SUCCESS IN SHELBY COUNTY: A ROADMAP TO SYSTEMIC JUVENILE REFORM

Sandra Simkins

Copyright © 2014 University of Memphis Law Review; Sandra Simkins

I. Introduction

In December 2013, approximately one year after the historic Agreement between the Department of Justice (“DOJ”) and the Juvenile Court of Memphis and Shelby County (“JCMSC”), 1 a local Memphis news station ran a story about two juvenile panel attorneys who were convinced that their client, Terrell Johnson, had been wrongly accused of murder. 2 "Johnson confessed to being [a] getaway driver in exchange for [forty dollars] and an iPhone." 3 According to his lawyer, “Mr. Johnson had the pressure of police officers telling him he wouldn't be released from jail until he was 69 years old [and] he had his mother crying in the other ear." 4 His lawyers undertook an extensive investigation, presented their findings to the prosecutor,
and then persuaded the judge to dismiss the charges. In the wake of the dismissal, the police chief began investigating two questions: whether the officers coerced the juvenile to give a murder confession and why the juvenile spent sixty-four days in detention before officials released him. This story is an encouraging sign that a healthy juvenile court system is developing—a system in which juvenile defense lawyers zealously advocate on behalf of their clients, and the system responds. The police chief's investigation is evidence that Shelby County is working diligently to comply with the DOJ’s recommendations in its investigation report from April 2012.

In 2012, after the DOJ reported details of the investigation, advocates for children around the country were riveted—not because the issues in Shelby County were unique, but because a DOJ investigation had never been utilized to tackle systemic issues within a juvenile court. A Memphis Commercial Appeal headline read “Federal Investigation Finds Discrimination in Shelby County Juvenile Justice System.” The DOJ report, based on an analysis of data from 2005 to 2009, found that black juveniles were treated more harshly than whites. Specifically, it found that black juveniles suffered more systemic harms than their white counterparts in several areas: black juveniles were (1) “[o]ne-third less likely to receive a warning for the same infractions,” (2) “[m]ore than twice as likely to be detained by intake officers in the lockup facility,” and (3) “[m]ore than twice as likely to be transferred to adult court.” In fact, the report showed that ninety-five percent of juveniles transferred to adult court were black. The same portion of the report also described a pattern of constitutional rights violations for all youths and unsafe jail conditions, including high rates of attempted suicide in the county detention center and unsafe use of restraint chairs.

JCMSC chose to embrace the findings and embarked on a process of thorough cooperation with the DOJ. On December 17, 2012, Shelby County and the DOJ signed an extensive agreement (“Agreement”) to overhaul the county's juvenile justice system. According to a New York Times article, “The [DOJ] and juvenile advocates called the agreement the first of its kind in the nation and a signal that momentum is growing to find new ways to treat teenagers who break the law.”

Juvenile-justice advocates have known for decades that there are hundreds of jurisdictions like Shelby County across the country. While the findings regarding disproportionate minority contact (“DMC”) are not groundbreaking, the investigation of JCMSC was utterly unique for two reasons: (1) never before had the inner workings of a juvenile court system been investigated for due-process violations; and (2) it was the first time that the DOJ made a connection among the common problems of juvenile court culture, due-process violations, and DMC. The investigation and the remedies in the Agreement highlight how the lack of vigorous advocacy and adversarial testing of facts, combined with a misunderstanding of the role of the juvenile defender, contribute to due-process violations and DMC.

The progress of Shelby County indicates that the roadmap of the Agreement can be a model for other jurisdictions. Within a year, there have been substantial gains in many due-process areas, and the court deserves recognition. Evaluating and maintaining those gains for the future will be important. Since the DOJ's investigation of Shelby County identifies problems common to many juvenile court jurisdictions, other jurisdictions can successfully replicate the framework of the Agreement.

Part II of this Article discusses why the time is ripe for juvenile-court reform. Part III provides the background and findings of the Shelby County investigation. Part IV discusses how other juvenile justice systems can benefit from the DOJ's findings in Shelby County. To that end, Part V explains three components of Shelby County's remedies contained in the Agreement that should lead to its success: (1) immediate changes in court practices focusing on due process; (2) ongoing monitoring; and (3) the creation of a strong defense bar. These components and the Agreement are further expounded in Part VI, which explains how they can lead to success outside of Shelby County. Part VII offers a brief conclusion.

II. Juvenile Court Reform: The Time Is Now
The past decade has been a dynamic time for juvenile law. The progress and reform efforts in the field make the time ripe for juvenile-justice reform, and for Shelby County to be a model. The recent quartet of United States Supreme Court juvenile sentencing and interrogation cases—Roper v. Simmons, Graham v. Florida, J.D.B. v. North Carolina, and Miller v. Alabama—has fundamentally changed the prevailing narrative of youth and crime. These important cases, combined with developing neuroscience, provide the impetus for reform.

In 2005, the Supreme Court in Roper relied on adolescent development research corroborated by neuroscientific research (graphically illustrated through brain imaging techniques) that key parts of the brain continue to develop well into adulthood. The Court held that youth differ from adults and are therefore less culpable for several reasons: (1) youth are immature and fail to demonstrate mature judgment; (2) youth are more susceptible to peer pressure, particularly negative peer pressure; and (3) youth is a “transitory” characteristic, providing adolescent offenders with a greater capacity for rehabilitation and reformation. All four decisions uniformly relied on research indicating that the teenaged brain is very different than the mature adult brain. This research has resonated with the public and re-framed the perpetual debate about appropriate and effective responses to juvenile offending.

In addition to the research and Supreme Court cases, other powerful forces also focus on juvenile-justice reform. First, there is the obvious interest in juvenile justice demonstrated by the DOJ in jurisdictions such as Shelby County, Tennessee; Meridian County, Mississippi; and the City of St. Louis, Missouri. Recent focus on trauma-informed care by the Office of Juvenile Justice and Delinquency Prevention challenges juvenile-justice stakeholders to re-think their approaches to juvenile offenders. Next, the recently released National Juvenile Defense Standards articulate the detailed role and responsibilities of juvenile defenders for the first time. Finally, the extraordinary continued success of the Annie E. Casey Foundation’s Juvenile Detention Alternative Initiative has caused many jurisdictions to make detention decisions based on data, drastically reducing the number of youth in detention.

III. Background and Findings of the DOJ Investigation

A. Background of Investigation

Memphis is the largest city in Tennessee. JCMSC processes about 11,000 delinquency matters a year—approximately 4,100 juvenile defendants get formally charged, and the rest are diverted. In addition, over half of all Tennessee transfers to adult court come from Shelby County. The DOJ’s investigation arose from allegations of discrimination and misconduct from the Shelby County Commission’s Juvenile Court Ad Hoc Committee, which submitted a Complaint and Request for investigation to the Civil Rights Division on January 15, 2007. In June 2007, a report from the National Center for State Courts “noted problems with JCMSC’s approach to due process and equal protection issues.” In the same month, the Memphis Bar Association adopted several recommendations to improve due process at JCMSC.

Beginning in 2009 and continuing with the full cooperation of JCMSC through 2010 and 2011, the DOJ conducted a comprehensive investigation that included a review of court policies and over 60,000 juvenile court files. Using the Violent Crime Control and Law Enforcement Act of 1994 and Title VI of the Civil Rights Act of 1964, the investigation revealed that JCMSC “fails to provide constitutionally required due process to all children appearing for delinquency proceedings, that the court's administration of juvenile justice discriminates against African-American children, and that its detention center violates the substantive due process rights of detained youth by not providing them with reasonably safe conditions of confinement.”

B. Overview of Juvenile Court
The goal of the original creators of juvenile court was to make sure that kids were treated differently than adults. The creators wanted to “treat” children, not punish them, and therefore, a separate juvenile-court language was developed. Children are not arrested; they are detained. They do not have trials, but rather adjudicatory hearings. They are not convicted; they are adjudicated delinquent. They do not receive a sentence; they get a disposition. Below is a visual representation of the juvenile court process:

| Arrest | Detention Hearing | Probable Cause Hearing | Trial (Adj. Hearing) | Disposition | Post-Disposition |

Footnotes

a2 If notice for transfer is filed, a transfer hearing occurs before the adjudicatory hearing.

C. Findings: Due-Process Violations Cited in the Investigation

1. Failure to Give Notice of Charges at Detention Hearings and Failure to Give Petitions Prior to Adjudicatory Hearings

Juveniles are entitled to the same notice that adult criminal defendants receive. Adults receive an affidavit of complaint that is in writing, made under oath, and contains “the essential facts constituting the offense charged.” However, the investigation found that juveniles in JCMSC did not receive equivalent notice at their initial hearings; they received only a verbal summary of the charges, a practice that violates due process.

The investigation revealed some hearings in which prosecutors, defense counsel, and even the magistrates did not know what charges the juvenile was facing. For example, in one detention hearing, “the prosecutor and juvenile defender made detention arguments to the judge that acknowledged the uncertainty of the exact charges facing the juvenile”:

Prosecutor: This is a felony. I don't know what the underlying felony is We would ask to [detain].

Juvenile Defender: To detain him, I think, maybe is a little unreasonable, maybe an appearance bond. I agree with the state. I don't know what the underlying facilitation of the felony is, but he's in the 10th grade.

2. Violation of Right to Be Free from Self-Incrimination

Significant problems also occurred during probation conferences. Probation officers were asking children about the charges and capturing incriminating statements without advising children of their rights. The incriminating information from the probation conference would sometimes be passed along to the magistrate prior to the adjudicatory hearing.

In addition to self-incrimination problems during the probation conference, violations also occurred at the adjudicatory hearing. A “particularly egregious example,” occurred during the adjudicatory hearing of juvenile E.E. when a prosecutor called him to testify against himself:

Both the magistrate and the juvenile defender failed to object to the prosecutor’s questions, thereby allowing the prosecutor “to cross-examine E.E. as part of the state's case-in-chief.”

3. Failure to Provide Timely Probable Cause Hearings

The law requires that juveniles have detention hearings within forty-eight hours of arrest. However, in Shelby County, problems arose because the juvenile court did not hold detention hearings on weekends and holidays:
The data JCMSC provided indicated that in the five-year period from 2005 to 2009, the court detained approximately 815 children for three days or more before holding a detention hearing and making a probable-cause determination. Therefore, on average, JCMSC denies a timely probable-cause determination to over 160 children each year. The DOJ investigation found that “[301], or 37%, of the 815 children were detained for seven days or longer before having their probable cause hearing.”

4. Failure to Conduct Constitutionally Required Transfer Hearings

The Tennessee statute regarding transfer hearings should ensure that juvenile courts employ a “thorough inquiry prior to transferring a child to adult court.” But the investigation revealed that magistrates made transfer decisions without a thorough inquiry, “making cursory or no inquiries into the child's background, or after asking the child to self-incriminate,” as in the following example:

At a transfer hearing for O.O., the Magistrate declined to hear testimony from witnesses, who were present and ready to testify, before transferring O.O.’s case to the Shelby County Sheriff for trial as an adult. O.O. was charged with murdering a 10-month-old infant left in her care. The defender sought to present evidence that the infant’s mother had a history of child abuse and caused some of the injuries on the infant's body, not O.O. The defense attorney informed the court that several witnesses were present to testify on behalf of O.O, including the medical examiner, another doctor who examined the infant's body and two police officers who investigated the case. The defense attorney also argued that O.O.’s social factors, including her history of exposure to domestic violence, previous sexual abuse, and her remorse made her suitable for the rehabilitation available in the juvenile court.

D. Juvenile Defense: Protecting Children's Due-Process and Equal-Protection Rights

The DOJ’s investigation of JCMSC is groundbreaking in the area of indigent juvenile defense because the DOJ—for the first time—makes a connection among the role of defense counsel, due process, and equal protection. In a lengthy separate section, the investigation details the problems (so familiar to those who practice in juvenile court) as significant barriers to constitutional protections for youth. The investigation specifically highlights common problems, discussed below, that have also been detailed in over twenty statewide assessments.

The investigation created a separate section called “Fundamental Misunderstandings About JCMSC’s Purpose and Players” to address the significant problems regarding the role confusion of juvenile defenders. In this unprecedented move, the investigation addressed the critical ethical responsibility of juvenile defenders to zealously represent a child's expressed interest: A number of stakeholders have a fundamental misunderstanding about the purpose of juvenile court and the roles and responsibilities of its participants. Misunderstandings about the role of defense counsel seem particularly acute . . . .

Defense attorneys play a central role in the proceedings. A Juvenile Defender (“JD” or “defender”) is the sole participant responsible for advancing the interest or position the child articulates. Unlike probation officers, psychiatrists and others, the defense counsel must protect the youth's expressed interest and cannot supplant it with his or her judgment about what is in the youth's best interest. Vigorous advocacy by defense counsel ensures that the youth's voice is heard in the process and a fair, just and appropriate result is achieved.
Never before has the DOJ emphasized the important role of the juvenile defender in protecting due-process rights. This clear statement gives support to every juvenile defender across the country and provides an unequivocal statement not only of their responsibilities but of the importance of their role. The investigation goes further and describes what it means to provide zealous representation in juvenile court. It reprimands defenders for taking shortcuts, such as waiving a right to a full hearing or stipulating to certain key facts, making it easier for the state to meet its burden under the law. For example, at a transfer hearing for A.A., the Magistrate had not yet announced a decision about whether to transfer A.A. to adult criminal court. But during the defense attorney's argument against waiver, the Magistrate asked the attorney whether A.A. admitted guilt. The defense attorney readily acknowledged that A.A. “admitted full responsibility on these charges.” In this case, A.A. should have had a full hearing on the transfer issue, where the Magistrate would have been required to find “reasonable grounds to believe that A.A. committed the delinquent act as alleged” in order to transfer A.A. By admitting A.A.’s guilt on this crucial issue, the JD helped the [Assistant District Attorney] make the case against his client.  

In another example, a juvenile defender recommended bypassing crucial testimony:  

In a transfer hearing for P.P., the defense attorney began the hearing by stipulating that P.P. “was found with the property, was legally detained [and] that he gave a statement freely and voluntarily.” Instead of insisting that the court follow mandatory transfer procedures, the JD suggested that the court skip live testimony, which would have been crucial for discovery purposes.

It is well documented in state assessments that juvenile defenders feel pressure to accommodate the court and to move the docket swiftly. Since it is frequently young, new attorneys who are getting trained in juvenile court, these juvenile defenders are particularly vulnerable to court pressure to engage in practices like skipping live testimony or stipulations. This section of the Agreement is a strong statement against those practices. It is a tool for every juvenile defender to use when he or she feels pressure to short-change a child's due-process rights.

In addition to role confusion, the report also cited several specific practice problems: (1) juvenile defenders consistently failed to request discovery; (2) juvenile defenders did not challenge probable cause when the government moved to detain their clients; and (3) juvenile defenders rarely filed written motions and appeals. In addition, the public defender's office in Memphis has no juvenile unit, although a defender coordinator supervises the fifty-two panel attorneys. However, the investigation revealed that the defender coordinator reported to the court, rather than the public defender's office. “This organizational structure, while not unconstitutional per se, creates an apparent conflict of interest, as a juvenile defender must balance the duty of representing the child-client with the inherent duty of loyalty to his or her employer.”

**IV. How Other Juvenile Court Systems Can Benefit from Investigation of JCMSC**

For the first time in the history of the DOJ, the agency investigated an entire juvenile court system. Beginning in 2009 and continuing with the full cooperation of JCMSC through 2010 and 2011, the DOJ conducted a comprehensive investigation that included the review of 60,000 juvenile-court files and policies. Acting under the Violent Crime Control and Law Enforcement Act of 1994 and Title VI of the Civil Rights Act of 1964, the investigation revealed that [JCMSC] fails to provide constitutionally required due process to all children appearing for delinquency proceedings, that the court's administration of juvenile justice discriminates against African-American children, and that its detention center violates the substantive due process rights of detained youth by not providing them with reasonably safe conditions of confinement. In regard to patterns of unconstitutional due-process violations, the investigation revealed several systemic failures:

- Failure to provide timely and adequate notice of charges to children appearing on delinquency proceedings;
- Failure to protect youth from self-incrimination during probation conferences;
• Failure to hold timely probable-cause hearings for youth arrested without a warrant;\textsuperscript{63}

\*743 • Failure to provide adequate due-process protections for children before transferring them to the adult criminal court;\textsuperscript{64}

• Lack of zealous advocacy by juvenile defenders and fundamental role confusion.\textsuperscript{65}

Unfortunately, statewide assessments have uncovered similar problems in jurisdictions across the country.\textsuperscript{66} National recognition of systemic issues in juvenile courts began in 1995 with the American Bar Association's publication of A Call for Justice, a report revealing that juvenile defenders were poorly representing children and that there existed an extreme lack of resources, training, and understanding of counsel's role.\textsuperscript{67} From 1995 to present, further evidence has emerged through twenty-one statewide assessments regarding the common problems in juvenile courts.\textsuperscript{68} In sum, despite the mandate of In re Gault\textsuperscript{69} to provide children with access to counsel and due-process protections, many courts operate in a pre-Gault mentality and refuse to provide the due-process protections envisioned by Gault.\textsuperscript{70}

Individual state assessments of access to counsel and quality of representation in delinquency court are critical tools. Each assessment was conducted with the support of the American Bar Association and the local leaders of the states. In the assessments, \*744 officials interview a wide range of juvenile-court stakeholders, make a cross section of juvenile-court observations, and visit detention facilities. Thus, a state can learn more about how its practices measure up to the mandate of Gault and the National Standards—often a tool for reform.

The problems identified in JCMSC are similar to the many problems identified in the twenty-one state assessments:

1. A “kiddie court” mentality with a “go along to get a long culture.” There is a reluctance to provide the same due-process protections in juvenile court that adult criminal court provides. A pre-Gault mentality persists; the dominant thinking is that “we are all here to help the kids, so let’s just plead them guilty so we can help them.”\textsuperscript{71}

2. Role confusion for juvenile defenders. In a culture with very little training or supervisory support—coupled with no right to a jury and institutional pressure to admit guilt—it is difficult for juvenile defenders to zealously advocate for the express interests of the child. Instead, juvenile defenders adopt a “best interests” approach, which is actually a violation of the lawyer's duty under the rules of professional responsibility.\textsuperscript{72}

3. Lack of resources for juvenile defense. Overwhelmingly, juvenile defenders lack experts, social workers, investigators, and support staff. Lack of resources coupled with lack of training often results in juvenile courts being little more than a “plea mill” with few trials, non-existent motion practice, and rote disposition arguments.\textsuperscript{73}

4. Justice by geography. In many states, some counties have more resources for juvenile defense. This creates a \*745 vast disparity in the kind of representation youth receive depending on their zip code.\textsuperscript{74}

V. Components of Shelby County’s Success
In December 2012, JCMSC and the DOJ entered into a comprehensive agreement to address the findings of the investigation. 75 The Agreement addressed substantive remedial measures for due-process violations, disproportionate minority contact (“DMC”) and equal-protection violations, and harmful conditions at the detention facility. 76 This Part of the Article focuses on the Agreement's emphasis on due-process violations.

The due-process section of the Agreement was divided into fifteen parts addressing violations or potential violations: Probable Cause; Notice of Charges; Transfer Hearings; Protections Against Self-Incrimination; Juvenile Defenders; Plea Colloquies; Restitution Guidelines; Bond-Setting Guidelines; Confidentiality of Proceedings; Language Access Plan; Treatment of Witnesses; Judicial Bench Cards; Written Findings; Recordings of Juvenile Delinquency Hearings; and Training. By October 2013, within those fifteen sections, forty-five provisions required compliance assessments. 77 Consistency exists in terms of the Agreement's reporting and monitoring requirements for JCMSC. 78 From my perspective, however, three components within the Agreement are particularly important for JCMSC’s—and other juvenile courts’—long-term success: (1) the numerous immediate changes that occurred in court practices focusing on children’s due-process rights, (2) the development of an ongoing monitoring system, and (3) the State and County’s investment in a stronger defense bar.

*A746 A. Immediate Changes in Court Practices Focusing on Due-Process Rights*

JCMSC has made great strides in changing court practices since the investigation. In fact, by the first compliance visit, JCMSC had reached beginning or partial compliance on twenty-six of the thirty-four required provisions.

<table>
<thead>
<tr>
<th>Compliance Standards</th>
<th>1st Compliance Report April 2013</th>
<th>2nd Compliance Report October 2013</th>
</tr>
</thead>
<tbody>
<tr>
<td>Substantial Compliance</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Partial Compliance</td>
<td>1</td>
<td>26</td>
</tr>
<tr>
<td>Beginning Compliance</td>
<td>25</td>
<td>17</td>
</tr>
<tr>
<td>Non Compliance</td>
<td>3</td>
<td>0</td>
</tr>
<tr>
<td>Insufficient Information/pending</td>
<td>5</td>
<td>2</td>
</tr>
<tr>
<td>Total # of Required Due Process Provisions in Agreement</td>
<td>34</td>
<td>45</td>
</tr>
</tbody>
</table>

In particular, JCMSC made immediate improvement in several key areas: written findings, treatment of witnesses, language access, bond-setting guidelines, restitution guidelines, plea colloquies, confidentiality of juvenile proceedings, protections against self-incrimination during in court proceedings, and notice of charges. 80

Many of these changes have resulted in new court policies, including the creation of a JCMSC Judicial Policy and Procedure Manual and a Bench Book. 81 These two documents create an accessible and unified understanding of court practices for all judges, magistrates, and attorneys practicing in the JCMSC. These immediate changes in court practices cost nothing more than time allocated by JCMSC stakeholders. Further, they vastly improve upon the protection of due-process rights of affected juveniles. These policy changes could be easily replicated by other jurisdictions that are interested in reform without DOJ involvement.

*A747 B. Ongoing Monitoring*

Data review within the system is also critical to make sure that the required changes are institutionalized and that they extend beyond the terms of the Agreement. Nationally, the juvenile justice system has evolved as a result of the Annie E. Casey Foundation's Juvenile Detention Alternatives Initiative (“JDAI”) and its focus on data-driven decision-making. 82 To collect such data, the Agreement calls for monthly reviews in four sections: (1) notice of charges, (2) probable cause, (3) transfer hearings, and (4) protections against self-incrimination. 83 In each of these four sections, the Agreement requires a specific
process. Each month, the judge or designee must review a sampling of case files to determine whether requirements regarding those four areas are being followed. The judge or designee must also include periodic observations of hearings. If requirements are not being followed, immediate corrective action must be taken.  

Although JCMSC recently created a data-collection system, it is clear from the early stages of monitoring that it will be an extremely valuable tool in assessing a juvenile court system. For example, the second compliance report data collection revealed the following:

- One hundred percent of children at JCMSC had lawyers during probable cause hearings;  
- Between April 1 and September 11, 2013, eighty-seven discovery motions were filed with the court; and  
- Between April and October 2013, there was increased preparation time for Transfer Hearings. I expressed *748 concern in my first report that fourteen days was not enough time to adequately prepare for a Transfer Hearing. During my visit, I reviewed files for all transfer hearings that occurred between April 2013 and October 2013. In each case, there was at least one month between the date of “Notice of Transfer” and the date of the Transfer Hearing.  

In addition, data can shed light on existing practices to assist a court in evaluating policies. At JCMSC, I began to focus on transfer hearings. By reviewing the data, I learned that 191 “notice of transfer” petitions were filed; however, only 84 ended up on the transfer docket. More than half of all petitions filed by the prosecutor's office are withdrawn. This is significant because filing a transfer petition causes a chain reaction that can lead to wasted resources and hasty plea bargains. Highlighting this data could assist the court in reevaluating the prosecutor's current policy promoting the filing of so many petitions.

<table>
<thead>
<tr>
<th>2013 Transfer Cases (January-September)</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td># of Cases where a “Notice of Transfer” was filed</td>
<td>191</td>
</tr>
<tr>
<td># of Cases on the Transfer Docket that are heard by Special Judge</td>
<td>84</td>
</tr>
<tr>
<td># of Transfer Petitions Granted</td>
<td>65</td>
</tr>
<tr>
<td># of Transfer Petitions Denied</td>
<td>19</td>
</tr>
</tbody>
</table>

*749* Finally, data collection revealed important information about current clinical service practices that will hopefully be changed in the near future. As the chart below indicates, an overwhelming number of evaluations were short and unsubstantiated by other documents. This is important to remember if the court is relying on these evaluations to make transfer decisions.

### Clinical Services Evaluations

<table>
<thead>
<tr>
<th>Evaluators Reviewed</th>
<th>Total # of Evaluations reviewed</th>
<th># of Evaluations that identified purpose</th>
<th># of Evaluations that cited reports from school/court/medical</th>
<th>Page Length of Evaluations</th>
<th>Evaluator Recommendations</th>
</tr>
</thead>
<tbody>
<tr>
<td>#1</td>
<td>28</td>
<td>0</td>
<td>1</td>
<td>1-2</td>
<td>Transfer 18</td>
</tr>
<tr>
<td>#2</td>
<td>12</td>
<td>0</td>
<td>0</td>
<td>2.5</td>
<td>Do Not Transfer 10</td>
</tr>
<tr>
<td>#3</td>
<td>4</td>
<td>0</td>
<td>1</td>
<td>3</td>
<td>Do Not Transfer 1</td>
</tr>
<tr>
<td>#4</td>
<td>6</td>
<td>0</td>
<td>1</td>
<td>4</td>
<td>Do Not Transfer 2</td>
</tr>
<tr>
<td>#5</td>
<td>2</td>
<td>0</td>
<td>0</td>
<td>5</td>
<td>Transfer 1</td>
</tr>
<tr>
<td>#6</td>
<td>1</td>
<td>0</td>
<td>1</td>
<td>6</td>
<td>Do Not Transfer 1</td>
</tr>
<tr>
<td>#7</td>
<td>1</td>
<td>0</td>
<td>1</td>
<td>7</td>
<td>Do Not Transfer 0</td>
</tr>
<tr>
<td>#8</td>
<td>7</td>
<td>0</td>
<td>2</td>
<td>2</td>
<td>Transfer 47</td>
</tr>
<tr>
<td>TOTALS</td>
<td>61</td>
<td>0</td>
<td>7</td>
<td>9</td>
<td>14</td>
</tr>
</tbody>
</table>

C. Creating a Stronger Defense Bar and Protecting the Integrity of the System

The investigation and Agreement also recognized the important role of juvenile defense. In this section, the Article discusses how the defense bar protects the integrity of the system. A prevailing myth about juvenile court is that everything in a child's juvenile-court record gets erased or expunged when he reaches the age of eighteen. Most parents are shocked when they ultimately realize the potentially lifelong collateral consequences of juvenile-court adjudication. The juvenile defender is the only person in the process who speaks for the child. Making sure that the defender has the skills and resources necessary to represent the child creates system accountability. This section will first look at the collateral consequences and then highlight the issue of transfer, particularly as it relates to Shelby County. It also discusses why a strong defense is critical for individuals and for system improvement as a whole.

1. Critical Check on the Power of a Punitive System with Lifelong Collateral Consequences

In 1967, fifteen-year-old Gerald Gault was sent to a training school for six years because he made a prank phone call. A brave defense attorney challenged the then-existing enabling structure. His advocacy led to the landmark decision giving juveniles due-process rights, including the right to counsel. In In re Gault, the United States Supreme Court held that the right to counsel is critical to ensure that youths receive due-process protections. Today, the rights at stake in juvenile court are even higher than they were when Gault was decided in 1967. Access to trained, resourceful, and zealous counsel is of the utmost importance. Since a radical policy shift in the 1990s, the nation's juvenile court system has become more punitive. Juvenile adjudications can result in life-altering collateral consequences that prevent youth from obtaining employment or enrolling in the military. Juvenile adjudications can also result in a lifetime sex-offender registration posted on the Internet for the world to see.

A strong defense bar is particularly important in Shelby County because of the number of juveniles facing transfer to the adult criminal system. One of the major changes from the 1990s was the increase in juvenile transfers to adult criminal justice systems. In response to fears of a “super-predator” that never materialized, states across the country changed their laws to make it easier to transfer youth to adult prison. In the state of Tennessee, Shelby County has the highest transfer rate of any county. According to data provided by the Tennessee Council of Juvenile and Family Court Judges Administrative Office of the Courts, a total of 161 cases for children under the age eighteen were transferred to adult court by the State of Tennessee in 2012. Of those 161 cases statewide, 91 cases (or 56.5%) of the transfer cases came from Shelby County. Research in this area clearly shows that transferring children is dangerous and leads to an increase in recidivism. However, under the current policy of the office, prosecutors in Shelby County file notices of transfer on all eligible juveniles.

2. Getting It Right for Individual Defendants by Pushing the System to Keep Pace with the Best Evolving Practices

Terrell Johnson, facing murder charges in Shelby County, spent over two months in a detention center before his attorney convinced prosecutors that their investigation indicated that they wrongly accused Terrell. This advocacy is an example of a healthy system at work: (1) the defender understands her role and spends time interviewing her client; (2) she has access to investigation resources and understands her duty to investigate the case; (3) she zealously persists in presenting her findings to the prosecutor; (4) the judge and prosecutor are open to hearing what the defender says and to reevaluate the case; and (5) finally, in the wake of information that the juvenile may have been forced to confess to the murder, the police chief opens an investigation.

Strong juvenile defense protects the integrity of the entire system. It guards the rights of individuals (making sure that the right person is held accountable), and thus each individual case can lead to an improved system. Only the defenders gather
information from the juvenile and his family, and only the defenders hear about the particular problems that exist within a facility or with a particular guard. Without this feedback, crucial information about the system becomes stagnant and undiscovered, as individual departments only talk to each other rather than all system stakeholders. In Terrell’s situation, the Memphis Police Department should be commended for responding to the information through its investigation.

The duty to express system concerns is part of the recently published National Juvenile Defense Standards: “While systemic barriers outside of counsel’s control often account for late appointments, limitations on the right to counsel, waiver of counsel, overbearing caseloads, and many other system deficiencies, counsel, may not stand by as gross injustices occur in the jurisdiction.” According to the Standards, defense counsel has the following duties in “addressing system deficiencies”:

- Participate in policy development and review;
- Advocate for early access to counsel;
- Advocate for presumption of indigence;
- Prevent invalid waiver of counsel;
- Challenge the causes of disparate treatment and discrimination;
- Demand adequate resources to provide effective assistance of counsel;
- Address excessive caseloads; and
- Report and address harmful conditions of confinement.

There are many examples across the country of juvenile defenders who, after listening to the experiences of their clients, raise systemic issues, take appeals, and create reform. Unfortunately, many reports indicate that conditions and practices in juvenile treatment facilities cause additional trauma. Harmful practices include the use of isolation or solitary confinement, restraint chairs, pressure point tactics, chemical restraints, physical and sexual abuse, lack of training and staff education regarding suicide prevention, and lack of training and education to address the needs of special populations such as LGBT youth. The Justice Policy Institute recently reported that a focus on improving conditions could lead to a reduction in juvenile incarceration rates. Solutions to these longstanding national problems include increased monitoring, a function that coincides perfectly with the role of defense counsel, particularly in post-disposition advocacy.

The duty of defenders to engage in system reform is particularly important in Shelby County given the reports of high rates of sexual abuse at the John S. Wilder Youth Development Center in Somerville, Tennessee—the facility where Shelby County children are sent for rehabilitation. According to a 2013 Department of Justice Bureau of Statistics report, nearly twenty percent of children surveyed reported that staff members of the facility sexually victimized them. Post-disposition monitoring of conditions of confinement is just one way a strong juvenile defense improves system accountability. Ideally, defenders would visit with clients at facilities, and upon hearing of abuse, bring the issue to the attention of the court to either correct the problem or remove the children from the facility.

When juvenile defenders engage in post-disposition advocacy, they hear about the practices within facilities first-hand from their clients. If juvenile defenders are aware of the goals of trauma-informed care, they will be able to advocate not only on behalf of their individual clients, but will also be able to fulfill their duty to “report and address harmful conditions of confinement.”
The DOJ recognizes the critical role of juvenile defenders and post-disposition representation in ensuring trauma-informed care. As stated in the Report of the Attorney General’s National Task Force on Children Exposed to Violence:

One of the most vital roles of counsel is to protect children against unjustified placement and incarceration and to guard against abuses within facilities. The presence of counsel could help ensure successful placements and aftercare programming. When exposure to violence is discovered, defense counsel would have the ability to file legal motions to stop the abuse and to remove the child from the facility where it is occurring. Children who do not have these protections have no recourse when they are mistreated in facilities where they are cut off from their families and other caring adults.  

*757 The frontline involvement of defenders is a critical component in all policy discussions. For example, in Shelby County, the DOJ investigation revealed that the detention center was using “pressure point tactics” and “restraint chairs.” It is a generally accepted professional standard that detention centers should not use restraint chairs on juveniles, and should only use them “under the direct supervision of a medical or mental health professional.” However, most juvenile courts will not be subject to a DOJ investigation, and thus self-assessment and the inclusion of all stakeholder voices—especially defense attorneys—is paramount.

3. Understanding Shelby County’s Existing Indigent Defense Delivery System

Under Tennessee law, public defenders elected in each judicial district are funded by the state and provide counsel to indigent clients. But two counties, Shelby (Memphis) and Davidson (Nashville) have established their own public defender offices that receive limited state funding. While Shelby County has its own public defender office, the office has historically not had a juvenile unit and has only represented adult defendants. All juvenile defendants in Shelby County were represented by individual panel attorneys compensated under Tennessee Supreme Court Rule 13. For juvenile attorneys, Rule 13 provides that panel attorneys shall be compensated $40 per hour for out-of-court time and $50 per hour for in-court time, subject to a cap of $1,000 absent special circumstances.

*758 The lack of a juvenile unit in the public defender’s office, combined with the low rate of compensation for panel attorneys under Rule 13, explains many of the problems identified in the DOJ investigation regarding lack of zealous representation and role confusion. As noted above, these issues are consistent with state assessments across the country. This lack of attorney specialization and poor compensation jeopardizes the rights of children in juvenile court. When a juvenile unit exists within a public defender’s office, however, attorneys will be better trained to handle the intricacies of juvenile court.

VI. The Agreement: A Roadmap to Successful Reform

Within months of the investigation, JCMSC and the DOJ signed an Agreement that created a roadmap to address the due-process violations. Under the Agreement, the DOJ required JCMSC to address forty-five separate due-process issues by the second compliance visit. In this section, the Article discusses the areas in the Agreement that emphasize the function of defense counsel in each due-process section.

A. Areas in the Agreement that Highlight the Role of Defense Counsel

The remedies in the Agreement, which address the due-process violations identified in the DOJ investigation, repeatedly highlight the important role of juvenile defense. In each of the four main sections listed below, the Article lays out the inclusion and actions required by juvenile defenders.
1. Probable Cause: Remedies and a Presumption of Indigence

This probable-cause section of the Agreement focuses on several important issues related to juvenile defense. First, it mandates a change in policy to create a presumption of indigence.\(^{138}\) This means that no child should ever be without an attorney at the probable-cause hearing. Without a presumption of indigence, if a child does not qualify for a juvenile defender, the parent or guardian is responsible for hiring an attorney. Frequently, a conflict of interest arises because the parent may not want to spend money on an attorney and will want the attorney to handle the case as expeditiously as possible. The danger, then, is a hasty plea deal rather than a thorough investigation and careful inquiry to determine an appropriate disposition. The Agreement requires that JCMSC “[a]ppoint a defense attorney to represent any indigent Child or Child whose indigence cannot be readily determined in advance of the Probable Cause Determination. Children must be presumed indigent unless information to the contrary is provided to JCMSC.”\(^{139}\) The probable-cause section also requires the juvenile defender to challenge the prosecutor's evidence presented at the probable cause hearing by “cross-examining witnesses, presenting alternative testimony, or by any other appropriate means.”\(^{140}\)

2. Notice of Charges: Remedies

This section of the Agreement ensures that children and juvenile defenders will receive adequate notice of all charges the prosecutor intends to file.\(^{141}\) As indicated in the state assessments, in many jurisdictions, a fast moving juvenile court will take short cuts to juvenile admissions in order to move a docket. In this remedy, JCMSC has agreed “to ensure that Children and defense counsel receive copies of the Affidavit of Complaint as soon as it is available, but at a minimum before the Detention Hearing”; when the prosecutor makes a change to a charge which increases the penalty, the agreement requires that juvenile defenders must have notice at least fourteen days in advance of the hearing.\(^{142}\) This important measure ensures a court system where juvenile defenders will not feel rushed or disadvantaged when there is an amendment to a petition.

3. Transfer Hearings: Remedies

There can be no greater moment in a child's life than a transfer hearing. The first decision ever rendered by the Supreme Court of the United States on the subject of juvenile court focused on the due-process requirements of transfer hearings.\(^{143}\) The guidelines of the National Council of Juvenile and Family Court Judges emphasize the importance of qualified and adequately resourced legal representation in transfer hearings.\(^{144}\) Tennessee law requires that judges balance seven Kent factors prior to transfer.\(^{145}\) Careful \(^{761}\) analysis is particularly important given the recent U.S. Supreme Court decisions of Roper v. Simmons\(^ {146}\) and Graham v. Florida,\(^ {147}\) which refer to delays in adolescent brain development and the corresponding impact on culpability.

The transfer-hearings section of the Agreement emphasizes an attorney's important responsibility to introduce evidence on her own behalf at transfer hearings, and thus it ensures that “[c]hildren, through their attorneys, are provided the opportunity to meaningfully confront evidence presented against them, including cross-examining adverse witnesses.”\(^ {148}\) The importance of this remedy cannot be overstated, given that JCMSC has the highest rate of transfer in the state of Tennessee.

4. Protections Against Self-incrimination: Remedies

At a probation conference, some cases are disposed without going to court. If a case can be disposed in a “non judicial” setting, the child is given the opportunity to admit the charges during a probation conference. The investigation provided a remedy to \(^{762}\) make sure that children are advised of their rights against self-incrimination prior to making a statement about the charges and to ensure that the child's attorney is notified in writing of any probation conference.\(^ {149}\)
B. The Crown Jewel: An “Independent, Ethical, and Zealous” Juvenile Unit

The most exciting part of the DOJ Agreement with JCMSC is that juvenile defense is valued and recognized as a critical part of the system. The Agreement not only requires improvements to Shelby County’s existing indigent defense delivery system, but also gives a roadmap to reform for other juvenile court jurisdictions. In addition to the above-mentioned remedies that highlight the role of juvenile defense, the Agreement has an entire section devoted to the creation of a specialized juvenile defense unit. This part of the Article outlines the Agreement’s mandate for changes in juvenile defense, predicts the structure of the new juvenile unit, and compares this system to other efforts throughout the country.

The Agreement, emphasizing the critical role of juvenile defense counsel, mandates that within one year, a new specialized juvenile unit be created within the existing Shelby County Public Defender’s Office. Furthermore, juvenile defenders will be supported with “[t]raining on trial/advocacy skills and knowledge of adolescent development.” In addition, the Agreement requires that the new unit have “appropriate administrative support, reasonable workloads, and sufficient resources to provide independent, ethical, and zealous representation to Children in delinquency matters.”

Next, the Agreement requires that children be represented throughout the life of the child’s juvenile-court involvement, “including *763 pre-adjudicatory investigation, litigation, dispositional advocacy, and post-dispositional advocacy for as long as JCMSC has jurisdiction over a Child.” This is particularly important because in many jurisdictions, juvenile defenders practice post-disposition advocacy rather than closing their files once they leave the courtroom and ceasing contact with a child when he is sent away to placement.

The Agreement also requires that the juvenile defenders have “practice standards” and that these practice standards extend to both the new juvenile unit within the public defender’s office and the existing panel attorneys who will continue representing children at the JCMSC. Finally, the Agreement requires that attorneys be appointed “as early as possible, including immediately after intake staff completes required paperwork”; that, where possible, there is appropriate supervision and evaluation of attorneys once standards have been promulgated; and that juvenile defenders have a confidential meeting space in which to meet with their clients.

This unit is to be “independent, ethical, and zealous.” Notably, what makes this Agreement so extraordinary is that its remedies track all of the identified problems not only of JCMSC, but of all the state assessments. Then, it offers a roadmap to reform. The Agreement identifies the need for continuous representation throughout the proceedings, training, supervision, manageable caseloads, and practice standards. It recognizes the specialized skills required for juvenile defense and why an understanding of adolescence development is essential.

C. Predicting the Structure of the New Juvenile Unit

Several offices across the country have a reputation for outstanding juvenile defense. For example, the offices at the Public Defender Service in Washington D.C., the Miami Public Defender Office, the Philadelphia Defender Association, New York Legal Aid Division of Juvenile Rights, and the San Francisco Public Defender all share characteristics that make them successful. It is *764 likely that the new juvenile unit in Shelby County will borrow certain facets from these offices, including access to social workers and investigators. Further, these offices all have specialized training programs that provide the skills and resources to effectively handle transfer hearings, challenge competency, make educated recommendations for child services, file motions, and take appeals.
It is also likely that the new juvenile unit will strive to meet the new standards using existing research. An older example is the Ten Core Principles of Juvenile Defense, released in 2004, which attempted to give clear guidance on the roles and duties of a juvenile defender. However, in the past few years, development of additional juvenile defense standards and juvenile defense training has progressed. In 2012, the National Juvenile Defender Standards were released, giving guidance to defenders in every area of practice, including supervision standards. They embody a “comprehensive understanding of the role and duties of the juvenile defender and seek to strengthen and guide the ethical and professional performance of the juvenile defense attorney.” In addition, the Juvenile Training Immersion Program was released in 2013 and is available to all juvenile defenders across the country. It provides a detailed, comprehensive curriculum designed not simply to tell juvenile defenders what to do, but how to do it—actually helping defenders develop the necessary skills to become effective advocates.

*765 D. The Agreement Compared with Other Efforts to Improve Juvenile Defense

The Agreement between JCMSC and the DOJ is the first time that a juvenile court system and the United States Government have provided and agreed upon a detailed roadmap to improve a system as a whole. However, other states have attempted to reform their juvenile systems and improve juvenile defense. For example, in New Orleans, “the Center for Children's Rights was founded in October 2006 in response to the collapse of the New Orleans justice system after Hurricane Katrina.” This office also addressed well-documented problems in Louisiana's juvenile courts and jails. Its mission is instructive for other jurisdictions seeking reform:

Each Children's Defense Team client is continuously represented by an advocacy team—a youth advocate, a social worker, an attorney, and an investigator—from the moment of first exposure to the justice system until he or she is free of state supervision. Our teams develop and implement comprehensive advocacy plans that defend clients' rights and respond to the causes and consequences of arrest and incarceration. This innovative defense model—the only one of its kind in Louisiana, but rooted in national best practices—makes a long-term difference in the lives of New Orleans' children.

In Massachusetts, the Youth Advocacy Division also provides holistic defense, and it recently created a statewide network to ensure that all contract counsel (or panel attorneys) also have access to training and support, not just the juvenile defenders in the public defender office. The Youth Advocacy Division developed performance standards for all indigent counsel. In order for an attorney to receive a court appointment to represent a child, the attorney must comply with training, performance, and evaluation standards.

VII. Conclusion

The country is in the midst of an exciting time in juvenile reform. The recent Supreme Court cases coupled with numerous other innovations leaves us poised to create a new landscape. The DOJ investigation into the practices of JCMSC was historic. Never before had the Department of Justice focused on an entire juvenile court system and never before had the DOJ acknowledged the critical role of juvenile defense in a functioning court system. The investigation and subsequent Agreement gives clear guidance not only to Memphis, but to many other jurisdictions in the country. Memphis is not wholly unique; rather, the problems faced by JCMSC are widespread and have been identified throughout twenty-one separate state assessments. The lack of resources, training, and understanding of the juvenile defender's role is all too common. Fortunately, the Agreement provides remedies to these common problems, and the tremendous progress that JCMSC has made in the course of one year leaves little doubt that these issues can be effectively addressed. JCMSC is an integral leader in this exciting time. Its detailed Agreement with the DOJ creates an obtainable goal for other jurisdictions to follow by providing the components for success, the commitment to the reform process demonstrated by the leadership of JCMSC, and the recognition of the critical role of juvenile defense.
Footnotes

1 Sandra Simkins, Clinical Professor, is the Director and co-founder of the Children’s Justice Clinic at Rutgers School of Law. She is currently the Due Process Monitor for the settlement Agreement between the Department of Justice and the Juvenile Court of Shelby County, Tennessee. In 2012, she received the Robert E. Shepard Jr. Award for Excellence in Juvenile Defense. Her book, When Kids Get Arrested, What Every Adult Should Know, was released in 2009. In 2008, she was selected by the MacArthur Foundation to participate in the Juvenile Indigent Defense Action Network (JIDAN) Models for Change. Areas of expertise include post-disposition representation, conditions of confinement, and isolation. The author would like to thank Jennifer Vallor, Senior Articles Editor of The University of Memphis Law Review, for her help during the editing process for this Article.


3 Eli Ross, Lawyer: Teen Was Forced to Confess to Role in Murder, LOCAL MEMPHIS (Dec. 18, 2013, 6:50 PM), http://www.localmemphis.com/story/lawyer-teen-was-forced-to-confess-to-role-in-murder/id/story/e_OLKrwhk2xgQAaTYicXg.

4 Id.

5 Id. (internal quotation marks omitted).

6 See id.

7 See generally MEMORANDUM OF AGREEMENT, supra note 1 (describing the intended methods of improvement to be implemented by the JCMSC to protect the constitutional rights of delinquent children).


10 JUVENILE COURT INVESTIGATION, supra note 8, at 43. The investigation examined data from a five-year period on approximately 66,000 cases. Id. at 43 n.40. Over this time, the investigation utilized the relative rate index, a federal reporting requirement that compares disproportionate minority contact, in each state, of the juvenile court proceeding with other counties around the country. See id. at 24-26.

11 The constitutional violations included inadequate notice of charges, violation of the right to be free from self-incrimination, and failure to provide timely probable cause hearings. See JUVENILE COURT INVESTIGATION, supra note 8, at 11-18.

12 See id. at 56-59.

13 See MEMORANDUM OF AGREEMENT, supra note 1, at 3-5.

14 Kim Severson, Deal Signed to Overhaul Juvenile Justice in Tennessee, N.Y. TIMES (Dec. 17, 2013), http://nytimes.com/2012/12/18/us/tennessee-county-agrees-to-changes-in-juvenile-justice-system.html?_r=0 (“[B]lack teenagers [in Memphis] were twice as likely as white teenagers to be detained and were sent to adult criminal court for minor infractions far more often than whites.”).

See MEMORANDUM OF AGREEMENT, supra note 1, at 9-33.

543 U.S. 551, 578 (2005) (holding that the execution of individuals who were under eighteen at the time of their crime is prohibited by the Eighth and Fourteenth Amendments).

560 U.S. 48, 82 (2010) (holding that a sentence of life imprisonment without the possibility of parole on a juvenile who did not commit homicide was unconstitutional).

131 S. Ct. 2394, 2408 (2011) (holding that a child's age is a relevant consideration to a custody analysis under Miranda v. Arizona, 384 U.S. 436 (1966)).

132 S. Ct. 2455, 2475 (2012) (holding that a sentence of life imprisonment without the possibility of parole for a person under eighteen at the time of capital felony murder violates the Eighth Amendment).

Roper, 543 U.S. at 569-70.

Id. at 569 (“These qualities often result in impetuous and ill-considered actions and decisions.”) (quoting Johnson v. Texas, 509 U.S. 350, 367 (1993)).

Id. at 569 (“Youth is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological change.”) (quoting Eddings v. Oklahoma, 455 U.S. 104, 115 (1982))).

Id. at 570.


JUVENILE COURT INVESTIGATION, supra note 8, at 7-8.

Id. at 5.

Id. at 6.

Id.

Id. at 5, 43 n.40.

JUVENILE COURT INVESTIGATION, supra note 8, at 8.

See id.; see also TENN. CODE ANN. § 37-1-101(a)(1)  (2010) ( “Provide for the care, protection, and wholesome moral, mental and physical development of children coming within its provisions . . . .”).

JUVENILE COURT INVESTIGATION, supra note 8, at 8.

Id. at 11-12 (“[I]f a party seeks to detain the child [before the adjudicatory hearing], the court must determine that probable cause that the child committed the alleged offense exists [I]f the [court] does not find probable cause to detain a child, she can release the child to appear for further court proceedings.” (citing TENN. R. JUV. P. 15(b))).

Id. at 12 (providing that the adjudicatory hearing, as discussed in Gault, is the “hearing on the merits,” which is the equivalent of a trial).

Id. (“At the adjudicatory hearing, the [judge] considers the [[district attorney’s] evidence in support of the petition and any evidence presented by the child, and decides whether the child is adjudicated delinquent of the charges.”).

If the adjudicatory hearing results in finding the minor guilty of the charged act, the appropriate disposition is determined at a separate dispositional hearing, which is conducted pursuant to Rule 32 and 33 of the Tennessee Rules of Juvenile Procedure. See TENN. R. JUV. P. 28.

JUVENILE COURT INVESTIGATION, supra note 8, at 12.

Id. (internal quotation marks omitted) (quoting TENN. R. CRIM. P. 3).

Id. at 14.

Id. at 15.

Id. at 16.

Id.

See Cnty. of Riverside v. McLaughlin, 500 U.S. 44, 57 (1991) (requiring the government to prove that there was a “bona fide emergency” if a delay is longer than forty-eight hours).

JUVENILE COURT INVESTIGATION, supra note 8, at 18 (footnote omitted).

Id.

Id. at 19 (emphasis added); see TENN. CODE ANN. § 37-1-134 (2010).

JUVENILE COURT INVESTIGATION, supra note 8, at 19.

Id. at 46-47.

Id. at 48 (citation omitted).

Id.

Id. at 49.

Id. at 50.


Common findings among these assessments include, among other barriers to adequate representation, a lack of access to competent counsel, inadequate time and resources for defenders to prepare for hearings or trials, a juvenile-court culture that encourages pleas to move cases quickly, a lack of pretrial and dispositional advocacy, and an over-reliance on probation. See Assessments, supra note 66.

387 U.S. 1 (1967).

See ROBIN WALKER STERLING, NAT’L JUVENILE DEFENDER CTR., ROLE OF JUVENILE DEFENSE COUNSEL IN DELINQUENCY COURT 5-6 (2009).

Id.

See NAT’L JUVENILE DEFENDER CTR., supra note 26, at 19 (stating that one of a lawyer's duties is to “Elicit and Represent [the] Client's Expressed Interests”); see also MODEL RULES OF PROF’L CONDUCT R. 1.14(a), 1.2(a).

See STERLING, supra note 70, at 5


MEMORANDUM OF AGREEMENT, supra note 1, at 3.

Id.

SIMKINS #2, supra note 14, at 2.

See MEMORANDUM OF AGREEMENT, supra note 1, at 34-38.

SIMKINS #2, supra note 14, at 2.

See id. at 25-30.

SIMKINS #1, supra note 14, at 5.

MEMORANDUM OF AGREEMENT, supra note 1, at 9-14.

See id. at 10-12, 14.

SIMKINS #2, supra note 14, at 10.

Id. at 12.

Id. at 14.

SIMKINS #1, supra note 14, at 4.

SIMKINS #2, supra note 14, at 14.

Id. at 3. A Notice of Transfer is a document filed with the court by the prosecution to indicate the state's intention to transfer the juvenile to the adult criminal court.

Resources diminish when the court must obtain information on each juvenile considered for transfer in order to conduct a thorough hearing. Hasty plea bargains arise because juveniles and their parents are so afraid of the adult criminal system that they take any deal just to avoid it.

SIMKINS #2, supra note 14, at 3.

Data from 2013 revealed 107 cases where “Notice of Transfer” was withdrawn after District Attorney Review. Id. at 3 n.2.

SIMKINS #2, supra note 14, at 17.

In re Gault, 387 U.S. 1, 4-5, 7-8 (1967).

Id. at 41.

See id.


John J. Dilulio, Jr., The Coming of the Super-Predators, WKLY. STANDARD, Nov. 27, 1995, at 23, 24 (noting that a “super-predator” is a person who is morally impoverished from “growing up surrounded by deviant, delinquent, and criminal adults in abusive, violence-ridden, fatherless, Godless, and jobless settings”). A “super-predator” can be a kid “of whatever race, creed, or color” and they are more likely to be “criminally depraved when they are morally deprived.” Id.


Id.

Id.

See Ross, supra note 2.

See JUVENILE COURT INVESTIGATION, supra note 8, at 47.

NAT’L JUVENILE DEFENDER CTR., supra note 26, at 152.

See id. at 152-61.


Nationally, scholars have brought to light to how trauma affects youth, and this awareness has led to an effort to educate judges and attorneys about the effects of childhood trauma. See, e.g., KRISTINE BUFFINGTON ET AL., NAT’L COUNCIL OF JUVENILE & FAMILY COURT JUDGES, TEN THINGS EVERY JUVENILE COURT JUDGE SHOULD KNOW ABOUT TRAUMA AND DELINQUENCY 2 (2010), available at http://www.ncjfcj.org/sites/default/files/trauma%20bulletin_0.pdf (seeking to empower judges to be able to “best assist traumatized youth who enter the juvenile justice system”); NAT’L CHILD TRAUMATIC STRESS NETWORK, JUDGES AND CHILD TRAUMA (2008), available at http://www.nctsn.org/sites/default/files/assets/pdfs/judicialbrief.pdf (exploring how judges understand and approach children with trauma histories). The National Child Traumatic Stress Network (NCTSN) reports the results of focus groups conducted to understand how knowledgeable juvenile and family court judges are about child trauma and to identify ways to promote education on the issue. See id. NCTSN has also established other projects that are more child-focused, promote peer-to-peer support, and empower youth and their families to share and reflect on their own stories and experiences. See id. In addition, the U.S. Attorney General and the Department of Justice have devoted significant resources to better understand childhood exposure to trauma across the country and have begun to address it through the Defending Childhood Initiative. See Task Force on Children Exposed to Violence, U.S. DEP’T OF JUSTICE, http://www.justice.gov/defendingchildhood/task-force.html (last visited Apr. 4, 2014).


See JUVENILE COURT INVESTIGATION, supra note 8, at 57-58.

See id. at 58.


SUCCESS IN SHELBY COUNTY: A ROADMAP TO..., 44 U. Mem. L. Rev. 727

118 JUVENILE COURT INVESTIGATION, supra note 8, at 58-59.

119 See KATAYOON MAJD ET AL., LEGAL SERVICES FOR CHILDREN, NAT’L JUVENILE DEFENDER CTR., & NAT’L CTR. FOR LESBIAN RIGHTS, HIDDEN INJUSTICE: LESBIAN, GAY BISEXUAL AND TRANSGENDER YOUTH IN JUVENILE COURTS 1 (2009), available at http://www.njdc.info/pdf/hidden_injustice.pdf (“Without a firm grasp on the ways in which LGBT-related bias can impact youth’s behavior and service needs, juvenile justice professionals remain unprepared to effectively serve these youth and fulfill their responsibilities to treat them fairly.”).


121 See Sedlak et al., supra note 117, at 11-12. The Department of Justice has employed monitors in numerous investigations to ensure improved practices in juvenile courts.


123 Kelley, supra note 122.

124 See NAT’L JUVENILE DEFENDER CTR., supra note 26, at 161 (“Counsel has a duty to investigate and act upon any claims by the individual client of unlawful conditions of confinement and to document and ascertain the frequency with which such conditions have been noted by others . . . .”).


126 JUVENILE COURT INVESTIGATION, supra note 8, at 57-58.

127 Id.


130 See JUVENILE COURT INVESTIGATION, supra note 8, at 8 (“Before 1899, the law made no distinction between children over seven and adults.”).


132 Id. R. 13 § 2(c)(1) (“The hourly rate for appointed counsel in non-capital cases shall not exceed forty dollars ($40) per hour for time reasonably spent in trial preparation and fifty dollars ($50) per hour for time reasonably spent in court.”); Id. § 2(d)(3).

133 See JUVENILE COURT INVESTIGATION, supra note 8, at 47-48.

134 See STERLING, supra note 70, at 5.

135 MEMORANDUM OF AGREEMENT, supra note 1, at 3-5.

136 See SIMKINS #2, supra note 14, at 2.

137 See MEMORANDUM OF AGREEMENT, supra note 1, at 13, 19, 26.

138 Id. at 9.
139  Id.

140  Id. at 10. Moreover, as discussed in my Second Compliance Report:

The “data collection system” has begun to track issues related to contesting an Affidavit of Complaint (“AOC”). An issue that deserves further consideration is the failure of juvenile defenders to contest the AOC. The data collected revealed the following:

<table>
<thead>
<tr>
<th>Juvenile Defenders Contesting Affidavit of Complaint</th>
<th>% of cases</th>
</tr>
</thead>
<tbody>
<tr>
<td>Oral argument</td>
<td>17%</td>
</tr>
<tr>
<td>Written documents</td>
<td>0%</td>
</tr>
<tr>
<td>Live Witnesses</td>
<td>0%</td>
</tr>
</tbody>
</table>

It is unclear why there are so few challenges to the AOC by juvenile defenders While I did not observe a juvenile defender challenge probable cause with witnesses, juvenile defenders repeatedly argued zealously for the release of their clients from detention.

SIMKINS #2, supra note 14, at 11.

141  See MEMORANDUM OF AGREEMENT, supra note 1, at 10-11.

142  Id. at 10 (emphasis added).


145  See MEMORANDUM OF AGREEMENT, supra note 1 (“1)the extent and nature of the Child's prior delinquency; (2) the nature of past treatment efforts and the nature of the Child's response thereto; (3) the Child's suitability for additional treatment; (4) the nature of the delinquent act alleged; (5) the Child's social factors; (6) the alternatives within the juvenile justice system which were considered and the rationale for rejecting those alternatives; and (7) whether the juvenile court and juvenile justice system can provide rehabilitation of the juvenile”); see also TENN. CODE ANN. § 37-1-134(b)(1)-(6) (2010 & Supp. 2013).

146  543 U.S. 551, 569-70 (2005) (discussing society's generally reduced standards of culpability for individuals under the age of eighteen due to lack of maturity, susceptibility to negative influences, and undeveloped character).

147  560 U.S. 48, 73 (2010) (considering the harshness of sentencing juveniles and noting that a life sentence without parole does not allow a juvenile the chance to demonstrate growth and maturity).

148  MEMORANDUM OF AGREEMENT, supra note 1, at 12. This remedy is consistent with National Juvenile Defense Standards, which mandate that juvenile defenders advocate against transfer. NATI JUVENILE DEFENDER CTR., supra note 26, at 139 (listing counsel's responsibilities as (1) “[c]hallenge any defect in the charges that would deprive the adult court of jurisdiction;” (2) “[r]aise any credible facial or ‘as applied’ state or federal constitutional challenges to adult prosecution;” (3) “[p]resent all facts, mitigating evidence, and testimony that may convince the court to keep the client in juvenile court, including the client's amenability to treatment and the availability of tailored treatment options in juvenile court; and” (4) “[c]onsider use of expert witnesses to raise the client's capacity to proceed in adult court, amenability to rehabilitation in juvenile court, and related developmental issues”). The Comment to Standard 8.4 also encourages counsel to “present testimony to prevent transfer, including testimony by people who can provide insight into the client's character.” Id. at 140 (listing potential character witnesses).

149  MEMORANDUM OF AGREEMENT, supra note 1, at 12-13 (“Within 90 days of the Effective Date, JCMSC shall revise its policies, procedures, and practices to prevent probation officers or any other staff from eliciting information about Children's involvement in the alleged delinquent act or acts in question outside the presence of the Child's defense attorney.”).

150  Id. at 14-16.

151  Id. at 15.

152  Id.
See NAT’L JUVENILE DEFENDER CTR. & NAT’L LEGAL AID & DEFENDER ASS’N, TEN CORE PRINCIPLES FOR PROVIDING QUALITY DELINQUENCY REPRESENTATION THROUGH PUBLIC DEFENSE DELIVERY SYSTEMS 2 (2d ed. 2008) [hereinafter TEN CORE PRINCIPLES] (providing criteria by which a public defense delivery system may fully implement the holding of Gault).

See generally NAT’L JUVENILE DEFENDER CTR., supra note 26. The National Juvenile Defense Standards were created to provide guidance, support, and direction to juvenile defense attorneys and others involved in the juvenile court system. Id.


