches should include the involvement of grandparents or other extended family members when possible and appropriate and the provision of family counseling during the incarceration of juvenile family members and coordination of family services when appropriate and feasible);

(17) provide for procedures to be established for protecting the rights of recipients of services and for assuring appropriate privacy with regard to records relating to such services provided to any individual under the State plan;

(18) provide assurances that--

(A) any assistance provided under this Act will not cause the displacement (including a partial displacement, such as a reduction in the hours of nonovertime work, wages, or employment benefits) of any currently employed employee;

(B) activities assisted under this Act will not impair an existing collective bargaining relationship, contract for services, or collective bargaining agreement; and

(C) no such activity that would be inconsistent with the terms of a collective bargaining agreement shall be undertaken without the written concurrence of the labor organization involved;

(19) provide for such fiscal control and fund accounting procedures necessary to assure prudent use, proper disbursement, and accurate accounting of funds received under this title;

(20) provide reasonable assurance that Federal funds made available under this part for any period will be so used as to supplement and increase (but not supplant) the level of the State, local, and other non-Federal funds that would in the absence of such Federal funds be made available for the programs described in this part, and will in no event replace such State, local, and other non-Federal funds;

(21) provide that the State agency designated under paragraph (1) will--

(A) to the extent practicable give priority in funding to programs and activities that are based on rigorous, systematic, and objective research that is scientifically based;

(B) from time to time, but not less than annually, review its plan and submit to the Administrator an analysis and evaluation of the effectiveness of the programs and activities carried out under the plan, and any modifications in the plan, including the survey of State and local needs, that it considers necessary; and

## 42 USCS § 5633

(C) not expend funds to carry out a program if the recipient of funds who carried out such program during the preceding 2-year period fails to demonstrate, before the expiration of such 2-year period, that such program achieved substantial success in achieving the goals specified in the application submitted by such recipient to the State agency;

(22) address juvenile delinquency prevention efforts and system improvement efforts designed to reduce, without establishing or requiring numerical standards or quotas, the disproportionate number of juvenile members of minority groups, who come into contact with the juvenile justice system;

(23) provide that if a juvenile is taken into custody for violating a valid court order issued for committing a status offense--

(A) an appropriate public agency shall be promptly notified that such juvenile is held in custody for violating such order;

(B) not later than 24 hours during which such juvenile is so held, an authorized representative of such agency shall interview, in person, such juvenile; and

(C) not later than 48 hours during which such juvenile is so held--

(i) such representative shall submit an assessment to the court that issued such order, regarding the immediate needs of such juvenile; and

(ii) such court shall conduct a hearing to determine--

(I) whether there is reasonable cause to believe that such juvenile violated such order; and

(II) the appropriate placement of such juvenile pending disposition of the violation alleged;

(24) provide an assurance that if the State receives under section 222 [42 USCS § 5632] for any fiscal year an amount that exceeds 105 percent of the amount the State received under such section for fiscal year 2000, all of such excess shall be expended through or for programs that are part of a comprehensive and coordinated community system of services;

(25) specify a percentage (if any), not to exceed 5 percent, of funds received by the State under section 222 [42 USCS § 5632] (other than funds made available to the State advisory group under section 222(d) [42 USCS § 5632(d)]) that the State will reserve for expenditure by the State to provide incentive grants to units of general local government that reduce the caseload of probation officers within such units;

(26) provide that the State, to the maximum extent practicable, will implement a system to ensure that if a juvenile is before a court in the juvenile justice system, public child welfare records (including child protective services records) relating to such juvenile that are on file in the geographical area under the jurisdiction of such court will be made known to such court;

(27) establish policies and systems to incorporate relevant child protective services records into juvenile justice records for purposes of establishing and implementing treatment plans for juvenile offenders; and

(28) provide assurances that juvenile offenders whose placement is funded through section 472 of the Social Security Act (42 U.S.C. 672) receive the protections specified in section 471 of such Act (42 U.S.C. 671), including a case plan and case plan review as defined in section 475 of such Act (42 U.S.C. 675).

(b) Approval by State agency. The State agency designated under subsection (a)(1), after receiving and considering the advice and recommendations of the advisory group referred to in subsection (a), shall approve the State plan and any modification thereof prior to submission to the Administrator.

(c) If a State fails to comply with any of the applicable requirements of paragraphs (11), (12), (13), and (22) of subsection (a) in any fiscal year beginning after September 30, 2001, then--

(1) subject to paragraph (2), the amount allocated to such State under section 222 [42 USCS § 5632] for the subsequent fiscal year shall be reduced by not less than 20 percent for each such paragraph with respect to which the failure occurs, and

(2) the State shall be ineligible to receive any allocation under such section for such fiscal year unless--

(A) the State agrees to expend 50 percent of the amount allocated to the State for such fiscal year to achieve compliance with any such paragraph with respect to which the State is in noncompliance; or

(B) the Administrator determines that the State--

(i) has achieved substantial compliance with such applicable requirements with respect to which the State was not in compliance; and

(ii) has made, through appropriate executive or legislative action, an unequivocal commitment to achieving full compliance with such applicable requirements within a reasonable time.

(d) Nonsubmission or nonqualification of plan; expenditure of allotted funds; availability of reallocated funds. In the event that any State chooses not to submit a plan, fails to submit a plan, or submits a plan or any modification thereof, which the Administrator, after reasonable notice and opportunity for hearing, in accordance with sections 802, 803, and 805 of title I of the Omnibus Crime Control and Safe Streets Act of 1968 [42 USCS §§ 3783, 3784, and 3785], determines does not meet the requirements of this section, the Administrator shall endeavor to make that State's allocation under the provisions of section 222(a) [42 USCS § 5632(a)], excluding funds the Administrator shall make available to satisfy the requirement specified in section 222(d) [42 USCS § 5632(d)], available to local public and private nonprofit agencies within such State for use in carrying out activities of the kinds described in paragraphs (11), (12), (13), and (22) of subsection (a). The Administrator shall make funds which remain available after disbursements are made by the Administrator under the preceding sentence, and any other unobligated funds, on an equitable basis and to those States that have achieved full compliance with the requirements under paragraphs (11), (12), (13), and (22) of subsection (a).

(e) Notwithstanding any other provision of law, the Administrator shall establish appropriate administrative and supervisory board membership requirements for a State agency designated under subsection (a)(1) and permit the State advisory group appointed under subsection (a)(3) to operate as the supervisory board for such agency, at the discretion of the chief executive officer of the State.

(f) Technical assistance.

(1) In general. The Administrator shall provide technical and financial assistance to an eligible organization composed of member representatives of the State advisory groups appointed under subsection (a)(3) to assist such organization to carry out the functions specified in paragraph (2).

(2) Assistance. To be eligible to receive such assistance, such organization shall agree to carry out activities that include--

(A) conducting an annual conference of such member representatives for purposes relating to the activities of such State advisory groups;

(B) disseminating information, data, standards, advanced techniques, and program models;

(C) reviewing Federal policies regarding juvenile justice and delinquency prevention;

(D) advising the Administrator with respect to particular functions or aspects of the work of the Office; and

(E) advising the President and Congress with regard to State perspectives on the operation of the Office and Federal legislation pertaining to juvenile justice and delinquency prevention.

#### **HISTORY:**

(Sept. 7, 1974, P.L. 93-415, Title II, Part B, § 223, 88 Stat. 1119; Oct. 15, 1976, P.L. 94-503, Title I, § 130(b), 90 Stat. 2425; Oct. 3, 1977, P.L. 95-115, § 3(a)(3)(B), (4), (c)(1)-(3)(A), (4)-(6)(A), (7)-(15), 91 Stat. 1048, 1051-1054; Dec. 8, 1980, P.L. 96-509, §§ 11, 19(g), 94 Stat. 2755, 2764; Oct. 12, 1984, P.L. 98-473, Title II, Ch VI, Division II, Subdiv B, § 626, 98 Stat. 2111; Nov. 18, 1988, P.L. 100-690, Title VII, Subtitle F, Ch 1, § 7258, 7263(a)(1)(A), (b)(1), 102 Stat. 4439, 4443, 4447; Nov. 4, 1992, P.L. 102-586, § 2(f)(3)(A), 106 Stat. 4987.)

(As amended Sept. 13, 1994, P.L. 103-322, Title XI, Subtitle B, § 110201(d), 108 Stat. 2012; Oct. 11, 1996, P.L. 104-294, Title VI, § 604(b)(28), 110 Stat. 3508; Oct. 21, 1998, P.L. 105-277, Div A, § 101(b) [Title I, § 129(a)(2)(C)], 112 Stat. 2681-76; Dec. 21, 2000, P.L. 106-554, § 1(a)(4), 114 Stat. 2763; Nov. 2, 2002, P.L. 107-273, Div C, Title II, Subtitle B, § 12209, 116 Stat. 1873; Jan. 5, 2006, P.L. 109-162, Title III, § 305, 119 Stat. 3016.)

#### **HISTORY; ANCILLARY LAWS AND DIRECTIVES**

#### **References in text:**

"This title", referred to in subsecs. (a)(3), (20), (24), and (d), is Title II of Act Sept. 7, 1974, P.L. 93-415, which appears generally as 42 USCS §§ 5611 et seq. For full classification of such Title, consult USCS Tables volumes.

"This part", referred to in subsecs. (a)(3), (6), (21), and (c), is Part B of Title II of Act Sept. 7, 1974, P.L. 93-415, which appears generally as 42 USCS §§ 5631 et seq. For full classification of such Part, consult USCS Tables volume.

"This Act", referred to in subsec. (a)(19), is Act Sept. 7, 1974, P.L. 93-415, which appears generally as 42 USCS §§ 5601 et seq. For full classification of such Act, consult USCS Tables volumes.

## Explanatory notes:

The bracketed word "and" has been inserted in subsec. (a)(3) to reflect the probable intent of Congress to include such word.

The bracketed "semicolon" has been inserted in subsec. (a)(5) to reflect the probable intent of Congress to include such punctuation.

The words "by the provision" have been enclosed in brackets in subsec. (a)(9)(L)(ii) to indicate the probable intent of Congress to delete those words.

The amendment made by § 1(a)(4) of Act Dec. 21, 2000, P.L. 106-554, is based on § 142 of Title I of Division B of H.R. 5666 (114 Stat. 2763A-235), as introduced on Dec. 15, 2000, which was enacted into law by such § 1(a)(4).

## Amendments:

1976. Act Oct. 15, 1976, in the introductory matter, substituted "(15), and (17)" for "and (15)".

1977. Act Oct. 3, 1977 (effective 10/1/77, as provided by § 263(c) of Act Sept. 7, 1974, as amended by § 6(d) of Act Oct. 3, 1977), in subsec. (a), in para. (3), substituted the preliminary matter for matter which read: "provide for an advisory group appointed by the chief executive of the State to advise the State planning agency and its supervisory board", in subpara. (C) inserted "business groups and businesses employing youth, youth workers involved with alternative youth programs, and persons with special experience and competence in addressing the problem of school violence and vandalism and the problem of learning disabilities;", in subpara. (D) deleted "and" after "local government," in subpara. (E) substituted "at least three of whom shall have been or shall currently be under the jurisdiction of the juvenile justice system; and" for the semicolon, and added subpara. (F), in para. (4), substituted "units of general local government or combinations thereof" for "local governments" and inserted ", except that nothing in the plan requirements, or any regulations promulgated to carry out such requirements, shall be construed to prohibit or impede the State from making grants to, or entering into contracts with, local private agencies or the advisory group", substituted para. (5) for one which read: "provide that at least 66 2/3 per centum of the funds received by the State under section 222 shall be expended through programs of local government insofar as they are consistent with the State plan, except that this provision may be waived at the discretion of the Administrator for any State if the services for delinquent or potentially delinquent youth are organized primarily on a statewide basis;", in para. (a)(6), inserted "unit of general" and "or to a regional planning agency", in para. (8), inserted "Programs and projects developed from the study may be funded under paragraph (10) provided that they meet the criteria for advanced technique programs as specified therein", in para. (10), substituted the preliminary matter for matter which read: "provide that not less than 75 per centum of the funds available to such State under section 222, whether expended directly by the State or by the local government or through contracts with public or private agencies, shall be used for advanced techniques in developing, maintaining, and expanding programs and services designed to prevent juvenile delinquency, to divert juveniles from the juvenile justice system, and to provide community-based alternatives to juvenile detention and correctional facilities. That advanced techniques include--", in subpara. (A), inserted "twenty-four hour intake screening, volunteer and crisis home programs, day treatment, and home probation," in subpara. (C), substituted "other youth to help prevent delinquency" for "youth in danger of becoming delinquent", substituted subpara. (D) for one which read: "(D) comprehensive programs of drug and alcohol abuse education and prevention and programs for the treatment and rehabilitation of drug addicted youth, and 'drug dependent' youth (as defined in section 2(q) of the Public Health Service Act (42 U.S.C. 201(q)))", in subpara. (G), inserted "traditional youth", in subpara. (H), in the preliminary matter, substituted "are designed to" for "that may include but are not limited to programs designed to", and added subpara. (I), substituted para. (12) for one which read: "provide within two years after submission of the plan that juveniles who are charged with or who have committed offenses that would not be criminal if committed by an adult, shall not be placed in juvenile detention or correctional facilities, but must be placed in shelter facilities;", in para. (13), inserted "and youths within the purview of paragraph (12)", in para. (14), deleted "and" after "detention facilities," inserted ", and non-secure facilities", substituted "paragraph (12)(A) and paragraph (13)" for "section 223(12) and (13), and inserted "Associate", in para. (15), deleted "all" after "to deal with", in para. (19), deleted ", to the extent feasible and practical," after "(but not supplant)", in paras. (20) and (21), inserted "Associate"; in subsec. (b), substituted "receiving and considering the advice and recommendations of" for "consulta-

tion with"; in subsec. (c) inserted "Failure to achieve compliance with the subsection (a)(12)(A) requirement within the three-year time limitation shall terminate any State's eligibility for funding under this subpart unless the Administrator, with the concurrence of the Associate Administrator, determines that the State is in substantial compliance with the requirement, through achievement of deinstitutionalization of not less than 75 per centum of such juveniles, and has made, through appropriate executive or legislative action, an unequivocal commitment to achieving full compliance within a reasonable time not exceeding two additional years."; in subsec. (d) inserted "chooses not to submit a plan," and "The Administrator shall endeavor to make such reallocated funds available on a preferential basis to programs in nonparticipating States under section 224(a)(2) and to those States that have achieved substantial or full compliance with the subsection (a)(12)(A) requirement within the initial three years of participation or have achieved full compliance within a reasonable time thereafter as provided by subsection (c)."; and deleted subsec. (e) which read: "In the event the plan does not meet the requirements of this section due to oversight or neglect, rather than explicit and conscious decision, the Administrator shall endeavor to make that State's allotment under the provisions of section 222(a) available to public and private agencies in that State for special emphasis prevention and treatment programs as defined in section 224."

Act Oct. 13, 1977 (effective 10/1/78 as provided by § 4(c)(3)(B) and § 4(c)(6)(B) of Act Oct. 13, 1977), in subsecs. (a)(5) and (a)(10), substituted "section 222(d)" for "section 222(e)".

1980. Act Dec. 8, 1980, in subsec. (a), in the introductory matter, substituted "applicable to a 3-year period. Such plan shall be amended annually to include new programs, and the State shall submit annual performance reports to the Administrator which shall describe progress in implementing programs contained in the original plan, and shall describe the status of compliance with State plan requirements. In accordance with regulations which the Administrator shall prescribe, such plan shall" for "consistent with the provisions of section 303(a), (1), (3), (5), (6), (8), (10), (11), (12), (15), and (17) of title I of the Omnibus Crime Control and Safe Streets Act of 1968. In accordance with regulations established under this title, such plan must", in para. (1), substituted "criminal justice council" for "planning agency" and "section 402(b)(1) of the Omnibus Crime Control and Safe Streets Act of 1968" for "section 203 of such title I", in para. (2), substituted "criminal justice council" for "planning agency", in para. (3), in subpara. (A), substituted "15" for "twenty-one" and "33" for "thirty-three", and "juvenile" for "a juvenile", in subpara. (B), inserted "locally elected officials," and "special education," in subpara. (E), substituted "one-fifth" for "one-third" and "24" for "twenty-six", inserted ", and" after "appointment" and substituted "3 of whose members" for "three of whom", in subpara. (F), in cl. (i), substituted "criminal justice council" for "planning agency", and substituted cl. (ii) for one that read: "(ii) may advise the Governor and the legislature on matters related to its functions, as requested"; in cl. (iii), substituted "criminal justice council" for "planning agency other than those subject to review by the State's judicial planning committee established pursuant to section 203(c) of the Omnibus Crime Control and Safe Streets Act of 1968, as amended" and deleted "and" following the semicolon, in cl. (iv), substituted "criminal justice council and local criminal justice advisory" for "planning agency and regional planning unit supervisory" and "section 1002" for "section 261(b) and section 502(b)", and added cl. (v), substituted another para. (8) for one which read: "set forth a detailed study of the State needs for an effective, comprehensive, coordinated approach to juvenile delinquency prevention and treatment and the improvement of the juvenile justice system. This plan shall include itemized estimated costs for the development and implementation of such programs. Programs and projects developed from the study may be funded under paragraph (10) provided that they meet the criteria for advanced technique programs as specified therein"; in para. (10), in the introductory matter, substituted "confinement in secure detention facilities and secure correctional facilities" for "juvenile detention and correctional facilities", deleted "and" preceding "establish and adopt", and inserted ", and to provide programs for juveniles who have committed serious crimes, particularly programs which are designed to improve sentencing procedures, provide resources necessary for informed dispositions, and provide for effective rehabilitation", in para. (10), in cl. (A), inserted "education, special education," in cl. (E), deleted "keep delinquents and to" preceding "encourage" and inserted "delinquent youth and", substituted paras. (10)(H) and (I) for ones which read:

"(H) provides for a statewide program through the use of probation subsidies, other subsidies, other financial incentives or disincentives to units of local government, or other effective means, are designed to--

"(i) reduce the number of commitments of juveniles to any form of juvenile facility as a percentage of the State juvenile population;

"(ii) increase the use of nonsecure community-based facilities as a percentage of total commitments to juvenile facilities; and

"(iii) discourage the use of secure incarceration and detention;

"(I) programs and activities to establish and adopt, based on the recommendations of the Advisory Committee, standards for the improvement of juvenile justice within the State;".

Such Act further, in subsec. (a), added para. (10)(J), in para. (11), substituted "provide" for "provides", in para. (12), in subpara. (A), substituted "secure detention facilities or secure correctional facilities" for "juvenile detention or correctional facilities" and inserted "or offenses which do not constitute violations of valid court orders", in subpara. (B), deleted "Associate" preceding "Administrator", redesignated former paras. (14) through (21) as paras. (15) through (22) respectively, added a new para. (14), and, in para. (15), as so redesignated, substituted "paragraph (12)(A), paragraph (13), and paragraph (14)" for "paragraph (12)(A) and paragraph (13)", deleted "Associate" following "monitoring to be", and inserted ", except that such reporting requirements shall not apply in the case of a State which is in compliance with the other requirements of this paragraph, which is in compliance with the requirements in paragraph (12)(A) and paragraph (13), and which has enacted legislation which conforms to such requirements and which contains, in the opinion of the Administrator, sufficient enforcement mechanisms to ensure that such legislation will be administered effectively", in para. (18)(A), as redesignated, substituted "of" for "or" following "preservation", in para. (21), as redesignated, substituted "criminal justice council" for "planning agency", substituted "than" for "then", and deleted "Associate" preceding "Administrator", in para. (22), as redesignated, deleted "Associate" preceding "Administrator", and in the concluding matter, substituted "section 403" for "303(a)" and inserted "Such plan shall be modified by the State, as soon as practicable after the date of the enactment of the Juvenile Justice Amendments of 1980, in order to comply with the requirements of paragraph (14)."; in subsec. (b), substituted "criminal justice council" for "planning agency"; in subsec. (c), deleted ", with the concurrence of the Associate Administrator," preceding "determines" and inserted "or through removal of 100 percent of such juveniles from secure correctional facilities" and inserted "Failure to achieve compliance with the requirements of subsection (a)(14) within the 5-year time limitation shall terminate any State's eligibility for funding under this subpart, unless the Administrator determines that (1) the State is in substantial compliance with such requirements through the achievement of not less than 75 percent removal of juveniles from jails and lockups for adults; and (2) the State has made, through appropriate executive or legislative action, an unequivocal commitment to achieving full compliance within a reasonable time, not to exceed 2 additional years."; in subsec. (d), substituted "sections 803, 804, and 805" for "sections 509, 510, and 511", inserted "endeavor to" and substituted "local public and private nonprofit agencies within such State for use in carrying out the purposes of subsection (a)(12)(A), subsection (a)(13), or subsection (a)(14)" for "public and private agencies for special emphasis prevention and treatment programs as defined in section 224", substituted "make funds which remain available after disbursements are made by the Administrator under the preceding sentence, and any other unobligated funds," for "endeavor to make such reallocated funds", and substituted "an equitable" for "a preferential", deleted "to programs in nonparticipating States under section 224(a)(2) and" following "basis", deleted "substantial or" following "achieved", and substituted "requirements under subsection (a)(12)(A) and subsection (a)(13)" for "subsection (a)(12)(A) requirement within the initial three years of participation or have achieved full compliance within a reasonable time thereafter as provided by subsection (c)".

1984. Act Oct. 12, 1984 (effective 10/12/84, as provided by § 670(a) of such Act, which appears as 42 USCS § 5601 note), in subsec. (a), substituted para. (1) for one which read: "designate the State criminal justice council established by the State under section 402(b)(1) of the Omnibus Crime Control and Safe Streets Act of 1968 as the sole agency for supervising the preparation and administration of the plan;"; in para. (2), deleted "(hereafter referred to in this part as the 'State criminal justice council') preceding "has or will", in para. (3), substituted subpara. (C) for one which read: "which shall include representatives of private organizations concerned with delinquency prevention or treatment; concerned with neglected or dependent children; concerned with the quality of juvenile justice, education, or social services for children; which utilize volunteers to work with delinquents or potential delinquents; community-based delinquency prevention or treatment programs; business groups and businesses employing youth, youth workers involved with alternative youth programs, and persons with special experience and competence in addressing the problem of school violence and vandalism and the problem of learning disabilities; and organizations which represent employees affected by this Act," and in subpara. (F), in cl. (i), substituted "State agency designated under paragraph (1)" for "State criminal justice council", in cl. (ii), substituted "paragraphs (12), (13), and (14)" for "paragraph (12)(A) and paragraph (13)" and in cl. (iv), substituted "paragraphs (12), (13), and (14)" for "paragraph (12)(A) and paragraph (13)", and deleted "in advising on the State's maintenance of effort under section 1002 of the Omnibus Crime Control and Safe Streets Act of 1968, as amended," following "board composition", in para. (9), inserted "special education", in para. (10), in the introductory matter, substituted "programs for juveniles, including those processed in the criminal justice system," for "programs for juveniles", and substituted "provide for effective rehabilitation, and facilitate the coordination of services between the juvenile justice and criminal justice systems" for "and provide for effective rehabilitation", in subpara. (E),

inserted ", including programs to counsel delinquent youth and other youth regarding the opportunities which education provides" in subpara. (F), inserted "and their families", in subpara. (H), substituted cl. (iii) for one which read: "establish and adopt, based upon the recommendations of the Advisory Committee, standards for the improvement of juvenile justice within the State; or", in cl. (iv), inserted "or" following the concluding semicolon, and added cl. (v), in subpara. (I), deleted "and" following the concluding semicolon, in subpara. (J), substituted "gangs whose membership is substantially composed of juveniles" for "juvenile gangs and their members", and added subparas. (K) and (L), substituted para. (14) for one which read: "provide that, beginning after the 5-year period following the date of the enactment of the Juvenile Justice Amendments of 1980 [Dec. 8, 1980], no juvenile shall be detained or confined in any jail or lockup for adults, except that the Administrator shall promulgate regulations which (A) recognize the special needs of areas characterized by low population density with respect to the detention of juveniles; and (B) shall permit the temporary detention in such adult facilities of juveniles accused of serious crimes against persons, subject to the provisions of paragraph (13), where no existing acceptable alternative placement is available"; redesignated paras. (17)-(22) as paras. (18)-(23), and added para. (17), in para. (19), as redesignated, in the introductory matter, substituted "arrangements shall be made" for "arrangements are made", and substituted "Act and shall provide for the terms and conditions of such protective arrangements established pursuant to this section, and such" for "Act. Such", in subpara. (D), inserted "and" following the concluding semicolon, in subpara. (E), substituted a semicolon for the concluding period, and deleted the concluding matter which read: "The State plan shall provide for the terms and conditions of the protection arrangements established pursuant to this section"; in para. (22), substituted "State agency designated under paragraph (1)" for "State criminal justice council" and deleted the concluding matter which read: "Such plan may at the discretion of the Associate Administrator be incorporated into the plan specified in section 403 of the Omnibus Crime Control and Safe Streets Act. Such plan shall be modified by the State, as soon as practicable after the date of the enactment of the Juvenile Justice Amendments of 1980, in order to comply with the requirements of paragraph (14)."; in subsec. (b), substituted "State agency designated under subsection (a)(1)" for "State criminal justice council designated pursuant to section 223(a)", and substituted "subsection (a)" for "section 223(a)"; in subsec. (c), substituted "not to exceed 3 additional years" for "not to exceed 2 additional years"; and in subsec. (d), substituted "sections 802, 803, and 804" for "sections 803, 804, and 805".

1988. Act Nov. 18, 1988 (effective 10/1/88 as provided by § 7296(a) of such Act, which appears as 42 USCS § 5601 note), in subsec. (a), in para. (1), substituted "section 291(c)(1)" for "section 261(c)(1)", in para. (14), in the introductory matter, substituted "1993" for "1989", redesignated former subparas. (i)-(iii) as subparas. (A)-(C), respectively, and in subpara. (C), as so redesignated, substituted a semicolon for the period, in para. (22), deleted "and" following the semicolon, redesignated former para. (23) as para. (24), and added a new para. (23).

Such Act further (effective 10/1/88 as above), in subsec. (c), designated the existing provisions as para. (1), and in such para., substituted "part" for "subpart", deleted the sentence which read: "Failure to achieve compliance with the requirements of subsection (a)(14) within the 5-year time limitation shall terminate any State's eligibility for funding under this subpart, unless the Administrator determines that (1) the State is in substantial compliance with such requirements through the achievement of not less than 75 percent removal of juveniles from jails and lockups for adults; and (2) the State has made, through appropriate executive or legislative action, an unequivocal commitment to achieving full compliance within a reasonable time, not to exceed 3 additional years." following "two additional years.", and added paras. (2)-(4).

Such Act further (effective and applicable as provided by § 7296(a), (b)(1) of such Act, which appears as 42 USCS § 5601 note), in subsec. (a), in para. (5), in the introductory matter, deleted "through" following "shall be expended", in subpara. (A), inserted "through" and deleted "and" following the semicolon, in subpara. (B), inserted "through" and added "and" following the semicolon, and added subpara. (C), in para. (8)(A), inserted "(including the joining of gangs that commit crimes)" wherever appearing, and "(including any geographical area in which an Indian tribe performs law enforcement functions)".

1992. Act Nov. 4, 1992, in subsec. (a), in the introductory matter, substituted "programs and challenge activities subsequent to State participation in part E. The State" for "programs, and the State", in para. (1), substituted "section 299(c)(1)" for "section 291(c)(1)", and substituted para. (3) for one which read: "provide for an advisory group appointed by the chief executive of the State to carry out the functions specified in subparagraph (F) and to participate in the development and review of the State's juvenile justice plan prior to submission to the supervisory board for final action and (A) which shall consist of not less than 15 and not more than 33 persons who have training, experience, or

special knowledge concerning the prevention and treatment of juvenile delinquency or the administration of juvenile justice, (B) which shall include locally elected officials, representation of units of local government, law enforcement and juvenile justice agencies such as law enforcement, correction or probation personnel, and juvenile or family court judges, and public agencies concerned with delinquency prevention or treatment such as welfare, social services, mental health, education, special education, or youth services departments, (C) which shall include (i) representatives of private organizations, including those with a special focus on maintaining and strengthening the family unit, those representing parents or parent groups, those concerned with delinquency prevention and treatment and with neglected or dependent children, and those concerned with the quality of juvenile justice, education, or social services for children; (ii) representatives of organizations which utilize volunteers to work with delinquents or potential delinquents; (iii) representatives of community based delinquency prevention or treatment programs; (iv) representatives of business groups or businesses employing youth; (v) youth workers involved with alternative youth programs; and (vi) persons with special experience and competence in addressing the problems of the family, school violence and vandalism, and learning disabilities, (D) a majority of whose members (including the chairman) shall not be full-time employees of the Federal, State, or local government, (E) at least one-fifth of whose members shall be under the age of 24 at the time of appointment and at least 3 of whose members shall have been or shall currently be under the jurisdiction of the juvenile justice system; and (F) which (i) shall, consistent with this title, advise the State agency designated under paragraph (1) and its supervisory board; (ii) shall submit to the Governor and the legislature at least annually recommendations with respect to matters related to its functions, including State compliance with the requirements of paragraph (12), (13), and (14); (iii) shall have an opportunity for review and comment on all juvenile justice and delinquency prevention grant applications submitted to the State criminal justice council, except that any such review and comment shall be made no later than 30 days after the submission of any such application to the advisory group; and (iv) may be given a role in monitoring State compliance with the requirements of paragraph (12), (13), and (14), in advising on State criminal justice council and local criminal justice advisory board composition, and in review of the progress and accomplishments of juvenile justice and delinquency prevention projects funded under the comprehensive State plan; and (v) shall contact and seek regular input from juveniles currently under the jurisdiction of the juvenile justice system;"

Such Act further, in subsec. (a), in para. (8), designated the existing provisions as subpara. (A) and in subpara. (A), as so designated, substituted "(i) an" for "(A) an", substituted "(ii)" for "(B)", and "(iii)" for "(C)", inserted "(including educational needs)" in two places, and added subparas. (B)-(D), in para. (9), inserted "recreation," substituted para. (10) for one which read:

"(10) provide that not less than 75 per centum of the funds available to such State under section 222, other than funds made available to the State advisory group under section 222(d), whether expended directly by the State, by the unit of general local government or combination thereof, or through grants and contracts with public or private agencies, shall be used for advanced techniques in developing, maintaining, and expanding programs and services designed to prevent juvenile delinquency, to divert juveniles from the juvenile justice system, to provide community-based alternatives to confinement in secure detention facilities and secure correctional facilities, to encourage a diversity of alternatives within the juvenile justice system, to establish and adopt juvenile justice standards, to encourage a diversity of alternatives within the juvenile justice system, and to establish and adopt juvenile justice standards, and to provide programs for juveniles, including those processed in the criminal justice system, who have committed serious crimes, particularly programs which are designed to improve sentencing procedures, provide resources necessary for informed dispositions, provide for effective rehabilitation, and facilitate the coordination of services between the juvenile justice and criminal justice systems. These advanced techniques include--

"(A) community-based programs and services for the prevention and treatment of juvenile delinquency through the development of foster-care and shelter-care homes, group homes, halfway houses, homemaker and home health services, twenty-four hour intake screening, volunteer and crisis home programs, education, special education, day treatment, and home probation, and any other designated community-based diagnostic, treatment, or rehabilitative service;

"(B) community-based programs and services to work with parents and other family members to maintain and strengthen the family unit so that the juvenile may be retained in his home;

"(C) opportunities for delinquents and other youth to help prevent delinquency;

"(D) projects designed to develop and implement programs stressing advocacy activities aimed at improving services for and protecting the rights of youth impacted by the juvenile justice system;

"(E) educational programs or supportive services designed to encourage delinquent youth and other youth to remain in elementary and secondary schools or in alternative learning situations, including programs to counsel delinquent youth and other youth regarding the opportunities which education provides,

"(F) expanded use of probation and recruitment and training of probation officers, other professional and paraprofessional personnel and volunteers to work effectively with youth and their families,

"(G) youth initiated programs and outreach programs designed to assist youth who otherwise would not be reached by traditional youth assistance programs;

"(H) statewide programs through the use of subsidies or other financial incentives to units of local government designed to--

"(i) remove juveniles from jails and lockups for adults;

"(ii) replicate juvenile programs designated as exemplary by the National Institute of Justice;

"(iii) establish and adopt, based on the recommendations of the National Advisory Committee for Juvenile Justice and Delinquency Prevention made before the date of the enactment of the Juvenile Justice, Runaway Youth, and Missing Children's Act Amendments of 1984, standards for the improvement of juvenile justice within the State;

"(iv) increase the use of nonsecure community-based facilities and discourage the use of secure incarceration and detention; or

"(v) involve parents and other family members in addressing the delinquency-related problems of juveniles;

"(I) programs designed to develop and implement projects relating to juvenile delinquency and learning disabilities, including on-the-job training programs to assist law enforcement and juvenile justice personnel to more effectively recognize and provide for learning disabled and other handicapped juveniles;

"(J) projects designed both to deter involvement in illegal activities and to promote involvement in lawful activities on the part of gangs whose membership is substantially composed of juveniles;

"(K) programs and projects designed to provide for the treatment of juveniles' dependence on or abuse of alcohol or other addictive or nonaddictive drugs; and

"(L) law-related education programs and projects designed to prevent juvenile delinquency;"

Such Act further, in subsec. (a), in para. (12)(A), inserted "or alien juveniles in custody," in para. (13), deleted "regular" before "contact" and inserted "or with the part-time or full-time security staff (including management) or direct-care staff of a jail or lockup for adults", and, in para. (14), substituted "1997" for "1993" and substituted "areas that are in compliance with paragraph (13) and--" and subparas. (A)-(C) for "areas which--

"(A) are outside a Standard Metropolitan Statistical Area,

"(B) have no existing acceptable alternative placement available, and

"(C) are in compliance with the provisions of paragraph (13);"

Such Act further, in subsec. (a)(14), purported to delete "; beginning after the five-year period following December 8, 1980,"; however, ", beginning after the five-year period following December 8, 1980," was deleted in order to effectuate the probable intent of Congress.

Such Act further, in subsec. (a), substituted para. (16) for one which read: "provide assurance that assistance will be available on an equitable basis to deal with disadvantaged youth including, but not limited to, females, minority youth, and mentally retarded and emotionally or physically handicapped youth;" and, in para. (17), substituted "the families" for "and maintain the family units".

Such Act further, in subsec. (a)(17), purported to substitute "delinquency (which" for "delinquency. Such"; however the substitution was made for "delinquency. Such" to effectuate the probable intent of Congress.

Such Act further, in subsec. (a), in para. (17), inserted "and the provision of family counseling during the incarceration of juvenile family members and coordination of family services when appropriate and feasible)", in para. (23), deleted "and" after the concluding semicolon, in para. (24), substituted "; and" for the concluding period, and added para. (25).

Such Act further substituted subsec. (c) (for continued effectiveness of para. (3) thereof, see note to this section), for one which read:

"(c)

(1) The Administrator shall approve any State plan and any modification thereof that meets the requirements of this section. Failure to achieve compliance with the subsection (a)(12)(A) requirement within the three-year time limitation shall terminate any State's eligibility for funding under this part unless the Administrator determines that the State is in substantial compliance with the requirement, through achievement of deinstitutionalization of not less than 75 per centum of such juveniles or through removal of 100 percent of such juveniles from secure correctional facilities, and has made, through appropriate executive or legislative action, an unequivocal commitment to achieving full compliance within a reasonable time not exceeding two additional years.

"(2) Failure to achieve compliance with the requirements of subsection (a)(14) within the 5-year time limitation shall terminate any State's eligibility for funding under this part unless the Administrator--

"(A) determines, in the discretion of the Administrator, that such State has--

"(i)

(I) removed not less than 75 percent of juveniles from jails and lockups for adults; or

"(II) achieved substantial compliance with such subsection; and

"(ii) made, through appropriate executive or legislative action, an unequivocal commitment to achieving full compliance within a reasonable time, not to exceed 3 additional years; or

"(B) waives the termination of the State's eligibility on the condition that the State agrees to expend all of the funds to be received under this part by the State (excluding funds required to be expended to comply with subsections (c) and (d) of section 222 and with section 223(a)(5)(C)), only to achieve compliance with subsection (a)(14).

"(3) Except as provided in paragraph (2), failure to achieve compliance with the requirements of subsection (a)(14) after December 8, 1985, shall terminate any State's eligibility for funding under this part unless the Administrator waives the termination of the State's eligibility on the condition that the State agrees to expend all of the funds to be received under this part by the State (excluding funds required to be expended to comply with subsections (c) and (d) of section 222 and with section 223(a)(5)(C)), only to achieve compliance with subsection (a)(14).

"(4) For purposes of paragraph (2)(A)(i)(II), a State may demonstrate that it is in substantial compliance with such paragraph by showing that it has--

"(A) removed all juvenile status offenders and nonoffenders from jails and lockups for adults;

"(B) made meaningful progress in removing other juveniles from jails and lockups for adults;

"(C) diligently carried out the State's plan to comply with subsection (a)(14); and

"(D) historically expended, and continues to expend, to comply with subsection (a)(14) an appropriate and significant share of the funds received by the State under this part."

Such Act further, in subsec. (d), inserted ", excluding funds the Administrator shall make available to satisfy the requirement specified in section 222(d)", substituted "activities of the kinds described in subsection (a)(12)(A), (13), (14) and (23)" for "the purposes of subsection (a)(12)(A), subsection (a)(13), or subsection (a)(14)" and substituted "subsection (a)(12)(A), (13), (14) and (23)" for "subsection (a)(12)(A) and subsection (a)(13)".

1994. Act Sept. 13, 1994, in subsec. (a)(12)(A), substituted "(other than an offense that constitutes a violation of a valid court order or a violation of *section 922(x) of title 18, United States Code*, or a similar State law)." for "which do not constitute violations of valid court orders".

1996. Act Oct. 11, 1996 (effective on 9/13/94, pursuant to § 604(d) of such Act, which appears as *18 USCS § 13* note), in subsec. (a)(12)(A), substituted "law)" for "law)".

1998. Act Oct. 21, 1998, in subsec. (a), in para. (4), substituted "units of local government" for "units of general local government" following "participation of" and substituted "units of local government" for "local governments" preceding ", except", in para. (5), in subpara. (A), substituted "units of local government" for "units of general local government" and, in subpara. (B), substituted "unit of local government" for "unit of general local government" and, in paras. (6) and (10), substituted "unit of local government" for "unit of general local government".

2000. Act Dec. 21, 2000, in subsec. (a)(14), in the introductory matter, inserted "(except in the case of Alaska where such time limit may be forty-eight hours in fiscal years 2000 through 2002)".

2002. Act Nov. 2, 2002 (effective on 10/1/2003, and applicable only with respect to fiscal years beginning on or after 10/1/2003, pursuant to § 12223 of such Act, which appears as *42 USCS § 5601* note), in subsec. (a), in the introductory matter, substituted ", projects, and activities" for "and challenge activities subsequent to State participation in part E", in para. (3), in the introductory matter, substituted "that--" for ", which--", in subpara. (A)(i), substituted ", the administration of juvenile justice, or the reduction of juvenile delinquency" for "or the administration of juvenile justice", and, in subpara. (D), in cl. (i), inserted "and" following the concluding semicolon, and, in cl. (ii), substituted "paragraphs (11), (12), and (13)" for "paragraphs (12), (13), and (14) and with progress relating to challenge activities carried out pursuant to part E", in para. (5), in the introductory matter, substituted "reduced by the percentage (if any) specified by the State under the authority of paragraph (25) and excluding" for ", other than", and, in subpara. (C), substituted "paragraphs (11), (12), and (13)" for "paragraphs (12)(A), (13), and (14)", deleted para. (6), which read: "(6) provide that the chief executive officer of the unit of local government shall assign responsibility for the preparation and administration of the local government's part of a State plan, or for the supervision of the preparation and administration of the local govern-

ment's part of the State plan, to that agency within the local government's structure or to a regional planning agency (hereinafter in this part referred to as the "local agency") which can most effectively carry out the purposes of this part and shall provide for supervision of the programs funded under this part by that local agency"; in para. (7), inserted ", including in rural areas", in para. (8), in subpara. (A), substituted "for an analysis of juvenile delinquency problems in, and the juvenile delinquency control and delinquency prevention needs (including educational needs) of, the State" for "for (i) an analysis of juvenile crime problems (including the joining of gangs that commit crimes) and juvenile justice and delinquency prevention needs (including educational needs) within the relevant jurisdiction", and substituted "of the State; and" for "of the jurisdiction; (ii) an indication of the manner in which the programs relate to other similar State or local programs which are intended to address the same or similar problems; and (iii) a plan for the concentration of State efforts which shall coordinate all State juvenile delinquency programs with respect to overall policy and development of objectives and priorities for all State juvenile delinquency programs and activities, including provision for regular meetings of State officials with responsibility in the area of juvenile justice and delinquency prevention;"; substituted subpara. (B) for one which read:

"(B) contain--

"(i) an analysis of gender-specific services for the prevention and treatment of juvenile delinquency, including the types of such services available and the need for such services for females; and

"(ii) a plan for providing needed gender-specific services for the prevention and treatment of juvenile delinquency;";

and deleted subparas. (C) and (D), which read:

"(C) contain--

"(i) an analysis of services for the prevention and treatment of juvenile delinquency in rural areas, including the need for such services, the types of such services available in rural areas, and geographically unique barriers to providing such services; and

"(ii) a plan for providing needed services for the prevention and treatment of juvenile delinquency in rural areas; and

"(D) contain--

"(i) an analysis of mental health services available to juveniles in the juvenile justice system (including an assessment of the appropriateness of the particular placements of juveniles in order to receive such services) and of barriers to access to such services; and

"(ii) a plan for providing needed mental health services to juveniles in the juvenile justice system;";

substituted para. (9) for one which read: "(9) provide for the active consultation with and participation of private agencies in the development and execution of the State plan; and provide for coordination and maximum utilization of existing juvenile delinquency programs and other related programs, such as education, special education, recreation, health, and welfare within the State;"; in para. (10), in subpara. (A), in the introductory matter, substituted "including" for ", specifically", deleted cl. (i), which read: "(i) for youth who can remain at home with assistance: home probation and programs providing professional supervised group activities or individualized mentoring relationships with adults that involve the family and provide counseling and other supportive services;"; and redesignated cls. (ii) and (iii) as cls. (i) and (ii), respectively, substituted subpara. (D) for one which read: "(D) projects designed to develop and implement programs stressing advocacy activities aimed at improving services for and protecting the rights of youth affected by the juvenile justice system;"; in subpara. (E), redesignated cl. (ii) as cl. (iii), substituted "juveniles--" and cls. (i) and (ii) for "juveniles, provided equitably regardless of sex, race, or family income, designed to--

"(i) encourage juveniles to remain in elementary and secondary schools or in alternative learning situations, including--

"(I) education in settings that promote experiential, individualized learning and exploration of academic and career options;

"(II) assistance in making the transition to the world of work and self-sufficiency;

"(III) alternatives to suspension and expulsion; and

"(IV) programs to counsel delinquent juveniles and other juveniles regarding the opportunities that education provides; and";

substituted subparas. (F) and (G) for ones which read:

"(F) expanded use of home probation and recruitment and training of home probation officers, other professional and paraprofessional personnel, and volunteers to work effectively to allow youth to remain at home with their families as an alternative to incarceration or institutionalization;

"(G) youth-initiated outreach programs designed to assist youth (including youth with limited proficiency in English) who otherwise would not be reached by traditional youth assistance programs;";

in subpara. (H), substituted "juveniles with disabilities" for "handicapped youth", deleted subpara. (K), which read: "(K) law-related education programs (and projects) for delinquent and at-risk youth designed to prevent juvenile delinquency;", in subpara. (L), in cl. (iv), added "and" following the concluding semicolon, in cl. (v), deleted "and" following the concluding semicolon, and deleted cl. (vi), which read: "(vi) a sense of competence and mastery including health and physical competence, personal and social competence, cognitive and creative competence, vocational competence, and citizenship competence, including ethics and participation;", in subpara. (M)(i), deleted "boot camps" following "monitoring,", substituted subpara. (N) for one which read: "(N) programs designed to prevent and reduce hate crimes committed by juveniles, including educational programs and sentencing programs designed specifically for juveniles who commit hate crimes and that provide alternatives to incarceration; and", in subpara. (O), substituted "other" for "cultural", and substituted the concluding semicolon for a period.

Such Act further (effective as above), in subsec. (a), in para. (10), redesignated subparas. (L)-(O) as subparas. (K)-(N), respectively, and added subparas. (O)-(S), substituted paras. (12)-(14) for ones which read:

"(12)

(A) provide within three years after submission of the initial plan that juveniles who are charged with or who have committed offenses that would not be criminal if committed by an adult or offenses (other than an offense that constitutes a violation of a valid court order or a violation of *section 922(x) of title 18, United States Code*, or a similar State law), or alien juveniles in custody, or such nonoffenders as dependent or neglected children, shall not be placed in secure detention facilities or secure correctional facilities; and

"(B) provide that the State shall submit annual reports to the Administrator containing a review of the progress made by the State to achieve the deinstitutionalization of juveniles described in subparagraph (A) and a review of the progress made by the State to provide that such juveniles, if placed in facilities, are placed in facilities which (i) are the least restrictive alternatives appropriate to the needs of the child and the community; (ii) are in reasonable proximity to the family and the home communities of such juveniles; and (iii) provide the services described in section 103(1);

"(13) provide that juveniles alleged to be or found to be delinquent and youths within the purview of paragraph (12) shall not be detained or confined in any institution in which they have contact with adult persons incarcerated because they have been convicted of a crime or are awaiting trial on criminal charges or with the part-time or full-time security staff (including management) or direct-care staff of a jail or lockup for adults;

"(14) provide that no juvenile shall be detained or confined in any jail or lockup for adults, except that the Administrator shall, through 1997, promulgate regulations which make exceptions with regard to the detention of juveniles accused of nonstatus offenses who are awaiting an initial court appearance pursuant to an enforceable State law requiring such appearances within twenty-four hours (except in the case of Alaska where such time limit may be forty-eight hours in fiscal years 2000 through 2002) after being taken into custody (excluding weekends and holidays) provided that such exceptions are limited to areas that are in compliance with paragraph (13) and--

"(A)

(i) are outside a Standard Metropolitan Statistical Area; and

"(ii) have no existing acceptable alternative placement available;

"(B) are located where conditions of distance to be traveled or the lack of highway, road, or other ground transportation do not allow for court appearances within 24 hours, so that a brief (not to exceed 48 hours) delay is excusable; or

"(C) are located where conditions of safety exist (such as severely adverse, life-threatening weather conditions that do not allow for reasonably safe travel), in which case the time for an appearance may be delayed until 24 hours after the time that such conditions allow for reasonably safe travel;";

in para. (15), substituted "paragraphs (11), (12), and (13)" for "paragraph (12)(A), paragraph (13), and paragraph (14)", and substituted "paragraphs (11) and (12)" for "paragraph (12)(A) and paragraph (13)", in para. (16), substituted "disability" for "mentally, emotionally, or physically handicapping conditions", substituted para. (19) for one which read:

"(19) provide that fair and equitable arrangements shall be made to protect the interests of employees affected by assistance under this Act and shall provide for the terms and conditions of such protective arrangements established pursuant to this section, and such protective arrangements shall, to the maximum extent feasible, include, without being limited to, such provisions as may be necessary for--

"(A) the preservation of rights, privileges, and benefits (including continuation of pension rights and benefits) under existing collective-bargaining agreements or otherwise;

"(B) the continuation of collective-bargaining rights;

"(C) the protection of individual employees against a worsening of their positions with respect to their employment;

"(D) assurances of employment to employees of any State or political subdivision thereof who will be affected by any program funded in whole or in part under provisions of this Act; and

"(E) training or retraining programs;"

substituted paras. (22)-(24) for ones which read:

"(22) provide that the State agency designated under paragraph (1) will from time to time, but not less often than annually, review its plan and submit to the Administrator an analysis and evaluation of the effectiveness of the programs and activities carried out under the plan, and any modifications in the plan, including the survey of State and local needs, which it considers necessary;

"(23) address efforts to reduce the proportion of juveniles detained or confined in secure detention facilities, secure correctional facilities, jails, and lockups who are members of minority groups if such proportion exceeds the proportion such groups represent in the general population;

"(24) contain such other terms and conditions as the Administrator may reasonably prescribe to assure the effectiveness of the programs assisted under this title; and",

in para. (25), substituted "2000" for "1992", and substituted the concluding semicolon for a period.

Such Act further (effective as above), in subsec. (a), redesignated paras. (7)-(25) as paras. (6)-(24), respectively, and added paras. (25)-(28); substituted subsec. (c) for one which read:

"(c) Approval by Administrator; compliance with statutory requirements.

(1) Subject to paragraph (2), the Administrator shall approve any State plan and any modification thereof that meets the requirements of this section.

"(2) Failure to achieve compliance with the subsection (a)(12)(A) requirement within the 3-year time limitation shall terminate any State's eligibility for funding under this part for a fiscal year beginning before January 1, 1993, unless the Administrator determines that the State is in substantial compliance with the requirement, through achievement of deinstitutionalization of not less than 75 percent of such juveniles or through removal of 100 percent of such juveniles from secure correctional facilities, and has made, through appropriate executive or legislative action, an unequivocal commitment to achieving full compliance within a reasonable time not exceeding 2 additional years.

"(3) If a State fails to comply with the requirements of subsection (a), (12)(A), (13), (14), or (23) in any fiscal year beginning after January 1, 1993--

"(A) subject to subparagraph (B), the amount allotted under section 222 to the State for that fiscal year shall be reduced by 25 percent for each such paragraph with respect to which noncompliance occurs; and

"(B) the State shall be ineligible to receive any allotment under that section for such fiscal year unless--

"(i) the State agrees to expend all the remaining funds the State receives under this part (excluding funds required to be expended to comply with section 222 (c) and (d) and with section 223(a)(5)(C)) for that fiscal year only to achieve compliance with any such paragraph with respect to which the State is in noncompliance; or

"(ii) the Administrator determines, in the discretion of the Administrator, that the State--

"(I) has achieved substantial compliance with each such paragraph with respect to which the State was not in compliance; and

"(II) has made, through appropriate executive or legislative action, an unequivocal commitment to achieving full compliance within a reasonable time.";

in subsec. (d), substituted "allocation" for "allotment", and substituted "paragraphs (11), (12), (13), and (22) of subsection (a)" for "subsection (a)(12)(A), (13), (14) and (23)" in two places; and added subsecs. (e) and (f).

2006. Act Jan. 5, 2006, in subsec. (a)(7)(B), redesignated cls. (i), (ii), and (iii), as cls. (ii), (iii), and (iv), respectively, and inserted new cl. (i).

#### Redesignation:

This section, enacted as § 223 of Subpart I of Part B of Title II of Act Sept. 7, 1974, P.L. 93-415, was redesignated as part of Part B of Title II of such Act by Act Nov. 18, 1988, P.L. 100-690, Title VII, Subtitle F, Ch 1, § 7263(a)(1)(A), 102 Stat. 4443, effective Oct. 1, 1988 as provided by § 7296(a) of such Act, which appears as 42 USCS § 5601 note.

#### Other provisions:

**Termination of advisory committees, boards and councils.** Act Oct. 6, 1972, P.L. 92-463, §§ 3(2) and 14, 86 Stat. 770, 776 (effective 1/5/73, as provided by § 15 of such Act), which is classified as 5 USCS Appx, provides that the advisory committees in existence on Jan. 5, 1973, are to terminate not later than the expiration of the two-year period following Jan. 5, 1973, unless, in the case of a board established by the President or an officer of the Federal Government, such board is renewed by appropriate action prior to the expiration of such two-year period, or in the case of a board established by the Congress, its duration is otherwise provided for by law.

**Act Nov. 4, 1992; savings provision.** Act Nov. 4, 1992, P.L. 102-586, § 2(f)(3)(B), 106 Stat. 4994, provides: "Notwithstanding the amendment made by subparagraph (A)(ii) [amending subsec. (c) of this section], section 223(c)(3) of the Juvenile Justice and Delinquency Prevention Act of 1974 (42 U.S.C. 5633(c)(3)), as in effect on the day prior to the date of enactment of this Act, shall remain in effect to the extent that it provides the Administrator authority to grant a waiver with respect to a fiscal year prior to a fiscal year beginning before January 1, 1993."