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Tate v. State: Highlighting the Need for a Mandatory Competency Hearing

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TATE v. STATE: HIGHLIGHTING THE NEED FOR A MANDATORY COMPETENCY HEARING

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Arrival time is 8:15 a.m.[1] *Attorneys conjure up thoughts of issues, such as what time the judge will take the bench, how full is the morning docket and whether it has been updated, how many arraignments have been scheduled,*[2] *children on pickup order status,*[3] *termination of a plea and pass,*[4] *af-*

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1. This is an account of my personal experience as a Certified Legal Intern with the Broward County Public Defender's Office, Juvenile Division. I was an Intern during the Fall semester of my third year of law school, interning for a period of two and a half months.

2. An arraignment is the step in a criminal prosecution where the defendant is brought before the court for a formal reading of a charges and entering of a plea. BLACK'S LAW DICTIONARY 82 (7th ed. 1999).

ternoon docket, number of trials, witnesses and whether they have been subpoenaed, violation of probation hearings,[5] *and on and on. The adversarial playground called juvenile court awaits the arrival of a public defender. Children and their families line the benches inside the courtroom. Stacks of delinquency petitions are placed neatly next to the large pile of face sheets.*[6] *The first child of the day, only fourteen years old, had pled no-contest to a first-degree felony six months earlier. Now he faces third-degree felony and first-degree misdemeanor charges. After speaking with the 5'3", 150 pound adolescent about the charges, the lawyer notices his face is blank. Obviously confused, he turns to his mother. The unfortunate truth is that he barely understands how he arrived at the courthouse, let alone the charges that he is facing. His mother, aware of this reality, begins to cry. The lawyer poses questions, which are answered by the mother and child.*

The youth's psychological history is extensive and severe, ranging from bipolar disorders to anger management issues. Although an attorney's day is overflowing with time pressures and obligations, under these circumstances, at the top of his to-do list should be filing a motion for competency.[7]

I. INTRODUCTION

It is imperative that a criminal defendant understands the nature of the proceedings against him and has the ability to assist his defense counsel during trial.[8] Whether tried in juvenile court or as an adult in criminal court, the

3. A.M.W. v. Portesy, 714 So. 2d 1170, 1171 (Fla. 2d Dist. Ct. App. 1998) (describing the term "pick-up order" as one often used in juvenile proceedings to describe the orders to take the children into custody); *see also* FLA. STAT. § 985.207(3) (2003) (stating that taking a child into custody is not equivalent to an arrest, but will precede a finding of whether the taking was a lawful one).

4. Term describing a state's offer to a child when he or she is a first time offender. This is most commonly offered for minor misdemeanors and if completed successfully often results in the state's dismissal of the charges.

5. Probation is a court-imposed criminal sentence that, subject to certain conditions, calls for the release of the convicted person back into the community instead of prison time. BLACKS LAW DICTIONARY 978 (7th ed. 1999).

6. P.H. v. Fryer, 570 So. 2d 1096, 1097 (Fla. 4th Dist. Ct. App. 1990) (describing the juvenile's "face sheet" and probable cause affidavit as evidencing his prior charges in the juvenile court system).

7. *See* § 985.223 (providing circumstances for which a competency evaluation may be raised); *see also* FLA. R. JUV. P. 8.095 (stating the procedures involved when competency of a juvenile is raised).

8. THOMAS GRISSO, FORENSIC EVALUATION OF JUVENILES 83 (David Anson & Debra Fink eds., 1998) [hereinafter GRISSO I]; *see also* Dusky v. United States, 362 U.S. 402, 402 (1960) (holding that the test for competency must be whether the defendant "has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—

concept remains the same: a child must be competent to stand trial.[9] This article focuses on competency questions and the attorney's obligations when representing a minor. Beginning with Part II and through Part VII, this article focuses on the impact of the *Tate* decision. Part VIII analyzes the history of due process rights in juvenile court, including the right to counsel, by sifting through the rationales of two landmark juvenile cases.[10] Part IX emphasizes the importance of a juvenile's right to be tried while competent. Part X tackles the predicament lawyers often encounter when they disregard the duty to file a motion for competency: ineffective assistance of counsel.[11] Part XI addresses the judge's role in determining whether a juvenile is competent. Part XII proposes a legislative change requiring a mandatory competency hearing for a youth under the age of sixteen charged with a serious crime. Part XIII will conclude that a mandatory competency hearing is crucial, without which, a youth is not sufficiently protected in the criminal justice system.

II. THE TATE OPINION

The grand jury returned a first-degree and felony murder indictment against Lionel Tate on August 11, 1999.[12] Tate was only twelve years old.[13] Evidence introduced at trial demonstrated that he viciously killed Tiffany Eunick.[14] In fact, his six-year-old victim sustained in excess of thirty-five injuries, including a skull fracture, contusions to the brain, more than twenty bruises, a fractured rib, kidney and pancreas wounds, and a detached liver.[15] Tate was convicted of premeditated murder.[16] Despite Tate exhibiting odd behavior during trial, which should have raised serious questions about his

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and whether he has a rational as well as factual understanding of the proceedings against him.").

9. GRISSO I, *supra* note 8.

10. U.S. CONST. amend. XI; FLA. CONST. art. I, § 16; *see also* FLA. R. JUV. P. 8.165 (stating that court has a duty to advise a child of his or her right to counsel and unless that right is waived by the child, that counsel shall be appointed at each and ever stage of the proceedings).

11. Strickland v. Washington, 466 U.S. 668, 669 (1984). *Tate* does not discuss this issue because it was not raised on appeal. Tate v. State, 864 So. 2d 44, 47–54 (Fla. 4th Dist. Ct. App. 2003) (discussing the points on appeal, none of which raised the issue of ineffective assistance of trial counsel).

12. Jodie Needle, *Boy Charged With Murder in Death of Playmate*, SUN-SENTINEL (Ft. Lauderdale), Aug. 12, 1999, at B2.

13. *Tate*, 864 So. 2d at 47.

14. *Id.*

15. *Id.* Experts on both sides agreed these injuries were not the result of an accident. *Id.*

16. *Id.*

competency, a motion for a competency evaluation or a hearing was not filed until the post-trial hearing.[17]

III. THE ATTORNEY-CLIENT PRIVILEGE

Tate's post-trial and appellate attorney, Richard Rosenbaum, called for that post-trial hearing to demonstrate Tate lacked the competency to stand trial prior, during, and subsequent to trial.[18] The testimony of Tate's trial counsel, Jim Lewis,[19] was sought by Rosenbaum, but would only be allowed if Tate waived the attorney-client privilege.[20] At the hearing, Rosenbaum argued Tate did not appreciate the consequences of refusing to waive the attorney-client privilege.[21] Indeed, the record indicated Tate merely followed his mother's orders not to waive.[22] Nevertheless, despite the fact that both attorneys, Rosenbaum and Lewis, took the position that it was in his "best interests to waive the privilege," after conferring with his mother, Tate refused.[23] Consequently, the trial judge refused to allow Lewis to testify and held that raising the competency issue after Tate had been convicted was untimely.[24] Therefore, the court denied the post-trial motion for a competency evaluation and a hearing.[25]

IV. THE ISSUE ON APPEAL

As a result of that denial, the main issue on appeal was whether a competency evaluation was constitutionally mandated.[26] More specifically, the Fourth District Court of Appeal questioned whether Tate had had "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and whether he had a rational, as well as factual, understand-

17. *Tate*, 864 So. 2d at 47. His appellate counsel argued Tate was not competent during any stage of the proceedings. *Id.* The primary thrust of that competency motion was that Tate did not understand the consequences of going to trial and could not assist counsel before, during or after trial. *Id.*

18. *Id.*

19. Needle, *supra* note 12.

20. *Tate*, 864 So. 2d at 48 (Fla. 4th Dist. Ct. App. Dec. 10, 2003). Lewis wanted to testify for him so that the court would be aware of what led to his belief that Tate was not competent during trial. *See* Paula McMahon, *Attorneys Renew Bid for Evaluation of Tate*, SUN-SENTINEL (Ft. Lauderdale), Mar. 7, 2001, at B3.

21. *Tate*, 864 So. 2d at 48.

22. *Id.*

23. *Id.* at 48–49.

24. *Id.*

25. *Id.*

26. *Tate*, 864 So. 2d at 48.

ing of the proceedings against him."[27] Tate's lack of understanding was evident though his behavior.[28] Although Lewis was prohibited from testifying about Tate's behavior during the trial, his troubling demeanor and attitude during the post-trial hearing supported a need for a competency hearing.[29] For example, Rosenbaum argued that Tate was drawing pictures, not listening, apparently oblivious to the proceedings, and simply not helping with his defense.[30] In addition, Tate lacked any real comprehension of his situation.[31] Rosenbaum pointed to such indications as that his eyes constantly wandered, illustrating a lack of comprehension of his situation.[32] Nevertheless, the judge completely disregarded Rosenbaum's arguments, concluding a "lack of interest in the proceedings did not equate with incompetency."[33]

V. THE EXPERT TESTIMONY AT TRIAL

However, due to the extensive and significant defense expert testimony at trial concerning Tate's inability to understand his situation, the competency issue should have been addressed in the lower court.[34] It went uncontroverted that Tate possessed an IQ of approximately ninety.[35] Furthermore, Wiley Mittenberg,[36] a neuropsychologist, testified Tate's mental age was equivalent to that of a nine or ten-year-old.[37] Joel Klass, a child psychologist, explained that Tate had the social maturity of a six-year-old.[38] Lastly,

27. *Id.*; *see also* Dusky v. United States, 362 U.S. 402, 402 (1960).
28. *Tate*, 864 So. 2d at 48.
29. *Id.*
30. *Id.*
31. *Id.*
32. *Id.*
33. *Tate*, 864 So. 2d at 48.
34. *Id.*
35. *Id*; AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 39, 45 (4th ed. 1994) (explaining the essential feature of mental retardation as subaverage intellectual functioning coupled with limited adaptive abilities). Intellectual abilities are considered together with adaptive abilities, i.e., communication, self-care, self-direction, health and safety. AMERICAN PSYCHIATRIC ASSOCIATION, *supra*, at 39. Taking into account a measurement error of about five points, a person with an IQ of 70 may be considered mildly retarded. *Id.* at 39–40. Furthermore, even one with an IQ of 75 can be considered mildly retarded when he lacks certain adaptive functions. *Id.* An IQ of 71-84 describes a person with borderline intellectual functioning. *Id.* at 45.
36. *Attorneys Argue Prison Fate of Convicted Teen Murderer*, CNN.COM, Mar. 2, 2001, http: //edition.cnn.com/2001/LAW/03/02/wrestling.death.02/ (last visited Mar. 27, 2004).
37. *Tate*, 864 So. 2d at 48.
38. *Id.*

even the State's expert witness, Sherri Bourg-Carter, testified Tate was immature.[39]

VI. THE STATE'S POSITION REGARDING TATE'S COMPETENCY

Notwithstanding Bourg-Carter's earlier testimony at trial, at the post-trial hearing, she opined that Tate was legally competent.[40] Moreover, she testified that a pre-trial "evaluation" was performed, and Tate's trial counsel was aware of it.[41] Furthermore, a pre-trial agreement between Bourg-Carter and John Spencer, a defense expert psychologist, called for certain "examinations" to be performed to prevent Tate from being subjected to repeated testing.[42] Bourg-Carter acknowledged that competency was a logical issue that a forensic psychologist would "need to consider."[43] However, neither a formal competency hearing nor an evaluation was ever performed.[44] As a result, Tate's ability to proceed to trial was never examined in a formal competency hearing.[45]

VII. THE ULTIMATE DECISION BY THE FOURTH DISTRICT COURT OF APPEAL

The Fourth District Court of Appeal reversed the conviction.[46] The court held that the denial of the defense's post-trial demand for a competency evaluation, combined with the trial court's failure to order, sua sponte,[47] a pre-trial competency evaluation, violated due process.[48] The decision focused on 1) Tate's age and immaturity, 2) facts that evolved pre- and post-

39. *Id.*

40. *Id.* at 49.

41. *Id.*

42. *Tate*, 864 So. 2d at 49. The State also pointed the court's attention to the plea hearing. *Id.* Tate's trial lawyer, during this plea hearing, consulted with Tate and his mother. *Id.* The record revealed that Tate was not willing to accept the plea offer and desired to move forward to trial. *Id.* The judge conferred with Tate who informed the court that he had had plenty of time to speak with his mother and wanted to proceed. *Id.* Furthermore, he asserted he had not been coerced and had no questions about his choice. *Tate*, 864 So. 2d at 49. Without a formal competency hearing or even an evaluation, the judge found that "Mr. Tate has sufficient ability to make a decision in this very important matter." *Id.*

43. *Id.*

44. *Id.* at 48.

45. *Id.*

46. *Tate*, 864 So. 2d at 48.

47. BLACKS LAW DICTIONARY 1155 (7th ed. 1999) (defining the term "sua sponte" meaning on the court's own motion or without prompting or suggestion).

48. *Tate*, 864 So. 2d at 46. *See generally* Paula McMahon, *Court Tosses Verdict Ruling: Teen's Murder Conviction Reversed Reason: Judge Failed to Order Competency Test*, SUN SENTINEL (Ft. Lauderdale), Dec. 11, 2003, at A1.

trial, 3) Tate's lack of experience with the court system, and 4) the complexity of the legal proceedings against him.[49]

VIII. JUVENILES AND DUE PROCESS

A. *History of Due Process*

The Illinois Juvenile Court Act of 1899 established the first court for delinquents under sixteen.[50] It mandated that a child's records must remain confidential to lessen the stigma of adjudication.[51] Constitutional protections were considered unnecessary because children were kept separated from incarcerated adults and the emphasis was on rehabilitation.[52] For approximately the next seventy years, the lack of the right to counsel was justified through the doctrine of parens patriae, which allowed the State to act in the best interests of the child rather than to punish him.[53] Thus, the proceedings were not considered adversarial, rendering competency to proceed to trial and participate in his defense immaterial.[54] By contrast, competency to stand trial in the adult criminal justice system dates back to 1836, sixty-three years prior to the Illinois Juvenile Court Act.[55] *R v. Pritchard* involved a deaf and dumb adult defendant whose attorney questioned his "fitness to stand trial."[56]

Pritchard, irrespective of its application to juveniles, is an example of how the concept of incompetency entered into the criminal justice system and why it barred conviction.[57] The court focused on the defendant's competency and established three elements for determining fitness to stand trial:

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49. *Tate*, 864 So. 2d at 50.

50. Robert E. Shepherd, Jr., *Still Seeking the Promise of Gault: Juveniles and the Right to Counsel*, 18 CRIM. JUST. 23, 23 (2003).

51. *Id.* This court was established in Cook County, Illinois and was set up to be a more forgiving setting than the adult criminal court. *Id.* Juveniles were kept separate from adults when incarcerated and detention of any juveniles under the age of twelve was not allowed. *Id.*; *see* BLACK'S LAW DICTIONARY 33 (7th ed. 1999) (defining the term "adjudication" as the process of judicially deciding a case).

52. Barry C. Feld, *The Transformation of the Juvenile Court—Part II: Race and the "Crack Down" on Youth Crime*, 84 MINN. L. REV. 327, 338 (1999).

53. Shepherd, *supra* note 50; Ellen Marrus, *Best Interests Equals Zealous Advocacy: A Not So Radical View of Holistic Representation for Children Accused of Crime*, 62 MD. L. REV. 288, 296 (2003) (arguing that the civil nature of the proceedings distinguished the juvenile system from that of the adult system).

54. GRISSO I, *supra* note 8, at 85.

55. THOMAS GRISSO, YOUTH ON TRIAL–A DEVELOPMENTAL PERSPECTIVE ON JUVENILE JUSTICE 74 (2000) [hereinafter GRISSO II].

56. *Id.* (citing R. v. Pritchard, 173 Eng. Rep. 135 (K.B. 1836)).

57. *Id.*

1) whether the defendant "stood mute of malice;"[58] 2) whether the defendant is capable of pleading to the indictment; and 3) whether the defendant possesses the sufficient intellect to comprehend the proceedings to form a proper defense.[59]

The *Pritchard* "fitness to stand trial" test can be compared to the "adjudicative competency test" articulated by the United States Supreme Court in 1960.[60] *Dusky v. United States* required that a defendant have a "rational" understanding of the proceedings and have the cognitive ability to consult with his attorney.[61] Thus, both *Pritchard* and *Dusky* focus on the defendant's present ability to understand his current situation to participate in his defense.[62] However, neither case addressed the problem that convicting an incompetent defendant, or failing to follow proper procedures to assess his competence when doubt has been raised, violates the Due Process Clause of the United States Constitution.[63]

In *Drope v. Missouri*, the defendant was indicted for rape.[64] His counsel moved for a continuance seeking examination by a psychiatrist who had recommended an evaluation.[65] The judge denied the motion.[66] On the first day of the trial, the defendant's wife testified that the defendant attempted to kill her the previous day.[67] On the second day, the defendant attempted suicide.[68] His lawyer then requested a mistrial because his client became hospitalized.[69] The court denied the motion concluding the defendant's inability to attend was voluntary.[70] The defendant was convicted after which he filed a motion to vacate alleging that the rejection by the court of his request for a psychiatric evaluation violated his right to due process.[71] The Missouri Court of Appeal held that neither the psychiatrist's recommendation, nor his

58. *Id.* "A defendant who 'stood mute' of malice was said to being doing so willfully." *Id.*

59. GRISSO II, *supra* note 55, at 74–75; *see also Pritchard*, 173 Eng. Rep. at 135.

60. GRISSO II, *supra* note 55, at 75; *see* Dusky v. United States, 362 U.S. 402, 402 n.9 (1960).

61. *Dusky*, 362 U.S. at 402.

62. GRISSO II, *supra* note 55, at 74–75.

63. *Id.* at 75; *see* Drope v. Missouri, 420 U.S. 162, 180 (1975).

64. *Drope*, 420 U.S. at 162.

65. *Id.* Although it is not stated in the case, the defendant's trial lawyer must have consulted with a psychiatrist to determine whether his client should be evaluated.

66. *Id.*

67. *Id.*

68. *Id.*

69. *Drope*, 420 U.S. at 162.

70. *Id.* The Supreme Court of Missouri affirmed the denial of the motion for a mistrial and held that the denial of the motion for a continuance was not an abuse of discretion. *Id.*

71. *Id.*

wife's testimony, raised sufficient question about his ability to proceed to trial to demonstrate a constitutional violation.[72] However, the United States Supreme Court reversed, concluding that sufficient doubt of his competency was raised and that further inquiry was required.[73]

Drope addressed the issue within the context of a trial, but the Supreme Court has also recognized that a defendant cannot enter a guilty plea unless he is mentally competent.[74] The bottom line is that, "[i]ncompetency bars adjudication, whether by plea or by trial."[75]

While case law afforded an adult the procedural due process protection of not being tried while incompetent, lack of history and precedent make understanding the issue of a juvenile's right to be competent to stand trial an uphill battle.[76] Evaluating a juvenile's competency to proceed was considered unnecessary.[77] This was because the juvenile justice system was so set apart and distinct from that of adult criminal court.[78] The two systems differed in purpose and principle.[79] The purpose of juvenile court was rehabilitation for their alleged wrongdoing, rather than punishment.[80] While the two seminal cases of *Kent v. United States*[81] and *In re Gault*[82] failed to establish an absolute right for a juvenile to be competent to stand trial, the right can be logically inferred from their holdings.[83] Competency played practically no role in the juvenile justice system until 1966.[84] Both *Kent* and *In re Gault* granted minors several of the identical due process rights available to adult defendants.[85]

In *Kent*, a fourteen-year-old was arrested after being reported for breaking into houses and attempting to snatch several purses.[86] Two years later, Morris A. Kent was arrested again, this time for housebreaking, robbery, and

72. *Id.*
73. *Drope*, 420 U.S. at 180.
74. *Id.* (citing Godinez v. Moran, 509 U.S. 389, 398 (1993)).
75. GRISSO II, *supra* note 55, at 75.
76. *Id.* at 73.
77. GRISSO I, *supra* note 8, at 85.
78. *Id.*
79. *Id.*
80. *Id.*; *see supra* note 53 and accompanying text.
81. 383 U.S. 541 (1966).
82. 387 U.S. 1 (1967).
83. Thomas Grisso, *Juvenile Competency to Stand Trial: Questions in an Era of Punitive Reform*, 12 CRIM. JUST. 4, 6 (1997) [hereinafter Grisso III].
84. Laurence Steinberg, *Juveniles on Trial: MacArthur Foundation Study Calls Competency Into Question*, 18 CRIM. JUST. 20, 21 (2003).
85. *Id.*; *see also* GRISSO III *supra* note 83. *But see* § 985.228(2) (stating that a juvenile is not entitled to a trial by jury).
86. *Kent*, 383 U.S. at 543.

rape.[87] Because he was not yet eighteen, Kent fell within the juvenile court's jurisdiction.[88] Kent's mother retained counsel for him the day after he was arrested.[89] Kent's attorney, along with his mother, met with the Social Service Director of the Juvenile Court to discuss the possibility of waiving jurisdiction.[90] His lawyer filed a motion opposing the waiver, asserting that his client was "a victim of severe psychopathology" and suggesting hospitalization for psychiatric observation.[91] Kent's attorney argued that the court should retain jurisdiction and try Kent as a juvenile to stress rehabilitation.[92] He also requested copies of the juvenile records used to determine whether to try Kent as an adult.[93] The judge did not rule or hold any hearings on those motions.[94] Furthermore, the judge rendered his decision without consulting Kent's attorney or his mother.[95] Instead, the court merely entered an order waiving jurisdiction and allowing him to be tried as an adult.[96] The judge simply stated that he made this decision as result of a "full investigation."[97] Following the indictment, Kent's counsel moved to dismiss, claiming the court erred by allowing Kent to be tried as an adult.[98] The motion was denied.[99] Kent's attorney appealed, asserting Kent was not afforded certain procedural rights that, under normal circumstances, would have been afforded to an adult.[100]

Among other deprivations, he claimed Kent was denied his liberty without a probable cause determination, had been interrogated by the police without counsel present, and was never informed of his right to remain silent.[101] On appeal, the United States Supreme Court, avoiding the constitutional issues, found the statute allowing waiver of jurisdiction after a "full

87. *Id.* at 544.
88. *Id.* at 543.
89. *Id.* at 544.
90. *Id.*
91. Kent v. United States, 383 U.S. 541, 545 (1966).
92. *Id.*
93. *Id.* at 546.
94. *Id.*
95. *Id.*
96. *Kent*, 383 U.S. at 546.
97. *Id.* at 548. The Juvenile Court Act, which governed waiver, merely stated there needed to be a "full investigation." *Id.* at 547. No standards were set out in the statute to govern the Juvenile Court's ultimate decision regarding waiver. *Id.*
98. *Id.* at 548.
99. *Kent*, 383 U.S. at 549.
100. *Id.* at 551.
101. *Id.* The attorney also argued that Kent's parents were not notified when he was being interrogated and that he had been unlawfully fingerprinted. *Id.* The conviction was affirmed and Kent appealed to the United States Supreme Court. *Id.*

investigation" could lead to arbitrary determinations, thereby reversing the decision.[102] According to the Justices, this is a "critically important" question not capable of fair resolution without the right to a hearing and to effective assistance of counsel.[103] Thus, *Kent* began the erosion of the State's parens patriae role in juvenile courts.

The Court, construing the Juvenile Court Act in *Kent* to be "rooted in social welfare philosophy,"[104] explained that juvenile proceedings primarily focus on the needs of the child and society rather than on adjudicating criminal conduct.[105] However, despite the State's continuing parens patriae role, this doctrine is "not an invitation to procedural arbitrariness."[106] Consequently, the Justices reversed Kent's conviction, stating that a waiver hearing, although not required to conform to all the requirements of a criminal trial, "must measure up to the essentials of due process and fair treatment."[107] The Kent Court, unwilling to further expand the procedural protections for a minor being tried in juvenile court, took that leap only one year later in the case of *In re Gault*.

In *In re Gault*, a fifteen-year-old was arrested on June 8, 1964.[108] Gerald Gault was brought to a detention facility without his parents having been notified.[109] After learning of the situation through his brother, his mother went to the institution and spoke to a deputy probation officer.[110] He told her why her son was there[111] and said a hearing was scheduled for the next day.[112] The deputy filed a petition for the hearing, and although the parents were verbally informed of the hearing, the deputy never officially served them.[113] The petition was unsupported by sufficient facts indicating the crime Gault allegedly committed.[114] It merely stated that Gault was a "delin-

102. *Kent*, 383 U.S. at 552, 553.

103. *Id.* at 553–554; *see also* Black v. United States, 355 F.2d 104, 105 (1965) (holding that the assistance of counsel in the "critically important" waiver determination is vital to the just determination of juvenile court proceedings).

104. Kent v. United States, 383 U.S. 541, 554 (1966).

105. *Id.*

106. *Id.* at 555. The Court made it clear this holding was limited to instances involving waiver of juvenile court jurisdiction and did not afford minors any additional procedural due process rights when they are tried in juvenile court. *Id.* at 556.

107. *Id.* at 562 (citing Pee v. United States, 274 F.2d 556, 559 (1959)).

108. 387 U.S. 1, 4 (1967).

109. *Id.* at 5.

110. *Id.*

111. *Id.* at 4. Gault had been taken into custody because of a complaint by a neighbor that he and his friend phoned her making lewd and indecent remarks. *Id.*

112. *Gault*, 387 U.S. at 5. It is not clear what type of hearing this was.

113. *Id.*

114. *Id.*

quent," requested a hearing for a judicial order reflecting the same, and that Gault needed the court's protection.[115] Additionally, it requested a judicial order be issued regarding Gault's custody and care.[116]

The court conducted the hearing the next day.[117] However, the hearing was deficient in the following ways: 1) the victim was not present; 2) Gault lacked counsel; and 3) there was neither sworn testimony nor a record.[118] During this hearing, the judge questioned Gault about his alleged criminal act.[119] Gault gave conflicting testimony regarding certain admissions that he made to a probation officer.[120] After the hearing, Gault returned to the detention center and then was sent home three days later with no explanation about why he had been detained or why he was released.[121] The same day, Mrs. Gault received a note from one of the probation officers, which stated that the "judge has set Monday June 15, 1964 at 11:00 a.m. as the date and time for further hearings on Gerald's delinquency."[122]

Gault, his mother and father, and the two probation officers involved, attended the proceeding.[123] Again, Gault lacked counsel, with no offer made to provide counsel.[124] Questions posed by the judge led to certain admissions by Gault regarding the charged crime.[125] As a result of the victim's continued absence, Gault did not have an opportunity to cross-exam.[126] Although one of the probation officers prepared a report of the proceeding, Gault and his parents failed to receive a copy.[127] Following a finding of delinquency, the judge sentenced Gault to a State Industrial School until he reached the age of twenty-one.[128]

Gault filed a writ of habeas corpus with the Supreme Court of Arizona.[129] The hearing, however, was in the superior court.[130] It focused on a substantial and vigorous cross-examination of the trial judge who committed

115. *Id.*
116. *Id.*
117. *Gault*, 387 U.S. at 5.
118. *Id.*
119. *Id.* at 6.
120. *Id.*
121. *Id.*
122. *Gault*, 387 U.S. at 6.
123. *Id.* at 7.
124. *Id.*
125. *Id.*
126. *Id.*
127. *Gault*, 387 U.S. at 7.
128. *Id.* at 7–8.
129. *Id.* at 8.
130. *Id.* The facts do not indicate why the hearing was in the Superior Court.

Gault.[131] The judge's position was that confinement until Gault reached the age of majority was appropriate under the Arizona Code.[132] When the superior court agreed and dismissed the writ, Gault sought review in the Supreme Court of Arizona.[133]

Gault argued the Juvenile Code was invalid on its face because it ran contrary to the Due Process Clause of the Fourteenth Amendment.[134] He contended that fundamental procedural rights were denied him at the trial court level.[135] Those rights included: 1) notice of the charges; 2) lack of counsel; 3) the lack of the opportunity to confront and cross-examine his accuser; 4) the privilege against self-incrimination; and 5) appellate review.[136]

The Supreme Court of Arizona concluded that due process is "requisite to the constitutional validity of proceedings in which a court reaches the conclusion that a juvenile has been at fault, has engaged in conduct prohibited by law, or has otherwise misbehaved with the consequence that he is committed to an institution in which his freedom is curtailed."[137] However, the holding was limited to determinations of delinquency resulting in incarceration.[138]

Justice Fortas, writing for the majority, expanded on the meaning of acting as parens patriae over a child.[139] Justification for depriving juveniles of their liberty without providing the procedural protections afforded to adults arose out of the civil rather than criminal nature of the proceedings.[140] A minor did not have a "right to liberty but to custody."[141] He had to listen to his parents and go to school.[142] Thus it followed that a parent's failure, which results in a delinquent child, calls for state intervention.[143] Accord-

131. *Id.*
132. *Gault*, 387 U.S. at 8–9.
133. *Id.* at 9.
134. *Id.* at 9–10.
135. *Id.*
136. *Id.* at 9.
137. *Gault*, 387 U.S. at 12. Notwithstanding this decision by the Supreme Court of Arizona, Gault's writ of habeas corpus was dismissed. *Id.*; *see also In re* W., 19 N.Y.2d 55 (1966) (holding that it is unconstitutional to admit a juvenile's involuntary confession); *In re* State of Interests of Carlo, 225 A.2d 110 (N.J. 1966) (holding that prior to the admission of a juvenile's confession, fundamental fairness element of due process must first be met).
138. *In re* Gault, 387 U.S. 1, 12 (1967).
139. *Id.* at 17.
140. *Id.*
141. *Id.*
142. *Id.*
143. *Gault*, 387 U.S. at 17.

ingly, a child was provided custody and not deprived of any rights.[144] Nevertheless, the Court noted, "unbridled discretion, however benevolently motivated, is frequently a poor substitute for principle and procedure, and Due process of law is the primary and indispensable foundation of individual freedom."[145] Furthermore, relaxed procedures, busy calendars, and "high-handed" methods often result in a deprivation of the fundamental rights for juveniles.[146] Referring to the fundamental fairness rationale in *Kent*, the Court found that the same principles of due process apply in a delinquency adjudicatory setting.[147] Therefore, it would be astonishing not to require procedural regularity and the exercise of caution implied in the term due process.[148] Additionally, "[u]nder the United States Constitution, the condition of being a boy does not justify a Kangaroo court."[149] Thus, the Supreme Court found that Gault was the victim of multiple constitutional violations.[150]

B. *Notice*

Due process requires sufficient notice to allow a reasonable opportunity for preparation.[151] More specifically, the alleged misconduct must be "set forth . . . with particularity."[152] The notification of the June 15 hearing merely stated there were to be further delinquency proceedings, but failed to describe the nature of the charges and failed to provide any supporting

144. *Id.*
145. *Id.* at 18, 20.
146. *Id.* at 19.
147. *Id.* at 30–31.
148. *Id.* at 27–28.
149. *Gault*, 387 U.S. at 28; *see also* Shepherd, *supra* note 50, at 24.
150. *In re* Gault, 387 U.S. 1, 31–57 (1967). Although it was raised on appeal, the court did not rule on whether a juvenile was entitled to a right of appeal from a finding of delinquency. *Id. But see* § 985.234 (stating that an appeal from a juvenile court order may be taken to the appropriate district court of appeal by any child and any parent or legal guardian or custodian of the child).
151. *Gault*, 387 U.S. at 33.
152. *Id.*; *see also* FLA. R. JUV. P. 8.010(a) (stating that no detention order shall be entered without a hearing during which all the parties shall have an opportunity to be heard); FLA. R. JUV. P. 8.010(d) (requiring the intake officer to make a diligent effort, in the most expeditious manner, to notify a parent or custodian of a child to inform them of the time and place of a detention hearing); FLA. R. JUV. P. 8.013 (providing that a detention petition order shall state the reasons why the child is in custody and should to be detained); FLA. R. JUV. P. 8.035 (mandating juvenile delinquency petitions allege facts showing the child to have committed a delinquent act).

facts.[153] Thus, the notice was insufficient to provide Gault an opportunity to reasonably prepare a defense.[154]

C. *Right to Counsel*

Since *Gault*, a child has the same right to counsel in a juvenile hearing as in an adult criminal setting because a delinquency adjudication that results in loss of liberty is equivalent to punishment when convicted in felony prosecutions.[155] The assistance of counsel is essential for carefully examining the facts of his case, as well as determining, preparing and presenting a defense.[156] The possibility of incarceration is too severe a penalty to not provide a child with legal representation.[157] Consequently, the Due Process Clause of the Fourteenth Amendment demands, in those situations where delinquency may result in incarceration, that the child and parents be notified of the right to counsel and to the appointment of a lawyer if indigent.[158]

D. *Self-incrimination*

Gault asserted that the privilege against self-incrimination was unavailable to him.[159] No one advised him that making certain admissions could result in a loss of his liberty.[160] The Court concluded that the privilege against self-incrimination goes the heart of procedural safeguards necessary to guarantee that "admissions or confessions are reasonably trustworthy."[161] Providing the privilege against self-incrimination to adults but not children creates a non-existent exception to the Fifth and Fourteenth Amendments, in essence excluding minors from its protection.[162]

153. *Gault*, 387 U.S. at 33.
154. *Id.*
155. *In re* Gault, 387 U.S. 1, 36 (1967). *But see* Florida v. T.G., 800 So. 2d 204, 210 (Fla. 2001) (holding that although the inquiry into waiver of counsel in juvenile proceedings should be equal to that afforded to adults, courts should be even more cautious when accepting a waiver of counsel from children).
156. *Gault*, 387 U.S. at 36.
157. *Id.*; *see supra* note 10.
158. *Gault*, 387 U.S. at 41.
159. *Id.* at 42.
160. *Id.* at 43–44.
161. *Id.* at 47.
162. *Id.*

E. *Confrontation and Cross-Examination*

Gault also argued that denying his right to confront and cross-examine the witnesses violated his constitutional rights.[163] Moreover, it was not enough that sworn testimony was taken of those involved in the juvenile proceedings.[164] Absent a finding of a valid confession, confrontation and sworn testimony by witnesses accessible for cross-examination are indispensable for a finding of delinquency.[165]

IX. THE SIGNIFICANCE OF COMPETENCY TO STAND TRIAL

The rising number of children committing violent offenses has been the catalyst for a change in the way states view competency of a juvenile.[166] Moreover, as juvenile proceedings rapidly approach the similarity of adult criminal proceedings, the argument that a child must be competent to stand trial becomes stronger.[167] For example, Florida has amended its statutes regarding competency to stand trial in juvenile cases to almost mirror the adult criminal code.[168] The resemblance between the two systems yields a height-

163. *Gault*, 387 U.S. at 42

164. *In re* Gault, 387 U.S. 1, 56 (1967).

165. *Id.*

166. GRISSO I, *supra* note 8, at 86; *see also* Steinberg, *supra* note 84. Steinberg discusses more than a century of change in the juvenile justice system from rehabilitation to punishment. *Id.* The cause for this change seems to be the dramatic increase in homicides and violent crimes committed by children. *Id.* Steinberg argues this is due to the increase in the availability of guns. *Id.*

167. Judy L. Estren, *Adjudicatory Hearings in Delinquency Cases*, FLA. JUV. L. & PRAC. § 7.2 (2003) (pointing out that the *Florida Rules of Juvenile Procedure* have removed practically all distinctions between adult criminal trials and adjudicatory hearings). The juvenile rules mimic those of the *Florida Rules of Criminal Procedure*. *Id.* Further, an adjudicatory hearing is virtually the same, procedurally, as an adult non-jury trial. *Id.*; *see also* Jennifer A. Parker, *Role of the Lawyer in Delinquency Cases*, FLA. JUV. L. & PRAC. § 2.1 (2003) (arguing that the juvenile justice system is moving towards protection of the public rather than rehabilitation); Julianne P. Sheffer, *Serious and Habitual Juvenile Offender Statutes: Reconciling Punishment and Rehabilitation Within the Juvenile Justice System*, 48 VAND. L. REV. 479 (1995) (arguing that juvenile justice systems have increasingly promoted punitive goals); FLA. STAT. § 985.01 (2003) (stating that the purpose of the delinquency chapter is to "ensure the protection of society" through "the most appropriate control, discipline, punishment and treatment while taking into account the need to protect the public safety). *Accord* McKeiver v. Pennsylvania, 403 U.S. 528 (1971) (upholding the constitutionality of the lack of a right to a jury trial involving a juvenile). *But see* § 985.228(2) (mandating that adjudicatory hearings be held without a jury); FLA. R. JUV. P. 8.110(c) (stating that an adjudicatory hearing shall be conducted by a judge without a jury).

168. Grisso III, *supra* note 83, at 7; *see also* § 985.223; FLA. R. CRIM. P. 3.211 (explaining competency to proceed as it relates to adults).

ened interest in examining a youth's competency. Although *In re Gault* did not explicitly mandate juveniles be competent to stand trial, that requirement can be logically inferred from the right to counsel mandated by the Court.[169] A right to counsel would be meaningless if an incompetent juvenile was compelled to stand trial.[170]

A determination of an adolescent's competency is a complex question based on evaluations by mental health experts.[171] Historically, incompetence was a tool used by adult defendants with mental illnesses.[172] In addition to mental incompetence, children have the additional problem of developmental immaturity.[173] In other words, a minor could be completely free from any mental disorder, yet, based on his age and immaturity, be unable to proceed to trial.[174] Conversely, a child could be mature, but lack the requisite mental capacity.[175] Therefore, it is imperative to analyze an adolescent's cognitive and psychosocial capacities to understand how they relate to his competence to stand trial.[176]

A 2003 MacArthur Foundation Research Network Study ("MacArthur") revealed astonishing results involving a juvenile's competence to proceed to trial.[177] MacArthur defined adolescence as between ten and seventeen years old.[178] During those seven years, developmental changes are rapid and ex-

169. *See* Grisso III, *supra* note 83.

170. *Id.* at 7; *see also In re* S.H., 469 S.E.2d 810 (Ga. Ct. App. 1996) (noting that the right to legal counsel would be meaningless if a juvenile defendant was not capable of exercising it and participating in his own defense).

171. § 985.223(b) (stating that all determinations of competency shall be made at a hearing based on evaluations of not less than two nor more than three experts appointed by the court).

172. Steinberg, *supra* note 84.

173. *Id.*

174. GRISSO I, *supra* note 8, at 86; *see also In re* Causy, 363 So. 2d 472, 476 (La. 1978) (stating that a child's "tender years" may form a basis for a finding of incompetency); Steinberg, *supra* note 84, at 21.

175. Steinberg, *supra* note 84, at 22. *See generally* § 984.223(f) (applying only one set of factors when evaluating juvenile incompetency regardless of the child's mental status or age). Experts appointed to evaluate a child must consider whether the child can: 1) appreciate the charges or allegations against him; 2) appreciate the range of possible penalties that could be imposed by the judge; 3) understand the "adversarial nature of the legal process;" 4) reveal important facts to defense counsel; 5) behave accordingly in the courtroom; and 6) testify relevantly. § 984.223(f).

176. Steinberg, *supra* note 84, at 22.

177. *Id.* at 21. Commentators are already using this study to support their legal arguments relating to juveniles and competency. Lynda E. Frost & Adrienne E. Volenik, *The Ethical Perils of Representing the Juvenile Defendant Who May Be Incompetent*, WASH. U. J.L. POL'Y 327, 353 (2004).

178. Steinberg, *supra* note 84, at 22.

treme.[179] These researchers sought to contrast cognitive and psychosocial differences with those of young adults, ages eighteen to twenty-four.[180] Of the 1,400 people tested, half were either in jail or a juvenile detention facility, while the rest were from the general public.[181]

Almost one-third of the eleven to thirteen-year olds and approximately one-fifth of the fourteen to fifteen-year olds were deemed not competent to stand trial.[182] Not surprisingly, many of the younger adolescents could neither understand the judicial process nor the judge's role.[183] Few could discern differences between prosecutors and defense attorneys.[184] Even when their rights were explained to them, they could not grasp them.[185] Many of the children fifteen and younger were incapable of putting facts together and drawing logical conclusions.[186] Their ability to imagine future consequences stemming from their actions was considerably less than adults.[187] Thirty percent of eleven to thirteen-year olds performed at the level of mentally ill adults regarding trial appreciation and interpreting important information.[188] Juveniles under the age of thirteen were least likely to comprehend risks or consider the long-term consequences of their decisions.[189] Similar to those under thirteen, nineteen percent of fourteen to fifteen-year olds also performed at the level of mentally ill adults in relation to trial appreciation and interpreting vital information.[190] Predictably, adolescents fifteen and younger were far more likely to just adhere to an authority figure's request than older adolescents and younger adults.[191] Overall, adolescents were more eager than adults to "come clean," particularly when promised the confession will result in a prize like going home.[192] Most significant is that these find-

179. *Id.*
180. *Id.*
181. *Id.*
182. *Id.* at 23.
183. Steinberg, *supra* note 84, at 23; *see also* Grisso III, *supra* note 83, at 7 (suggesting that current research indicates that thirteen to fourteen year olds have questionable ability to deal with abstract legal concepts that a majority of adults can).
184. Steinberg, *supra* note 84, at 23.
185. *Id.*
186. *Id.*
187. *Id.*
188. *Id.*
189. Steinberg, *supra* note 84, at 23.
190. *Id.*
191. *Id.*
192. *Id.*

ings were the same regardless of the youth's previous contact with the judicial system.[193]

This study demonstrates that a child's intelligence level can have a strong impact on whether a juvenile will be deemed competent to proceed to trial.[194] A disproportionate number of children in the justice system have below average intelligence and, of course, these were "most likely to lack the abilities related to competence."[195] Additionally, of the incarcerated minors fifteen years old and younger, two-thirds had an IQ below eighty-nine.[196]

The MacArthur study also suggests the necessity for social policy and legislative change.[197] Just as important is that it supports imposing a heavy burden on defense attorneys to address their juvenile clients' competency issues.[198] In fact, Patricia Lee, a member of the MacArthur Research Network, warns that "competency is the first question defense attorneys have to confront in these cases."[199]

X. INEFFECTIVE ASSISTANCE OF COUNSEL: THE BURDEN ON THE ATTORNEY

A juvenile charged with a crime faces a frightening experience and is in a very difficult position.[200] Being arrested in and of itself is a traumatizing experience for a child.[201] The decisions he has to make will affect the rest of his life.[202] An attorney must know his juvenile client's level of development to ensure he is able to appreciate the choices he will have to make and to aid

193. *Id.*; *see also* Grisso III, *supra* note 83, at 8 (stating that research indicates that the "mere fact that a youth is a repeat offender is not a reliable indicator of the youth's understanding of the trial process or his rights"). This is particularly interesting in light of the fact that the *Tate* court considered this as a factor in reversing his conviction. Tate v. State, 864 So. 2d 44, 50 (Fla. 4th Dist. Ct. App. 2003).

194. Steinberg, *supra* note 84, at 23.

195. *Id.*

196. *Id.* at 24; *see* AMERICAN PSYCHIATRIC ASSOCIATION, *supra* note 35.

197. Steinberg, *supra* note 84, at 24.

198. *Id.*

199. *Id.*; *see also* Grisso II, *supra* note 55, at 77 (noting that most reported opinions involving adjudicative competency revolved around the lawyer's failure to seek competency evaluations).

200. Steinberg, *supra* note 84, at 24.

201. *Id.*

202. *Id.* Compounding this are the cognitive defects and learning disabilities from which the child may suffer. Unfortunately, the minor may be in a situation where he has been abandoned by his family. *Id.* In fact, Lee points to pressures children face when placed in custody, such as: 1) sitting in a holding cell for hours; 2) waiver of important legal rights; 3) plea offers from the prosecutors; and 4) plea offers from the judge rushing through their case. *Id.*

in his defense.[203] Thus, failure to explore competency may constitute ineffective assistance of counsel.[204] To establish ineffective assistance of counsel the following must be proved: "1) counsel's performance was deficient, in that his representation fell below an objective standard of reasonableness; and 2) the deficient performance prejudiced the defense depriving the defendant of a fair trial, in that there is a reasonable probability that but for counsel's unprofessional errors, the result would have been different."[205] A reasonable probability is "a probability sufficient to undermine confidence in the outcome."[206]

A finding of incompetency precludes a conviction, so a failure to investigate a defendant's competency is ineffective assistance of counsel.[207] In *Broomfield v. State*, the defendant, James Broomfield, pled guilty to robbery of a firearm and grand theft of a motor vehicle.[208] One year later he filed a motion for post-conviction relief alleging he was incompetent when he entered his plea.[209] His first trial attorney, Kenneth Garber, testified that he had filed a motion in the trial court seeking a competency evaluation.[210] The psychologist who evaluated Broomfield reported that he was "actively psychotic" and incompetent to stand trial, but that his competency could have been restored with suitable hospitalization and medication.[211]

When a conflict of interest forced Garber to withdraw, Frank Porter was appointed to represent Broomfield.[212] The psychologist's report was given to Porter.[213] By the time of the post-conviction hearing, Porter could not remember whether he discussed the report with Broomfield, but he did say that

203. Steinberg, *supra* note 84, at 24. Lee argues, "the burden is on defense attorneys to make certain their clients understand the situation and the choices they must make." *Id.*

204. Broomfield v. Florida, 788 So. 2d 1043, 1044–45 (Fla. 2d Dist. Ct. App. 2001).

205. Strickland v. Washington, 466 U.S. 668, 669 (1984); *see also* Jones v. Florida, 845 So. 2d 55, 65 (Fla. 2003). *But see* Davis v. Florida, No. SC02-1580, SC02-2472, 2003 WL 22722316, at *3 (Fla. Nov. 20, 2003) (holding that strategic decisions made by trial counsel do not constitute ineffective assistance of counsel).

206. *Jones*, 845 So. 2d at 55 (citing Ragsdale v. Florida, 798 So. 2d 713, 715 (Fla. 2001)).

207. *Broomfield*, 788 So. 2d at 1043, 1044–45 (Fla. 2d Dist. Ct. App. 2001) (citing Jones v. Florida, 740 So. 2d 520, 522 (Fla. 1999)).

208. *Id.* at 1043. The defendant was currently serving a sentence for a federal crime. The plea for both of the felonies was to run concurrently with the federal sentence. *Id.*

209. *Id.* The defendant did not file a direct appeal from his sentence. *Id.* Thus, the facts of the case were developed at the post-conviction hearing. *Id.*

210. Broomfield v. Florida, 788 So. 2d 1043, 1044 (Fla. 2d Dist. Ct. App. 2001).

211. *Id.* The facts do no explicitly indicate whether Broomfield had at one time been competent, but the psychologist's report would indicate that because there was a chance of restoration, he may have been competent in the past. *Id.*

212. *Id.*

213. *Id.*

he did not have reservations about his client's competency to enter into the plea.[214] Notably, however, when asked at the post-conviction hearing whether he would have permitted Broomfield to enter a plea without a second report, Garber responded, "probably not."[215] In addition to Porter's own observations at the plea hearing, a letter Broomfield sent influenced his decision not to raise competency.[216] In the letter, Broomfield wrote that he would be entering his pleas in state court and questioned how his state sentence would be imposed given his current federal sentence.[217] It was unclear whether Porter ever spoke to Broomfield prior to the plea hearing.[218] Thus, testimony by Broomfield was imperative for the trial court's resolution of whether Porter was ineffective.

Broomfield's testimony at the post-conviction hearing related to Porter's deficient representation.[219] He stated that he had not been given the psychologist evaluation, and if he had been furnished the report, he would not have entered his pleas.[220] Moreover, Broomfield had been hospitalized in federal prison and was taking medication.[221] The trial court found that Broomfield was competent at the time he entered his pleas and that his counsel was not ineffective.[222]

On appeal, the Second District Court of Appeal concluded that Porter was ineffective based on his failure to investigate Broomfield's competency at the time he entered his pleas.[223] The psychologist's report that Porter disregarded was sufficient to support an incompetency defense.[224] Moreover,

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214. *Broomfield*, 788 So. 2d at 1044.

215. *Id.*; *see* FLA. R. CRIM. P. 3.210(b) (explaining that upon motion by the court, counsel for the defendant or the state concerning a defendant's competency, the court shall order the defendant to be examined by no more than three, nor less than two experts).

216. *Broomfield*, 788 So. 2d at 1044.

217. *Id.*

218. *Id.*

219. Broomfield v. Florida, 788 So. 2d 1043, 1044 (Fla. 2d Dist. Ct. App. 2001).

220. *Id.*

221. *Id.* at 1044. Broomfield also testified that when he entered his plea in federal court, that judge found him competent. *Id.*

222. *Id.*

223. *Id.* at 1045; *see also* Powell v. Florida, 464 So. 2d 1319, 1319 (Fla. 1st Dist. Ct. App. 1985) (recognizing that a failure to raise a defendant's incompetency can be grounds for ineffective assistance of counsel); Lilley v. Florida, 667 So. 2d 887, 887 (Fla. 2d Dist. Ct. App. 1996) (stating that failing to inform the court of a defendant's mental illness and alcohol problems could rise to the level of ineffective assistance of counsel); Saunders v. Florida, 704 So. 2d 224 (Fla. 4th Dist. Ct. App. 1998) (reversing a defendant's conviction due to absence of record refuting claim that counsel was ineffective for failure to investigate defendant's competency).

224. *Broomfield*, 788 So. 2d at 1045.

Porter's reliance on the letter Broomfield sent to him was misplaced.[225] The court also questioned Porter's personal assessment of Broomfield's competency when the record did not indicate whether they ever spoke prior to the plea hearing.[226] An attorney's obligation to find out information about his client, especially when certain facts become known that should trigger further inquiry, is imperative to effective representation.[227]

A lack of client consultation can rise to the level of ineffective assistance of counsel if the defendant can show prejudice resulted.[228] In *Jackson v. State*, for example, the defendant alleged that his attorney was ineffective because he only visited him twice while in prison.[229] The Fifth District Court of Appeal held that the defendant must also show how he was prejudiced by the failed communication.[230] The defendants in *Jackson* and *Broomfield* were adults, but the claim of ineffective assistance of counsel can also be raised by a youth being tried in juvenile court.[231]

Although ineffective assistance of counsel stemming from the failure to investigate a youth's competency in juvenile court has not been addressed in Florida, based on *Kent* and *Gault*, minors should have the same rights as the adult defendants in *Jackson* and *Broomfield*. A finding of incompetency will bar adjudication of an adolescent in juvenile court just as it prohibits conviction of an adult or a juvenile being charged as one.[232] Thus, based on the

225. Broomfield v. Florida, 788 So. 2d 1043, 1045 (Fla. 2d Dist. Ct. App. 2001). The court found that the letter Broomfield sent Porter could not rebut the findings of the psychologist's report. *Id.*

226. *Id.*

227. Jackson v. Florida, 801 So. 2d 1024, 1025 n.1 (Fla. 5th Dist. Ct. App. 2001).

228. *Id.* at 1025.

229. *Id.*

230. *Id.*; *see also* Cook v. Florida, 792 So. 2d 1197, 1202 (Fla. 2001) (holding that failing to investigate the defendant's family history and mental health mitigators could be ineffective assistance of counsel); McCann v. Florida, 854 So. 2d 788, 790–91 (Fla. 2d Dist. Ct. App. 2003) (failing to investigate and prepare a meaningful defense may not be a strategic decision but could rise to the level of ineffective assistance of counsel). Wyoming has held the failure of trial counsel to interview a defendant is ineffective assistance of counsel when the attorney could have realized through a consultation that inculpatory statements were made by his client which would have lead to the filing of a motion to suppress based on a Miranda violation. LDO v. Wyoming, 858 P.2d 553, 556–57 (Wyo. 1993).

231. P.M.W. v. Florida, 678 So. 2d 484, 485 (Fla. 5th Dist. Ct. App. 1996) (holding that juvenile trial counsel's failure to file an initial appeal brief constituted ineffective assistance of counsel).

232. § 985.223(5) (a)-(c) (mandating that a child found to be incompetent shall remain under the juvenile court's jurisdiction for two years following the date of the order of incompetency). If the court determines that, at any time, a youth will never become competent to proceed, the court may dismiss the petition for delinquency. *Id.* Furthermore, at the end of

rationale of *Broomfield*, failing to investigate a youth's competency in juvenile court can lead to a claim of ineffective assistance of counsel.[233] According to a Senior Attorney of the Broward County Public Defender Juvenile Division, an influx of ineffective assistance of counsel allegations by juveniles because of a failure to explore the youth's competency will be a ramification of the *Tate* opinion. "After *Tate*, more juveniles will be appealing based on ineffective assistance of counsel for a failure to inquire into their competency."[234] Thus, incompetency to proceed must be the first issue an attorney addresses when his client is charged with a serious crime.[235]

XI. COMPETENCY TO STAND TRIAL: THE BURDEN ON THE JUDGE

While the lawyer bears the burden of filing a motion for competency, the judge carries the responsibility of ruling on the defendant's competence.[236] In addition, when neither of the lawyers raise the issue of competency, a judge may also have the obligation to order a competency hearing.[237]

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the two year period, if there is no evidence that a child will retain competency within one year, the court must dismiss the petition. *Id.*

233. Kentucky recognizes that children are often the victims of informal juvenile judicial process. Catherine Browning Hendrickson, *The Legal Practitioner's Guide to RCR 11.42 for Juvenile Defendants*, 5-SPG KY. CHILD. RTS. J. 16, 24 (1997). As a result, counsel and adolescent clients meet for the first time shortly prior to arraignment or trial. *Id.* Thus, the youth may have a claim of ineffective assistance of counsel so that disposition may be set aside. *Id. But see* A.F.E. v. Florida, 853 So. 2d 1091 (Fla. 1st Dist. Ct. App. 2003) (stating that collateral relief on the issue of ineffective assistance of counsel is not practical for a juvenile because the sentence imposed by the court may conclude prior to the granting of appellate relief).

234. Interview with Melinda Blostein, Senior Attorney, Broward County Public Defender Juvenile Division, in Ft. Lauderdale, Fla. (Mar. 2, 2004).

235. *See* Diana Marrero, *Miami-Dade 8th Grader Charged with Murdering Classmate in School*, SUN- SENTINEL (Miami-Dade), Feb. 19, 2004, at A1. A juvenile was charged as an adult for first-degree murder. *Id.* Steve Drizin, a law professor at Northwestern University, stated that "one of the first issues that will have to be addressed is the boy's competency to stand trial in adult court." *Id.*

236. Steinberg, *supra* note 84, at 25.

237. FLA. R. CRIM. P. 3.210(b) (stating that a court shall, on its own motion, order a competency hearing when the court has reasonable ground to believe the defendant is not competent to proceed); *see also* FLA. R. JUV. P. 8.095(2) (providing that during any time prior to or during the adjudicatory hearing the court has reasonable grounds to believe the child may be incompetent, the court on its own motion shall immediately stay the proceedings and order a hearing to determine the child's competency to proceed); Mike Folks, *Judge Rejects Teen's Plea, Sets Competency Hearing*, SUN SENTINEL (Ft. Lauderdale), Mar. 1, 1995, at B2 (stating a fourteen-year-old was charged as an adult with murder whereafter the judge did not accept his plea deal when she learned of his past psychiatric treatment and instead ordered a competency hearing).

A judge's failure to order a hearing on the issue of a defendant's competency can violate his constitutional right to a fair trial.[238]

In *Pate v. Robinson*, after admitting he shot his wife, the adult defendant was convicted of murder.[239] The defense attorney never filed a motion for competency, and the court failed to order one on its own.[240] As a result, one issue was whether the defendant was competent to stand trial.[241] The State argued the trial judge was not required to order a competency hearing sua sponte.[242] After examining the extensive evidence of defendant's troubling behavior, the United States Supreme Court disagreed.[243]

Each witness for the defense testified that the defendant exhibited erratic behavior and was insane.[244] His mother testified that the defendant had always acted a little peculiarly after a brick fell from the third floor and hit him on the head when he was seven or eight years old.[245] Years later, while the defendant was visiting his mother from the Army and speaking with a guest, he jumped up and kicked a hole in the bar.[246] When asked what was wrong, the defendant just paced back and forth with his hands in his pockets.[247] At other times he would not speak or answer questions and would have an odd glare in his eyes.[248] He would imagine people were "after him" and saw people who were not there.[249] His behavior was described as extremely violent and erratic.[250] His grandfather testified to the defendant's forgetful behavior.[251] Testimony also revealed he was suicidal.[252]

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238. Pate v. Robinson, 383 U.S. 375, 385 (1966).

239. *Id.* at 376.

240. *Id.* at 376–377.

241. *Id.* at 376. Another issue was whether Pate was insane at the time he committed the crime. *Id.*

242. *Pate*, 383 U.S. at 378.

243. *Id.*

244. *Id.* at 378, 383.

245. *Id.* at 378.

246. *Id.* at 378–79.

247. *Pate*, 383 U.S. at 379.

248. *Id.* Testimony by the defendant's grandfather indicated that when the defendant worked for him he would have a strange dazed look in his eyes. *Id.* at 380.

249. *Id.* at 379. Testimony indicated that while visiting his aunt he was seeing a person who "was going to shoot him." *Id.* During this time his mother testified he was foaming at the mouth. *Pate*, 383 U.S. at 379.

250. *Id.* at 379, 380. On the way to a hospital, he tried to leap from a policeman's car, and while at the hospital he had to be strapped into a chair. *Id.* at 379.

251. *Id.* at 380. The defendant would leave and come back from work without ever realizing he left. *Id.* at 380–381.

252. *Pate*, 383 U.S. at 381. The defendant attempted to kill himself by a gunshot wound to the head, and another unsuccessful drowning attempt. *Id.* This came on the heels of shooting and killing his eighteen month old son. *Id.*

After serving time for the murder of his son, the defendant beat up his mother's brother-in-law.[253] The mother sought an arrest warrant explaining to the police that he was out of his mind.[254] In addition, she attempted to have him arrested for continually fighting on the streets.[255] The defendant eventually murdered his wife while she worked.[256] The State offered only one piece of rebuttal evidence to the testimony that the defendant was not competent.[257]

William H. Haines, the Director of the Behavior Clinic of Criminal Court of Cook County, had examined the defendant two or three months prior to trial.[258] He was not, however, present to testify at trial.[259] Nevertheless, the State introduced his opinion that the defendant "knew the nature of the charges against him and was able to cooperate with counsel when he examined him before trial."[260]

The United States Supreme Court concluded that the defendant was constitutionally entitled to a hearing to determine his competency; the trial judge's failure to make that inquiry, sua sponte, denied him of his right to a fair trial.[261]

A judge's obligation to order a competency hearing is also applicable in juvenile court when there are reasonable grounds to believe that a child may

253. *Id.*

254. *Id.*

255. *Pate*, 383 U.S. at 381–382.

256. *Id.* at 382. Testimony indicated he came into the restaurant where she worked, stared at her for a minute, and eventually shot her once or twice. *Id.* He never said a word the entire time he was in the store. *Id.* After the killing, the defendant went to his friend's house who called the police. *Id.* The defendant was present when the police arrived but he said he did not know anything about a murder when asked by the police. *Pate*, 383 U.S. at 382–383.

257. *Id.* at 383.

258. *Id.*

259. *Id.* The facts do not indicate why Dr. Haines was not present to testify at trial.

260. *Id.*

261. *Pate*, 383 U.S. at 385; *see also* Hill v. Wainwright, 473 So. 2d 1253, 1259 (Fla. 1985). The trial court failed to address the issue of whether the evidence at trial mandated a competency hearing for the defendant. *Hill*, 473 So. 2d at 1259. Testimony indicated that the defendant had an IQ of sixty-six, had a history of grand mal epileptic seizures, mental retardation with communication issues, and accepting guilt without considering the facts. *Id.* at 1254–1256. The court, relying on the principle rationale of *Robinson*, held that the judge's failure to order a competency hearing, *sua sponte*, denied the defendant of the right to a fair trial. *Id.* at 1259. *But see* Agan v. Florida, 503 So. 2d 1254, 1256 (Fla. 1987). The mere fact that a defendant confesses, pleads guilty, and disregards his lawyer's advice does not raise doubt about his mental competency. *Id.* The court, on its own motion, must order a competency hearing only when there is "evidence, information, or any showing before the court that raises questions concerning the defendant's competency." *Id.* Here, this principle cannot be extended to the defendant merely because the decision he made to plead guilty was a bad one. *Id.*

be incompetent to proceed.[262] *W.S.L. v. State* is illustrative. A nine-year-old boy was adjudicated guilty of first-degree felony murder, sexual battery, attempted sexual battery, and aggravated battery.[263] Prior to trial, the child's trial attorney filed a motion for a competency hearing.[264] In support, he included the report of the psychologist who had examined the boy.[265] Despite the psychologist's conclusion that the adolescent "did not have an understanding of the adversary nature of the criminal justice system and had no ability to assist his attorney in planning a defense because of his age and intellect," the trial judge denied the motion.[266] The Second District Court of Appeal held that the psychologist's report provided reasonable grounds to believe that the juvenile "may have been incompetent."[267] Thus, the court concluded that the trial judge erred in denying the youth's motion for a hearing to determine his competency to stand trial.[268]

Although *W.S.L.* was decided in 1985, the Juvenile Rules have not changed. When reasonable grounds exist, before or during an adjudicatory hearing, to believe a youth may be incompetent, the court "shall" immediately order a hearing to determine the adolescent's competency.[269] On the other hand, the Florida statute relating to incompetency in a juvenile delinquency case does not mandate the judge order a competency hearing; it is discretionary.[270] It states that when there is reason to believe, prior to or during a delinquency case, that the child may be incompetent to proceed, the court on its own motion "may" order an evaluation of the child's mental condition.[271] The statute and rule differentiate between the time before or during an adjudicatory hearing and prior to or during a delinquency case. Those two periods of time overlap and can be considered the same. For example, an adjudicatory hearing can occur at any time "during a delinquency case." Likewise, any time before or during an adjudicatory hearing is con-

262. W.S.L. v. Florida, 470 So. 2d 828, 830 (Fla. 2d Dist. Ct. App. 1985), *rev'd on other grounds*, 485 So. 2d 131 (Fla. 1986); *see also* FLA. R. JUV. P. 8.095(2) (providing that during any time prior to or during the adjudicatory hearing the court has reasonable grounds to believe the child may be incompetent, the court on its own motion shall immediately stay the proceedings and order a hearing to determine the child's competency to proceed).

263. *W.S.L.*, 470 So. 2d at 829.

264. *Id.* at 830.

265. *Id.*

266. *Id.*

267. *Id.*

268. *W.S.L.*, 470 So. 2d at 830. The Second District Court of Appeal relied on what was rule 8.170(a)(1) of the *Florida Juvenile Rules of Procedure* in holding that the judge was obligated to order the competency hearing. *Id.*

269. FLA. R. JUV. P. 8.095(a)(2).

270. § 985.223(1).

271. *Id.*

sidered to be "part of the delinquency case." Because those two periods of time can be considered to be identical, the different language in the rule and in the statute can lead to confusion and unfair results. Thus, making the statute discretionary and the juvenile rule mandatory is illogical. Moreover, the rationale of *Tate, Pate, and W.S.L.* obligates the judge to order a competency hearing when there are reasonable grounds, which leads to the conclusion that the discretionary nature of the Florida statute gives a judge leeway he should not have.

XII. PROPOSAL

The evolution of juvenile competence turns on historical issues of justice and fairness.[272] Early intervention in a child's development establishes a pattern that prevents delinquency in later years.[273] The most important and effective programs are those that highlight family support structure, as well as those providing health care services, and others that stress parental support and education.[274] Interceding in a troubled child's life as soon as possible is also imperative for the prevention of recidivism.[275] Likewise, early determination of a child's competency to stand trial will help to prevent a violation of his procedural due process rights. The findings of the MacArthur study illustrate that, on average, children fifteen and younger are less likely to possess essential characteristics necessary to be competent to stand trial than those sixteen and older.[276] Thus, a mandatory competency hearing for children under sixteen, either being tried in juvenile court or in adult court, would, at the very least, address the issue of competency to stand trial.

Intervening as early as possible to reduce the potential for recidivism is just as important as the court's obligation to make an initial determination of a child's competency prior to proceeding on a petition. The former protects the child from committing future criminal acts, and the latter guards against adjudicating or convicting an incompetent youth. Therefore, states must

272. Steinberg, *supra* note 84, at 24.

273. Gloria Danzinger, *Delinquency Jurisdiction in a Unified Family Court: Balancing Intervention, Prevention, and Adjudication*, 37 FAM. L. Q. 397, 398 (2003).

274. *Id.* at 397–98. Danzinger writes that intervening means to do so early in the adolescent's development through pre-school education programs and through parent educational services that improve the child's ability to prepare for school. *Id.* at 397. This, she argues, may set up patterns that prevent criminal behavior by the child when he or she grows up. *Id.* It is her position that the children who elect to participate in these programs are less likely to drop out and become delinquents. *Id.*

275. *Id.* Recidivism means that a child has multiple similar charges. BLACK'S LAW DICTIONARY 1021 (7th ed. 1999).

276. Steinberg, *supra* note 84, at 24.

require immediate obligatory hearings to determine an adolescent's competency. If a state does not require competency inquiries of a juvenile, a judge can and ought to consider competency first, says Robert Schwartz, cofounder and executive director of the Juvenile Law Center.[277] One state does just that.[278]

Under Virginia law, a competency hearing is required when the State Attorney requests a transfer hearing, and the child, fourteen or older, is charged with what would be a felony if committed by an adult.[279] However, this does not go far enough. A youth charged with a felony in juvenile court should also be entitled to a mandatory competency hearing.[280] The reasons to discriminate between the two systems, adult and juvenile, have diminished with the current movement toward punishment in the juvenile system.[281] "The fact is, the juvenile justice system has become so punitive, the consequences of a juvenile adjudication have such long-term effects on kids' lives, that we have to address the competence issue."[282] The vital notions of procedural due process support the proposal for a mandatory competency hearing.

The *Tate* opinion provided a juvenile tried as an adult with an additional procedural safeguard at the trial court level. Irrespective of Tate's trial lawyer's failure to move for competency, the judge's failure to do so violated his due process. However, that holding cannot be limited to a juvenile tried in adult court. Under *W.S.L*, it would seem that a judge would have that same obligation in juvenile proceedings. Due process should not be limited just because the child is tried as a minor. Mandatory competency hearings for children under sixteen charged with a felony, either in juvenile or adult court, would provide important and extra protections to children who can easily fall victim to a complex and unforgiving system.

Certainly a mandatory competency hearing would be a drain on judicial and other resources. Nevertheless, the time and money spent trying a child without addressing his competency wastes judicial resources when the end result is a reversal because of a constitutional due process violation.[283] In addition, the lack of a compulsory competency hearing can have adverse consequences on the child as well as undermine the integrity of the judicial system.

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277. *Id.*

278. VA. CODE ANN. § 16.1-269.1(A)(3) (Michie 2004).

279. *Id.*

280. Grisso III, *supra* note 83, at 9 (explaining that youths up to mid-adolescence may need a mandatory competency hearing).

281. Steinberg, *supra* note 84, at 25.

282. *Id.*

283. Tate v. State, 864 So. 2d 44, 44 (Fla. 4th Dist. Ct. App. 2003).

XIII. CONCLUSION

A child is not just a shorter, more compact version of an adult.[284] The immaturity level a youth brings with him to court is evident and must be considered in a justice system that strives "to be both effective and fair."[285] A lawyer cannot ignore his adolescent client's due process rights any more than a judge cannot ignore the same. Moreover, uniformity among the Rules of Juvenile Procedure and the Florida Statutes, relating to delinquency, should uniformly require a judge to address competency, not merely give him the discretion to do so. Unfortunately, adolescents under the age of sixteen will convert from defendants to the vulnerable victims of the Criminal Justice System without the due process of a mandatory competency hearing prior to being tried.

284. Steinberg, *supra* note 84, at 25.
285. *Id.*