

TABLE OF CONTENTS

	Page Number
TABLE OF AUTHORITIES	ii
STATEMENT OF THE CASE AND FACTS	1
ARGUMENT	1
CERTIFIED QUESTION:	
Does Juvenile Rule 29 apply to probation revocation hearings in juvenile court?.....	2
FIRST PROPOSITION OF LAW:	
A child has the right to counsel at all stages of the proceedings against him. A child’s waiver of his right to counsel at a probation revocation hearing should be permitted only upon strict compliance with constitutional safeguards that can ensure such waiver is knowing, intelligent, and voluntary and thus comports with the due process requirements of Article I, Section 16 of the Ohio Constitution and the Fifth and Fourteenth Amendments to the United States Constitution.	3
SECOND PROPOSITION OF LAW:	
When a child appears in juvenile court before a magistrate, the magistrate’s failure to warn the child of the child’s responsibility to file objections to the magistrate’s decision pursuant to Juvenile Rule 40 before permitting the child to waive his right to counsel is structural error and thus warrants automatic reversal.....	7
CONCLUSION	10
CERTIFICATE OF SERVICE	11

TABLE OF AUTHORITIES

	<u>Page No.</u>
CASES:	
<u>Fare v. Michael C.</u> (1979), 442 U.S. 707, 99 S.Ct. 2560	5
<u>Gagnon v. Scarpelli</u> (1973), 411 U.S. 778, 93 S. Ct. 1756.....	8
<u>In re C.S.</u> , 115 Ohio St.3d 267, 2007-Ohio-4919	<i>passim</i>
<u>In re Dalton S.</u> (2007), 273 Neb. 504, 730 N.W.2d 816	5
<u>In re Gault</u> (1967), 387 U.S. 1, 87 S. Ct. 1428	1,2
<u>In re Manuel R.</u> (1988), 207 Conn. 725, 543 A.2d 719.....	1,2,6
<u>Johnson v. Zerbst</u> (1938), 304 U.S. 458, 58 S. Ct. 1019	1
<u>L.A.B.</u> , 9 th Dist. No. 23309, 2007-Ohio-1479	8
<u>Morrissey v. Brewer</u> (1972), 408 U.S. 471, 92 S.Ct 2593.....	1
CONSTITUTIONAL PROVISIONS:	
Fifth Amendment, United States Constitution.....	3
Sixth Amendment, United States Constitution	8
Fourteenth Amendment, United States Constitution	1,3,8
Article I, Section 16, Ohio States Constitution.....	3
STATUTE:	
R.C. 2151.352	1,7,8
RULES:	
Juv.R. 29	2,10
Juv.R. 35	1,8
Juv.R. 40	7,8,9
Crim.R. 32.3.....	8

STATEMENT OF THE CASE AND FACTS

L.A.B. rests on the Statement of the Case and Facts as it was raised in his Merit Brief.

ARGUMENT

Introduction

At issue in this case is a child's waiver of his right to counsel at a probation revocation hearing in a juvenile delinquency proceeding before a magistrate. Recently, this Court found that the right to counsel in a juvenile delinquency proceeding "flows to the juvenile through the Due Process clause of the Fourteenth Amendment...." In re C.S., 115 Ohio St.3d 267, 2007-Ohio-4919 at ¶79. It also recognized that "not all situations calling for procedural safeguards call for the same kind of procedure." *Id.* at ¶81, citing Morrissey v. Brewer (1972), 408 U.S. 471, 481, 92 S.Ct 2593. In this case, as in C.S., this Court's "task is to ascertain what process is due [* * *] while being true to the core concept of due process in a juvenile case—to ensure orderliness and fairness." *Id.*

But the State's focus on Juvenile Rule 35(B) to the exclusion of due process, In re Gault (1967), 387 U.S. 1, 36, 87 S.Ct. 1428, C.S., and R.C. 2151.352, encourages a result that is unfair, would create disorder for Ohio's juvenile courts, and would create an abrupt departure from this Court's newly created "strong presumption against waiver of the constitutional right to counsel" for juveniles in juvenile court. *Id.* at ¶105, citing Johnson V. Zerbst (1938), 304 U.S. 458, 464, 58 S.Ct. 1019.

C.S. established a clear standard for waiver of a child's right to counsel. And due process and R.C. 2151.352 provide a child the right to counsel at "every stage of the proceedings." See Gault at 36, and In re Manuel R. (1988), 207 Conn. 725, 737-38, 543 A.2d 719 (cited in C.S. at ¶78 and 106, respectively). Therefore, because "[i]t is now commonly recognized that courts

should take ‘special care’ in scrutinizing a purported confession or waiver by a child[,]” (C.S. at ¶106, citing Manuel R.) this Court must find that “the same careful consideration of the fairness and due process rights that Gault demands” also requires “the application of those principles in all delinquency cases” including probation revocation proceedings.

CERTIFIED QUESTION

Does Juvenile Rule 29 apply to probation revocation hearings in juvenile court?

L.A.B. and the State disagree about whether Juv.R. 29 should apply to probation revocation hearings. Should this Court conclude that Juv.R. 29 applies to probation revocation hearings, C.S. dictates that

In a juvenile delinquency case, the preferred practice is strict compliance with Juv.R. 29(D). If the trial court substantially complies with Juv.R.(D) in accepting an admission by a juvenile, the plea will be deemed voluntary absent a showing of prejudice by the juvenile or a showing that the totality of the circumstances does not support a finding of a valid waiver.

C.S. at ¶6 of the syllabus. But the record in this case reveals that the juvenile court did not comply with the requirements of Juv.R. 29—neither strictly nor substantially—therefore, the matter must be remanded to the juvenile court for a new hearing.

But even if this Court concludes that Juv.R. 29 does not apply to probation revocation hearings, this Court must reverse the Court of Appeals’ decision and remand the matter to the juvenile court for a new hearing, because the totality of the circumstances in this case does not support the finding of a valid waiver of counsel below.

FIRST PROPOSITION OF LAW

A child has the right to counsel at all stages of the proceedings against him. A child's waiver of his right to counsel at a probation revocation hearing should be permitted only upon strict compliance with constitutional safeguards that can ensure such waiver is knowing, intelligent, and voluntary and thus comports with the due process requirements of Article I, Section 16 of the Ohio Constitution and the Fifth and Fourteenth Amendments to the United States Constitution.

In its brief, the State avers that the proper standard for waiver of a child's right to counsel in a probation revocation hearing is a review under the totality of the circumstances. Answer at 10-11, citing C.S. at ¶106. L.A.B. agrees that a "totality-of-the-circumstances analysis is the proper test to be used in ascertaining whether there has been a valid waiver of counsel by a juvenile." C.S. at ¶3 of the syllabus. Accordingly, the parties agree that the analysis from C.S. applies to waivers of counsel in probation revocation hearings.

In C.S., this Court emphasized the important role a juvenile's parent plays in a juvenile delinquency proceeding. But, in its Answer, the State ignores the obvious conflict that existed between L.A.B. and his mother and its impact on L.A.B.'s waiver of counsel.

In C.S., this Court found that "[o]nly if the child has some adult to advise him may the child knowingly and voluntarily waive his right to counsel." Id. at ¶96. And, it found that "[t]hough it is not dispositive, a key factor in the totality of the circumstances is the degree to which the juvenile's parent is capable of assisting and willing to assist the juvenile in the waiver analysis." Id. at ¶110.

L.A.B.'s mother was not in a position to advise her son because she was understandably fed up with L.A.B.'s bad behavior.¹ Specifically, after the probation officer advocated for L.A.B. to go to intensive probation, "[to] see what someone with a lesser caseload can do with him, see if they can work with him" (T.p. 44 (S-8)), L.A.B.'s mother asked the magistrate if she could add her perspective. (T.p. 46 (S-10)). She told the magistrate:

All this extending his probation, then going to YOC and all that extra, it's not going to help. By him getting locked up in the detention center, the same day he is going to get released, he's going to do the same thing. Enough is enough. We need to be hard on him and send him where he's supposed to go.

(T.p. 46 (S-10)). Under the analysis in C.S., absent meaningful representation by L.A.B.'s mother, or by an attorney, L.A.B. should not have been permitted to waive his right to an attorney. C.S. at ¶98.

But only if a child is counseled by his parent or an attorney about his decision to waive counsel, does the totality-of-the-circumstances test adopted by this Court in C.S. become relevant. The totality-of-the-circumstances requires the juvenile court to employ an "inquisitional approach" when ascertaining whether a child wishes to waive his right to counsel. Id. at ¶107. Then, to determine whether a juvenile validly waived his right to counsel, a higher court must evaluate whether the juvenile court properly considered the factors for valid waiver, not, as the State suggests, review the juvenile court record anew to determine whether the court *could have* found a valid waiver if it *had* engaged in the proper inquiry. The factors in the totality-of-the-circumstances test are to be applied as follows:

¹ This point was raised in L.A.B.'s appeal below; specifically, he averred that the appointment of a Guardian ad Litem was required where the record revealed that there was a conflict between him and his mother. The Ninth District declined to consider this argument, because it found that L.A.B. had failed to raise it during his proceeding, failed to file objections to the magistrate's decision pursuant to Juv.R. 40, and failed to allege it as plain error on appeal.

The judge must consider a number of factors and circumstances including the age, intelligence, and education of the juvenile; the juvenile's background and experience generally and in the court system specifically; the presence or absence of the juvenile's parent, guardian, or custodian; the language used by the court in describing the juvenile's rights; the juvenile's conduct; the juvenile's emotional stability; and the complexity of the proceedings.

Id. at ¶108, citing In re Dalton S. (2007), 273 Neb. 504, 514-15, 730 N.W.2d 816 and Fare v. Michael C. (1979), 442 U.S. 707, 725, 99 S.Ct. 2560.

The State cites the magistrate's three-part colloquy in support of its assertion that L.A.B. validly waived his right to counsel:

THE COURT: We are on the record for the matter of [L.A.B.]. Case number is DL 05-07-3586. It is before the court for a preliminary hearing on a probation violation. [L.A.B.] is present with his mother and his probation officer, Mr. Sims.
[***]
Okay. The probation violation indicates that you have violated your probation by not attending YOC on a regular basis and having missed the last three days in a row. Do you understand that?

[L.A.B.]: Yes.

THE COURT: All right, [L.A.B.]. You have the right to be represented by a lawyer at any time. If you can't afford a lawyer, I will give you one that you don't have to pay for. Do you understand that?

[L.A.B.]: Yes.

THE COURT: Do you want to be represented by a lawyer or do you want to proceed today without a lawyer?

[L.A.B.]: Without a lawyer.

Answer at 11. But this portion of the record reflects that the magistrate considered none of the factors outlined in the totality-of-the-circumstances test in C.S.

Further, although the State claims that the totality-of-the-circumstances test applies, in its analysis, the State asks this Court to retrospectively apply the test, and focus on only one of the factors: L.A.B.'s prior court experience.

Moreover, a careful review of L.A.B.'s past proceedings leads to only one conclusion: L.A.B. has never been properly informed of his right to counsel, has never fully understood his right to counsel, and has never validly waived his right to counsel. Specifically, review of the passages cited in the State's Answer (at 12-13) reveals that L.A.B. told the court that he did not want an attorney at his original adjudication in 2005 "because [he knew he] took the bike." Answer at 12, quoting 8/24/05 T.pp. 3-4. But, a juvenile in any juvenile court proceeding has the right to counsel notwithstanding the juvenile's guilt or innocence or his intention to admit or deny; therefore, during the hearing cited by the State, the court erred when it allowed L.A.B. to mistakenly believe he was only entitled to counsel if he was innocent. Answer at 12, quoting 8/24/05 T.pp. 3-4.

The State also avers that the fact that L.A.B. waived counsel "in every case" is significant here. Answer at 13. But it is not, because never, during any hearing in any of L.A.B.'s proceedings did the court ever make a thorough inquiry *before* it accepted a waiver of L.A.B.'s right to counsel as C.S. requires. C.S. at ¶106, citing In re Manuel at 737-38. See, 8/24/05 T.pp. 3-4; 2/27/06 T.p. 3; 4/6/06 T.pp. 13-14; 5/2/06 T.pp. 3-4; 5/8/06 T.p. 25; 5/17/06 T.p. 31.

Further, during most of L.A.B.'s hearings the court misstated the effect of L.A.B.'s admission on his right to counsel because it did not explain that juveniles have the right to counsel at all stages of the proceedings, including disposition. (See, e.g., 2/27/06 T.p. 5, "You understand by [admitting] you give up [***] your right to have a lawyer and your right to have a trial?"; 4/6/06 T.p. 15, "You understand by [admitting,] you give up the rights to trial and to an attorney that I just explained to you?"; 5/2/06 T.p. 3, "[Your admitting] means you don't have the right to a lawyer anymore"; 6/8/06 T.p. 41, "You understand by [admitting,] you would give

up the right to have an attorney and give up the right to a trial?") Therefore, the State's references to L.A.B.'s prior court experience only support L.A.B.'s claim of invalid waiver.

Interestingly, the State does not discuss L.A.B.'s age, intelligence, or education—except to note in its Statement of the Case that L.A.B. was twelve when the original complaint was filed and was having serious problems at school, which resulted in his suspension from school in January 2006. Answer at 1.

Also missing from the State's analysis of the totality of the circumstances is C.S.'s requirement that in cases "in which a juvenile is charged with a serious offense, the waiver of the right to counsel must be made in open court, recorded, and in writing." C.S. at ¶109. The record contains no evidence that L.A.B. ever entered a written waiver of counsel; therefore, none of L.A.B.'s waivers of counsel has ever been valid.

A juvenile's right to counsel is the same at every stage of the proceeding (R.C. 2151.352); therefore, a juvenile's waiver of his right to counsel at a probation revocation hearing must be as knowing, as intelligent, and as voluntary as it is at any other stage of the proceedings. Accordingly, L.A.B. asks this Court to reject the State's arguments here.

SECOND PROPOSITION OF LAW

When a child appears in juvenile court before a magistrate, the magistrate's failure to warn the child of the child's responsibility to file objections to the magistrate's decision pursuant to Juvenile Rule 40 before permitting the child to waive his right to counsel is structural error and thus warrants automatic reversal.

In its brief, the State suggests that this Court should not consider L.A.B.'s second proposition of law because he did not raise the claim of structural error in the Court of Appeals. But L.A.B. could not raise that claim in the court of appeals because he was not yet aware that the Ninth District would hold him to a level of pro-se representation following his hearing before

the magistrate, and find that he had forfeited his second and third assignments of error on appeal. Specifically, the Ninth District found, “[d]ue to [L.A.B.’s] failure to object to the magistrate’s decision, he has deprived the trial court of the opportunity to correct the alleged errors in the first instance and has thereby forfeited his right to appeal the findings and conclusions contained in the magistrate’s decision.” L.A.B., 9th Dist. No. 23309, 2007-Ohio-1479, at ¶16.

The State also asserts that “a Juvenile Court magistrate need not inform [a child] of the procedure surrounding Juvenile Rule 40 prior to obtaining a waiver of counsel.” First, as is set forth in L.A.B.’s merit brief, a magistrate’s failure to inform the child of the responsibilities pursuant to Juv.R. 40 and the resulting failure by the child to represent himself effectively without being first warned of the dangers of self-representation could be considered structural error.²

Unlike criminal defendants, juvenile defendants enjoy the same statutory right to counsel “at all stages of the proceedings....” R.C. 2151.352. For criminal defendants in community control revocation hearings, their right to counsel is ensured through the Sixth and Fourteenth Amendments to the U.S. Constitution and the conditions for valid waiver of counsel is provided by Crim.R. 32.3. See Crim.R. 32.3(B);(D); Gagnon v. Scarpelli (1973), 411 U.S. 778, 786, 93 S. Ct. 1756. Juvenile defendants are subject to revocation of probation under Juv.R. 35(B) which does not provide any guidance for valid waiver of counsel.

But the standard for valid waiver in delinquency proceedings is now set forth in C.S. And whether or not a court’s denial of counsel after a hearing before a magistrate is found to be

² Proposition of Law II was raised in L.A.B.’s Memorandum in Support of Jurisdiction and was accepted by this Court before the decision in In re C.S. was released.

structural error, C.S. commands that the juvenile court must consider the factors in the totality-of-the-circumstances test before it can accept a valid waiver of counsel by the juvenile. C.S. at ¶108. L.A.B. realizes that strict adherence to list of factors offered in C.S. and cited by the State (Answer at 15), is not required, but notes that the last of the factors in the list is “the complexity of the proceedings.”

When juvenile court proceedings are conducted by a magistrate, the stage of the proceeding that follows the hearing before a magistrate is exceedingly complex. Juv.R. 40(D)(3)(b) requires the child or his attorney to:

1. Request findings of fact and conclusions of law within seven days of the Magistrate’s Decision.
2. Submit proposed findings of fact and conclusions of law, if requested by the Magistrate or by local rule.
3. File Objections to the Magistrate’s Decision within fourteen days of the filing of the Magistrate’s Decision. The Objections would have to be specific and state with particularity the grounds for objection.
4. Request the preparation of the transcript of proceedings and file the transcript with the court within 30 days after filing the objections.
5. Seek leave of court to supplement the objections after the transcript is filed.
6. File Supplemental Objections.

Juv.R. 40(D)(3)(b)(i)-(iii). And, Juv.R. 40(D)(3)(b)(iv) provides that “[e]xcept for a claim of plain error, a party shall not assign as error on appeal the court’s adoption of any factual finding or legal conclusion” unless the party has objected pursuant to Juv.R. 40(D)(3)(b).

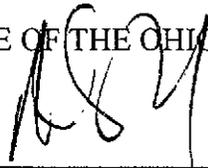
Therefore, given the unique problem that exists for juveniles who appear without counsel in a hearing before a magistrate, L.A.B. asks this Court to find that due process and C.S. require an inquiry that ensures that the child understands the requirements in Juv.R. 40 as part of the totality of the circumstances, and ensures that the child is fully capable of representing himself at that stage of the proceedings before he can validly waive his right to counsel.

CONCLUSION

All of Ohio's children are entitled to counsel at all stages of juvenile court proceedings. And, juvenile courts are required to respect the strong presumption against a child's waiver of his right to counsel. Therefore, this Court should hold that Juvenile Rule 29 applies to all adjudicatory hearings—including probation revocation hearings, adopt the two propositions of law, reverse the decision of the court of appeals, and remand the case to the juvenile court.

Respectfully submitted,

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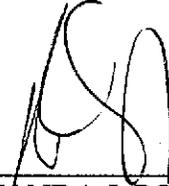
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing **Reply Brief of Appellant L.A.B.** was forwarded by regular U.S. Mail this 12th day of May, 2008 to the office of Philip D. Bogdanoff, Assistant Summit County Prosecutor, Safety Building, 53 University Avenue, 7th Floor, Akron, Ohio 44308.



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