To Testify or Not to Testify: The Dilemma Facing Children with Multiple Cases Before the Same Judge in Delinquency Court.

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In juvenile court, children often have more than one delinquency case pending, especially children living in group foster homes and children who are students at alternative schools. Research in developmental psychology and neuroscience has demonstrated that children's brains function in a fundamentally different way than do the brains of adults. As the Court explained succinctly how children's brains are different:

"The substantive and procedural convergence between juvenile and criminal courts eliminates virtually all of the differences in strategies of social control between youths and adults. As a result, no reason remains to maintain a separate juvenile court whose only distinction is its persisting procedural deficiencies. The juvenile court's continued existence despite these changes reflects an ambivalence about children and their control, and provides an opportunity to re-examine basic assumptions about the nature and competence of young people." Id.

The United States Supreme Court has decided three landmark cases recently that recognize the fundamental principle that children are different. See Roper v. Simmons, 543 U.S. 551 (2004) (abolishing the juvenile death penalty); Graham v. Florida, 130 S.Ct. 2011 (2010) (abolishing life without parole for children convicted of crimes other than homicide); J.D.B. v. North Carolina, 131 S.Ct. 2394 (2011) (holding that a child’s age must be taken into account in determining whether a child was in custody for purposes of Miranda v. Arizona, 384 U.S. 436 (1966)).

Each of these cases relied to a large extent on developing science demonstrating that children’s brains function in a fundamentally different way than do the brains of adults. As the Roper Court noted: “The substantive and procedural convergence between juvenile and criminal courts eliminates virtually all of the differences in strategies of social control between youths and adults. As a result, no reason remains to maintain a separate juvenile court whose only distinction is its persisting procedural deficiencies. Yet, even with the juvenile court's transformation from an informal, rehabilitative agency into a scaled-down criminal court, it continues to operate virtually unreformed. The juvenile court's continued existence despite these changes reflects an ambivalence about children and their control, and provides an opportunity to re-examine basic assumptions about the nature and competence of young people.” Roper, 543 U.S. at 569.

An amicus brief relied upon the Graham court explains succinctly how children’s brains are different: “Research in developmental psychology and neuroscience - including the research presented to the Court in Simmons and additional research conducted since Simmons was decided - confirms and strengthens the conclusion that juveniles, as a group, differ from adults in the salient ways the Court identified. Juveniles - including older adolescents - are
schools. In most jurisdictions, all of a child’s delinquency cases are assigned to the same judge. If the child is taken into custody at a later time, the new case is also assigned to the same judge. That means that if a child exercises her right to go to trial in each case, the same judge will hear every case. If they are set for trial on the same day, and they often are, the judge will hear each case in succession. Even if the child does not exercise her right to go to trial in every case, due to this policy, the judge will be aware of the child’s other pending cases and may well have accepted the child’s plea in one or more cases before presiding over the child’s trial. This article argues that this policy can, in effect, violate state rules of evidence which bar the admission of

less able to restrain their impulses and exercise self-control; less capable than adults of considering alternative courses of action and maturely weighing risks and rewards; and less oriented to the future and thus less capable of apprehending the consequences of their often-impulsive actions. For all those reasons, even once their general cognitive abilities approximate those of adults, juveniles are less capable than adults of mature judgment, and more likely to engage in risky, even criminal, behavior as a result of that immaturity. Research also demonstrates that “juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure,” while at the same time they lack the freedom and autonomy that adults possess to escape such pressures. Simmons, 543 U.S. at 569. Finally, because juveniles are still in the process of forming a coherent identity, adolescent crime often reflects the “signature” - and transient - “qualities of youth” itself, id. at 570, rather than an entrenched bad character. Research has documented that the vast majority of youthful offenders will desist from criminal behavior in adulthood. And the malleability of adolescence means that there is no reliable way to identify the minority who will not.” Brief for the American Psychological Association, American Psychiatric Association, National Association of Social Workers, and Mental Health America as Amici Curiae Supporting Petitioners, submitted in Graham, 2009 WL 2236778 (2009). As the science of juvenile brain development has advanced considerably, there have not been any corresponding major changes in delinquency court.

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3 See Tulman, Joseph, Disability and Delinquency: How Failures to Identify, Accommodate and Serve Youth with Education-Related Disabilities Leads to Their Disproportionate Representation in the Delinquency System, 3 Whitter J. Child & Fam. 3 (2003). Tulman cites a statement made on the floor of the U.S. Senate by Senator Paul Wellstone: “Of the 100,000 children who are arrested and incarcerated each year, as many as 50 percent suffer from a mental or emotional disturbance.” Id. at 7. Tulman summarizes the situation concerning children with education-related disabilities in the delinquency system very powerfully: “The substantive and procedural convergence between juvenile and criminal courts eliminates virtually all of the differences in strategies of social control between youths and adults. As a result, no reason remains to maintain a separate juvenile court whose only distinction is its persisting procedural deficiencies. Yet, even with the juvenile court's transformation from an informal, rehabilitative agency into a scaled-down criminal court, it continues to operate virtually unreformed. The juvenile court's continued existence despite these changes reflects an ambivalence about children and their control, and provides an opportunity to re-examine basic assumptions about the nature and competence of young people.” Id. at 5. It is also well-documented that poor and minority children are substantially over-represented in the delinquency population. See, Disproportionate Minority Confinement, 2002 Update, U.S. Department of Justice, Office of Justice Programs, Office of Juvenile Justice and Delinquency Prevention (noting that although approximately one-third of the juvenile population is minority, minority youth comprise two-thirds of the juvenile detention/corrections population); see also Pope, Carl E., Lovell, Rick, Hsia, Heidi M., Disproportionate Minority Confinement, A Review of the Research Literature from 1989 through 2001, Office of Juvenile Justice Delinquency and Prevention, Juvenile Justice Bulletin. For excellent information about the realities of life for poor children, see National Center for Children in Poverty, Mailman School of Public Health, Columbia University at www.nccp.org.
juvenile adjudications of delinquency to impeach and can also chill the child’s Constitutional
right to testify. This article also looks generally at the use of juvenile adjudications to impeach.
Given that no state allows the use of juvenile adjudications of delinquency to impeach an
accused (whether in juvenile or adult court), this article recommends that states adopt a rule
requiring a child to provide notice to the court if she wishes to testify at her adjudicatory hearing.
Once such notice is provided, the adjudicatory hearing must be held in front of a judge who does
not have knowledge of the child’s prior history in delinquency court. Only in this way can a
child’s absolute right to testify in her own defense be protected.4

I. Constitutional Protections for Children in Delinquency Proceedings

Historically, children in delinquency court were not afforded all of the protections given
to adults facing criminal charges. This was because juvenile court was seen as a way for the
state to step in where children were at-risk of entering the adult criminal justice system. A report
submitted by the Cook County (Illinois) Bar Association to the legislature in support of the
creation of the first juvenile court:

The fundamental idea of the Juvenile Court Law is that the State
must step in and exercise guardianship over a child found under
such adverse social or individual conditions as develop crime . . . It
proposes a plan whereby he may be treated, not as a criminal, or
legally charged with a crime, but as a ward of the state.5

Over time, however, the courts, including the United States Supreme Court, began to recognize
that the ideal of kindly juvenile judges who used their wide discretion to help at-risk children

4 The child would retain her right to testify if the facts at trial develop in such a way that she chooses to testify after
hearing the presentation of the State’s evidence. Prior notice would ensure that the case is not heard by a judge pre-
disposed to not believe the child.
5 Quoted in Florida Juvenile Law and Practice at 1-3 (2009).
was far from the reality faced every day by children in delinquency court. In the seminal case of *In re Gault,* the United States Supreme Court stated:

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6 In *In re Gault,* 387 U.S. 1 (1967), the Court traced the historical development of juvenile delinquency courts:

From the inception of the juvenile court system, wide differences have been tolerated—indeed insisted upon—between the procedural rights accorded to adults and those of juveniles. In practically all jurisdictions, there are rights granted to adults which are withheld from juveniles. In addition to the specific problems involved in the present case, for example, it has been held that the juvenile is not entitled to bail, to indictment by grand jury, to a public trial or to trial by jury. It is frequent practice that rules governing the arrest and interrogation of adults by the police are not observed in the case of juveniles. The Juvenile Court movement began in this country at the end of the last century. From the juvenile court statute adopted in Illinois in 1899, the system has spread to every State in the Union, the District of Columbia, and Puerto Rico. The constitutionality of juvenile court laws has been sustained in over 40 jurisdictions against a variety of attacks. The early reformers were appalled by adult procedures and penalties, and by the fact that children could be given long prison sentences and mixed in jails with hardened criminals. They were profoundly convinced that society’s role was not to ascertain whether the child was ‘guilty’ or ‘innocent,’ but ‘What is he, how has he become what he is, and what had best be done in his interest and in the interest of the state to save him from a downward career.’ The child—essentially good, as they saw it—was to be made ‘to feel that he is the object of (the state’s) care and solicitude,’ not that he was under arrest or on trial. The rules of criminal procedure were therefore altogether inapplicable. The apparent rigidities, technicalities, and harshness which they observed in both substantive and procedural criminal law were therefore to be discarded. The idea of crime and punishment was to be abandoned. The child was to be ‘treated’ and ‘rehabilitated’ and the procedures, from apprehension through institutionalization, were to be ‘clinical’ rather than punitive. These results were to be achieved, without coming to conceptual and constitutional grief, by insisting that the proceedings were not adversary, but that the state was proceeding as parens patriae. The Latin phrase proved to be a great help to those who sought to rationalize the exclusion of juveniles from the constitutional scheme; but its meaning is murky and its historic credentials are of dubious relevance. The phrase was taken from chancery practice, where, however, it was used to describe the power of the state to act in loco parentis for the purpose of protecting the property interests and the person of the child. But there is no trace of the doctrine in the history of criminal jurisprudence. At common law, children under seven were considered incapable of possessing criminal intent. Beyond that age, they were subjected to arrest, trial, and in theory to punishment like adult offenders. In these old days, the state was not deemed to have authority to accord them fewer procedural rights than adults. The right of the state, as parens patriae, to deny to the child procedural rights available to his elders was elaborated by the assertion that a child, unlike an adult, has a right ‘not to liberty but to custody.’ He can be made to attorn to his parents, to go to school, etc. If his parents default in effectively performing their custodial functions—that is, if the child is ‘delinquent’—the state may intervene. In doing so, it does not deprive the child of any rights, because he has none. It merely provides the ‘custody’ to which the child is entitled. On this basis, proceedings involving juveniles were described as ‘civil’ not ‘criminal’ and therefore not subject to the requirements which restrict the state when it seeks to deprive a person of his liberty. Accordingly, the highest motives and most enlightened impulses led to a peculiar system for juveniles, unknown to our law in any comparable context. The constitutional and theoretical basis for this peculiar system is—to say the least—debatable. *Gault,* 387 U.S. at 13-18.
Juvenile Court history has again demonstrated that unbridled discretion, however benevolently motivated, is frequently a poor substitute for principle and procedure. In 1937, Dean Pound wrote: ‘The powers of the Star Chamber were a trifle in comparison with those of our juvenile courts . . . .’ The absence of substantive standards has not necessarily meant that children receive careful, compassionate, individualized treatment. The absence of procedural rules based upon constitutional principle has not always produced fair, efficient, and effective procedures. Departures from established principles of due process have frequently resulted not in enlightened procedure, but in arbitrariness.  

The facts of Gault demonstrate just how dangerous giving any judge unbridled discretion can be. One afternoon in 1964, fifteen-year old named Gerald Francis Gault and a friend purportedly made a prank phone call. As eloquently described by Justice Fortas, the calls “were of the irritatingly offensive, adolescent, sex variety.”9 At the time of the “offense,” Gerald was on probation because he had been caught in the company of another teenager who stole a wallet.10 Gerald was taken into custody while both of his parents were at work.11 No notice was left for the parents and no attempt was made to contact them to let them know their son was in custody.12 Upon learning of her son’s whereabouts from a neighbor, Gerald’s mother went to the detention home and was told by Gerald’s probation officer of her son’s alleged acts and that there would be a hearing the next day.13 The probation officer filed a petition in juvenile court that Gerald’s parents did not see until a federal habeas proceeding brought.14 The petition did not allege any factual basis for the court proceeding.15 At the “hearing” the next day, the complainant was not present and no transcript or written memorandum of the proceedings was created.

7 387 U.S. 1 (1967).
8 387 U.S. 1, 17-18 (1967).
9 Id. at 4-5.
10 Id.
11 Id. at 5.
12 Id.
13 Id.
14 Id.
15 Id.
created. Gerald was questioned by the judge but was not told that he had a right to remain silent. A few days later, without explanation, Gerald was released. Shortly thereafter, his parents were notified simply that there would be another hearing. Once again, the complainant was not present and Gerald testified without having been advised of his Constitutional rights. Gerald’s mother specifically requested the presence of the complainant so that she could identify which of the two boys had actually made the lewd remarks. At the hearing a “referral report” was sent to the court by the probation officers but was not sent to Gerald or his parents. At the conclusion of the hearing, the judge committed Gerald as a juvenile delinquent to the State Industrial School until his 21st birthday “unless sooner discharged by due process of law.” At no point were Gerald or his parents advised that he had a right to counsel. In essence, Gerald was sentenced to six years in juvenile prison for a prank phone call without any notice of the charges, without having been able to cross-examine the complainant, without knowledge that he could remain silent and without the advice of counsel.

In Gault, the Court re-evaluated the juvenile justice system and held that many of the fundamental protections afforded to criminal defendants must be afforded to children facing charges in delinquency court. The Court noted the severity of the consequences of a juvenile adjudication of delinquency and noted “it would be extraordinary if our Constitution did not

\[\text{\textsuperscript{16} Id.}\]
\[\text{\textsuperscript{17} Id.}\]
\[\text{\textsuperscript{18} Id. at 6.}\]
\[\text{\textsuperscript{19} Id. at 7.}\]
\[\text{\textsuperscript{20} Id.}\]
\[\text{\textsuperscript{21} Id.}\]
\[\text{\textsuperscript{22} Id.}\]
\[\text{\textsuperscript{23} Id. at 7-8.}\]
\[\text{\textsuperscript{24} Id. at __.}\]
require the procedural regularity and the exercise of care implied in the phrase ‘due process.’

Under our Constitution, the condition of being a boy does not justify a kangaroo court.”

The Court held that due process requires that children be given notice of the charges against them, that the Sixth and Fourteenth Amendments require that children be advised of their right to counsel and that they be provided with counsel if they cannot afford counsel, and that the Fifth, Sixth and Fourteenth Amendments require that children be able to confront and cross-examine the witnesses against them and that children may invoke the right against self-incrimination. A few years later, the Court held that every element of the offense charged in a

25 Id. at 27-28.
26 Id. at 31-34 (Due process of law requires notice of the sort we have described—that is, notice which would be deemed constitutionally adequate in a civil or criminal proceeding. It does not allow a hearing to be held in which a youth’s freedom and his parents’ right to his custody are at stake without giving them timely notice, in advance of the hearing, of the specific issues that they must meet.)
27 Id. at 34-42 (The juvenile needs the assistance of counsel to cope with problems of law, to make skilled inquiry into the facts, to insist upon regularity of the proceedings, and to ascertain whether he has a defense and to prepare and submit it. The child ‘requires the guiding hand of counsel at every step in the proceedings against him.’) (quoting Powell v. State of Alabama, 287 U.S. 45, 69 (1932)).
28 Id. at 42-57 (“It would indeed be surprising if the privilege against self-incrimination were available to hardened criminals but not to children. The language of the Fifth Amendment, applicable to the States by operation of the Fourteenth Amendment, is unequivocal and without exception. And the scope of the privilege is comprehensive. . . . It would be entirely unrealistic to carve out of the Fifth Amendment all statements by juveniles on the ground that these cannot lead to ‘criminal’ involvement. In the first place, juvenile proceedings to determine ‘delinquency,’ which may lead to commitment to a state institution, must be regarded as ‘criminal’ for purposes of the privilege against self-incrimination. To hold otherwise would be to disregard substance because of the feeble enticement of the ‘civil’ label-of-convenience which has been attached to juvenile proceedings . . . our Constitution guarantees that no person shall be ‘compelled’ to be a witness against himself when he is threatened with deprivation of his liberty—a command which this Court has broadly applied and generously implemented in accordance with the teaching of the history of the privilege and its great office in mankind’s battle for freedom. . . . It is also urged . . . that the juvenile and presumably his parents should not be advised of the juvenile’s right to silence because confession is good for the child as the commencement of the assumed therapy of the juvenile court process, and he should be encouraged to assume an attitude of trust and confidence toward the officials of the juvenile process. This proposition has been subjected to widespread challenge on the basis of current reappraisals of the rhetoric and realities of the handling of juvenile offenders. In fact, evidence is accumulating that confessions by juveniles do not aid in ‘individualized treatment,’ as the court below put it, and that compelling the child to answer questions, without warning or advice as to his right to remain silent, does not serve this or any other good purpose. . . . [I]t seems probable that where children are induced to confess by ‘paternal’ urgings on the part of officials and the confession is then followed by disciplinary action, the child’s reaction is likely to be hostile and adverse—the child may well feel that he has been led or tricked into confession and that despite his confession, he is being punished.).

While the Court declined to rule on the child’s argument that the Constitution requires appellate review of juvenile delinquency proceedings and the right to a transcript of such proceedings, most states provide for transcription of
petition for delinquency must be proven to the trier of fact beyond a reasonable doubt.\textsuperscript{29}

Critically, a year later, the Court held that children are not entitled to a jury in delinquency proceedings.\textsuperscript{30} In most states, a juvenile judge presides over all pre-trial proceedings and the adjudicatory hearing.\textsuperscript{31}

The Court’s rationale in holding that children are not entitled to juries in delinquency proceedings was based upon the notion that juvenile proceedings are supposed to be rehabilitative rather than punitive. The standard of due process required in juvenile delinquency proceedings as developed in \textit{Gault} and \textit{Winship}, is “fundamental fairness.”\textsuperscript{32} Despite acknowledging the many flaws in the juvenile system as it existed at the time and acknowledging that the juvenile system can impose the functional equivalent of prison on children, the Court held that juries were not required in delinquency proceedings: “Concern about the inapplicability of exclusionary and other rules of evidence, about the juvenile court judge’s possible awareness of the juvenile’s prior record and of the contents of the social file; about repeated appearances of the same familiar witnesses in the persons of juvenile and probation officers and social workers—all to the effect that this will create the likelihood of pre-judgment—chooses to ignore it seems to us, every aspect of fairness, of concern, of sympathy, and of paternal attention that the juvenile court system contemplates.”\textsuperscript{33} While the primary

delinquency proceedings and appellate review of these proceedings. \textit{See, e.g.}, Fl. R. Juv. P. 8.830 (providing for written transcripts of all proceedings in delinquency court); Fl. St. Ann. 985.534 (providing a right to appeal from an adjudication of delinquency).
\textsuperscript{29} “The Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.” \textit{In re Winship}, 397 U.S. 358 (1970). This right is applicable to children “during the adjudicatory stage of a delinquency proceeding.” \textit{Id}.
\textsuperscript{30} \textit{See McKeiver v. Pennsylvania}, 403 U.S. 528 (1971) (holding that a jury is not constitutionally required in juvenile delinquency proceedings).
\textsuperscript{31} \textit{See, e.g.}, Fl. R. Juv. P. 8.110(c) (“The adjudicatory hearing shall be conducted by the judge without a jury. At this hearing the court determines whether the allegations of the petition have been sustained.”).
\textsuperscript{32} \textit{McKeiver}, 403 U.S. at 543.
\textsuperscript{33} \textit{Id.} at 550.
The purpose of juvenile court may have, at one point, been rehabilitation\(^\text{34}\) that is no longer the case today. The legislative intent for the juvenile justice system in most states\(^\text{35}\) is to protect the public from acts of delinquency.\(^\text{36}\) Preventing delinquency, strengthening the family, early intervention and rehabilitation are often listed as secondary goals of the juvenile justice system.\(^\text{37}\) It appears that Justice Fortas’ warning in *Kent v. United States* over forty years ago is more applicable today than ever: “There may be grounds for concern that the child receives the worst of both worlds: that he gets neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children.”\(^\text{38}\)

A fundamental right afforded to all children in delinquency court is the right to testify in his or her own defense.\(^\text{39}\) Interestingly, this was not one of the rights addressed by the Supreme Court in *Gault*.\(^\text{40}\) In fact, the first case in which the Supreme Court recognized a criminal

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\(^\text{34}\) See generally, Feld, Barry C., The Transformation of the Juvenile Court, 75 Minn. L. Rev. 691(1991).

\(^\text{35}\) A few states, however, still prioritize the rehabilitation and care of the child. See, e.g., Louisiana Title VIII, Chapter 1, Art. 801 (“The purpose of this Title is to accord due process to each child who is accused of having committed a delinquent act and, except as provided for in Article 897.1, to insure that he shall receive, preferably in his own home, the care, guidance, and control that will be conducive to his welfare and the best interests of the state and that in those instances when he is removed from the control of his parents, the court shall secure for him care as nearly as possible equivalent to that which the parents should have given him”); Nebraska Rev. St. 43-402 (“It is the intent of the Legislature that the juvenile justice system provide individualized accountability and individualized treatment for juveniles in a manner consistent with public safety to those juveniles who violate the law. The juvenile justice system shall also promote prevention efforts which are community-based and involve all sectors of the community. Prevention efforts shall be provided through the support of programs and services designed to meet the needs of those juveniles who are identified as being at risk of violating the law and those whose behavior is such that they endanger themselves or others.”

\(^\text{36}\) See, e.g., Fl. St. Ann. 985.02(3) (legislative intent of the juvenile justice system is “to first protect the public from acts of delinquency”); Wisconsin St. Ann. 938.01 (“It is the intent of the legislature to promote a juvenile justice system capable of dealing with the problem of juvenile delinquency, a system which will protect the community, impose accountability for violations of law and equip juvenile offenders with competencies to live responsibly and productively”); Vermont St. Ann. § 3085(c)(1)(a) (first goal of juvenile justice system is to “hold juveniles accountable for their unlawful conduct”); Colorado Rev. St. Ann. § 19-2-102 (“[T]he intent of this article is to protect, restore and improve the public safety by creating a system of juvenile justice that will appropriately sanction juveniles who violate the law and, in certain cases, will also provide the opportunity to bring together affected victims, the community and the juvenile offenders for restorative purposes”).

\(^\text{37}\) See Fl. St. Ann. 985.02(3)(a)-(d).


\(^\text{39}\) See Fl. R. Juv. P. 8.110(d).

\(^\text{40}\) See generally, *Gault*, supra.
defendant’s right to testify was not decided until 1987 – twenty years after Gault. In Rock v. Arkansas,\(^4\) the Supreme Court held that a per se rule barring hypnotically refreshed testimony violated a criminal defendant’s right to testify in her own behalf.\(^5\) Surprisingly, this was the first time the Supreme Court recognized the absolute right of a criminal defendant to testify.\(^6\) The Court in Harris v. New York\(^7\) had stated years earlier that “[e]very criminal defendant is privileged to testify in his own defense, or to refuse to do so,”\(^8\) but the Court did not hold that the right to testify at one’s criminal trial is absolute until Rock.

While the Supreme Court has not expressly held that children have the right to testify on their own behalf in delinquency proceedings, that would be the logical conclusion from reading Gault and Rock together. If Gault held that Fifth and Fourteenth Amendments preclude the State from forcing a child to be a witness against herself, then the converse must also be true under Rock.\(^9\) Thus it is of paramount importance that juvenile courts protect a child’s right to testify.

**II. Admissibility of Prior Adjudications of Delinquency**

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\(^5\) See Rock, 483 U.S. at 51-52 (“The right to testify on one’s own behalf at a criminal trial has sources in several provisions of the Constitution. It is one of the rights that “are essential to due process of law in a fair adversary process.” Faretta v. California, 422 U.S. 806, 819, n. 15, 95 S.Ct. 2525, 2533 n. 15, 45 L.Ed.2d 562 (1975). The necessary ingredients of the Fourteenth Amendment’s guarantee that no one shall be deprived of liberty without due process of law include a right to be heard and to offer testimony. . . . The right to testify is also found in the Compulsory Process Clause of the Sixth Amendment, which grants a defendant the right to call “witnesses in his favor,” a right that is guaranteed in the criminal courts of the States by the Fourteenth Amendment. . . . Even more fundamental to a personal defense than the right of self-representation, which was found to be “necessarily implied by the structure of the Amendment,” is an accused’s right to present his own version of events in his own words. . . . The opportunity to testify is also a necessary corollary to the Fifth Amendment’s guarantee against compelled testimony. In Harris v. New York, 401 U.S. 222, 230, 91 S.Ct. 643, 648, 28 L.Ed.2d 1 (1971), the Court stated: “Every criminal defendant is privileged to testify in his own defense, or to refuse to do so.” Id., at 225, 91 S.Ct., at 645."


\(^7\) 401 U.S. 222 (1971).

\(^8\) Id. at 230. In Harris, the Court held that if a defendant testifies, he may be impeached with his own statements to law enforcement even if those statements were taken under circumstances that did not comply with Miranda v. Arizona, 384 U.S. 436 (1966).

\(^9\) In Rock, the Court held that a defendant’s right to testify is grounded in the Fifth, Sixth and Fourteenth Amendments. See generally Rock, supra.
The admissibility of prior adjudications must be looked at from two distinct angles. First, one must consider the right of a defendant (in either juvenile or adult court) to cross-examine the State’s witnesses to reveal bias, motive and to explore the witness’s general credibility. Second, one must consider the use of a juvenile adjudication to impeach the accused when the adjudication was the result of a proceeding lacking in some basic protections afforded adults, most importantly the right to a jury trial. One must consider whether a juvenile adjudication of delinquency is relevant to an adult’s credibility years after the juvenile adjudication. The law must protect the accused by allowing her to cross-examine the witnesses against her in a manner that reveals all bias and possible motives while protecting the accused from being painted in a negative light by events that occurred when they were younger and were adjudicated in a forum without all the protections accorded criminal defendants.

In *Davis v. Alaska*, the United States Supreme Court recognized that barring the defense from cross-examining a prosecution witness about an adjudication of delinquency can violate the defendant’s right under the Sixth and Fourteenth Amendments to confront the witnesses against her. In *Davis*, a key prosecution witness against a defendant accused of burglary and larceny was on juvenile probation for two burglaries. Defense counsel sought to elicit this fact in order to demonstrate to the jury that the witness had a motive to falsely identify the defendant as having been near the stolen safe in order to remove suspicion from himself as well as to show that the witness was particularly susceptible to pressure from law enforcement due to his fear of having his probation revoked for failure to cooperate.

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48 See *Davis*, 415 U.S. at 316.
49 *Id.*
The *Davis* Court acknowledged the difference between using adjudications of delinquency for general impeachment purposes and using such adjudications to show possible biases, prejudices of motives of the witness.\(^{50}\) The *Davis* Court held that the Sixth and Fourteenth Amendments require that the defense be allowed to question a witness about an adjudication of delinquency when such evidence could reveal the witnesses’ bias, prejudice or motive.\(^{51}\) The defendant’s right to confront the witnesses against her trumped the interest of the State and the child in maintaining the anonymity of children charged in delinquency court.\(^{52}\) The *Davis* Court did not address the issue of using juvenile adjudications of delinquency for general impeachment purposes.\(^{53}\)

\(^{50}\) *Id.* at 316-17 (“One way of discrediting the witness is to introduce evidence of a prior criminal conviction of that witness. By so doing the cross-examiner intends to afford the jury a basis to infer that the witness’ character is such that he would be less likely than the average trustworthy citizen to be truthful in his testimony. The introduction of evidence of a prior crime is thus a general attack on the credibility of the witness. A more particular attack on the witness’ credibility is effected by means of cross-examination directed toward revealing possible biases, prejudices, or ulterior motives of the witness as they may relate directly to issues or personalities in the case at hand. The partiality of a witness is subject to exploration at trial, and is ‘always relevant as discrediting the witness and affecting the weight of his testimony.’ 3A J. Wigmore, Evidence § 940, p. 775 (Chadbourn rev. 1970). We have recognized that the exposure of a witness’ motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination.”) (citing *Greene v. McElroy*, 360 U.S. 474 (1959)).

\(^{51}\) *Davis* provides an excellent example of the problem with a blanket rule preventing the use of juvenile adjudications of delinquency to impeach. As noted, the witness in *Davis* was on juvenile probation for two burglaries. It is reasonable to infer from this fact that the witness was at some point questioned by law enforcement about the burglaries. Yet, when asked by defense counsel at trial if he had ever been questioned by law enforcement before the incident at bar, the witness testified “no.” *Davis*, 415 U.S. at 313. Defense counsel was unable to bring out the fact that the witness was on probation for two burglaries in order to impeach his testimony.

\(^{52}\) See *Davis*, 415 U.S. at 319 (the defendant “sought to introduce evidence of [the witnesses’] probation for the purpose of suggesting that [the witness] was biased and, therefore, that his testimony was either not to be believed in his identification of petitioner or at least very carefully considered in that light. Serious damage to the strength of the State’s case would have been a real possibility had [the defendant] been allowed to pursue this line of inquiry. In this setting we conclude that the right of confrontation is paramount to the State’s policy of protecting a juvenile offender. Whatever temporary embarrassment might result to [the witness] or his family by disclosure of his juvenile record-if the prosecution insisted on using him to make its case-is outweighed by petitioner’s right to probe into the influence of possible bias in the testimony of a crucial identification witness.”).

\(^{53}\) The importance of a defendant’s right to confront the witnesses against her was reiterated by the Supreme Court thirty years after *Davis* in *Crawford v. Washington*, 541 U.S. 36 (2004). While the issue before the Court was different in the two cases, the reasoning of *Crawford* supports the Court’s ruling in *Davis* thirty years earlier: “Where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation.” 541 U.S. at 68-69.
The statutes governing the admissibility of adjudications of delinquency to impeach must be viewed in light of *Davis*. A survey of the rules of evidence in all 50 states was conducted to determine how many states allow a child to be impeached with an adjudication of delinquency (if the act involves an act of dishonesty or is punishable for an adult by a year or more in jail). Ten states currently have statutes or cases that ban the admissibility of juvenile adjudications to impeach. The majority of states, however, have adopted rules that generally bar the admissibility of juvenile adjudications of delinquency, but allow them in a criminal trial when such admission is necessary for a fair determination of guilt or innocence.

In the majority of states, the rules governing the use of juvenile adjudications of delinquency to impeach are not black and white, but rather require the finder of fact to make the ultimate decision on admissibility based on the unique circumstances of each case. For example, in Arizona, adjudications of delinquency are admissible to impeach a witness other

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*See Alabama Rule of Evidence 609(d) (“Evidence of juvenile or youthful offender adjudications is not admissible under this rule”); Fl. St. Ann. § 90.610(b) (“Evidence of juvenile adjudications are inadmissible under this subsection”); Kentucky Rule of Evidence 609(a) and Kentucky Rev. St. § 635.040 (Rule 609(a) allows impeachment if witness has been convicted of certain crimes. Kentucky Statute § 635.040 states that no “adjudication by a juvenile session of District Court shall be deemed a conviction.”); Louisiana Code of Evidence Art. 609(D) (“Evidence of juvenile adjudications of delinquency is generally not admissible under this article.”); Montana Rule of Evidence 609 (bars impeachment by prior convictions for both adults and children: “For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime is not admissible); Nebraska Rev. St. § 27-609 (“Evidence of juvenile adjudications is not admissible under this rule.”); Nevada Rev. St. 50.095(4) (“Evidence of juvenile adjudications is inadmissible under this section.”); State in Interest of K.P., 167 N.J. Super. 290, 293-94 (App. Div. 1979) (adjudications of juvenile delinquency are not crimes and are inadmissible to impeach under New Jersey Rule of Evidence 609); McKinney’s Consolidated Laws of New York Annotated, Family Court Act § 380.1 (juvenile adjudications of delinquency are not convictions); Ohio Rules of Evidence Rule 609(d) (“Evidence of juvenile adjudications of delinquency are not crimes).” See Alaska Rule of Evidence 609(e); Arizona Rule of Evidence 609(d); Arkansas Rule of Evidence 609(d); Delaware Rule of Evidence 609(d); Georgia Code Ann. § 24-9-84.1(d); Illinois Rule of Evidence 609(d); Indiana Rule of Evidence 609(d); Iowa Rule of Evidence 5.609(d); Michigan Rule of Evidence 609(e); Minnesota Rule of Evidence 609(d); Mississippi Rule of Evidence 609(d); New Hampshire Rule of Evidence 609(d); New Mexico Rule of Evidence 11-609(D); North Carolina Rule of Evidence 609(d); North Dakota Rule of Evidence 609(d); Oklahoma Rule of Evidence 2609(D); Pennsylvania Rule of Evidence 609(d); Rhode Island Rule of Evidence 609(d); South Dakota Rule of Evidence 609(d); Tennessee Rule of Evidence 609(d); Texas Rule of Evidence 609(d); Utah Rule of Evidence 609(d); Vermont Rule of Evidence 609(d); Washington Rule of Evidence 609(d); West Virginia Rule of Evidence 609(d); Wyoming Rule of Evidence 609(d).

*See supra* note.
than the accused if it would be admissible against an adult and the trial court finds that its admission is necessary for a fair determination of guilt or innocence. This is contrary to what is stated is the first section of the same rule which requires that a witness have been convicted of a crime in order to be impeached. Arizona law makes clear that a juvenile adjudication of delinquency “shall not be deemed conviction of a crime.” Yet, Arizona law allows a witness to be impeached with an adjudication of delinquency when it is necessary to protect the rights of the accused.

In assessing the rules concerning the admission of juvenile adjudications of delinquency to impeach, it is important to remember that, while a defendant has an absolute right to confront and cross-examine the witnesses against her which might involve showing bias or motive by impeaching with an adjudication of delinquency, the State has no right to confront or cross-examine the accused. Therefore, if the accused testifies, most States protect her from being impeached with juvenile adjudications of delinquency.

Florida Rule of Evidence 90.610 sets forth the rules governing use of certain crimes to impeach witnesses and defendants who testify. Generally, the rule provides that a witness, including an accused, may be impeached by evidence that the witness/accused has been convicted of a crime if either the sentence was a year or longer or the crime involved dishonesty or false statement. This rule is similar to the rule applicable in most state courts and in Federal

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57 See Arizona Rule of Evidence 609(d) (“Evidence of juvenile adjudications is generally not admissible under this rule. The court may, however, in a criminal case allow evidence of a juvenile adjudication of a witness other than the accused if conviction of the offense would be admissible to attack the credibility of an adult and the court is satisfied that admission in evidence is necessary for a fair determination of the issue of guilt or innocence.”)

58 See Arizona Rule of Evidence 609(a) (“evidence that the witness has been convicted of a crime shall be admitted.

59 A.R.S. § 8-207(A).

60 See Arizona Rule of Evidence 609(d).

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court. Unlike the rule in most states, Florida Rule 90.610(b) provides specifically that “[e]vidence of juvenile adjudications are inadmissible under this subsection.” If the rule is read to apply only to general impeachment, it should withstand scrutiny under Davis. However, if the rule is read as barring the use of juvenile adjudications of delinquency to show bias or motive on the part of the witness, the rule violates the holding of Davis. The precise wording of the rule states that “[a] party may attack the credibility of any witness . . . .”6

While the Federal Rules of Evidence do not contain such a blanket exception, the accused is similarly protected. Federal Rule of Evidence 609 provides that juvenile adjudications are generally not admissible. See FRE 609(d). This subsection also provides that, in a criminal case, a juvenile adjudication may be used to impeach a witness other than the accused if the court determines that it is necessary to admit the juvenile adjudication in order to reach a fair determination of guilt or innocence and the adjudication would be admissible to impeach an adult.

Thus, most states and the Federal Rules of Evidence provide similar protection to children such that they may not be impeached with evidence of adjudications of juvenile delinquency if they choose to testify.

III. Implications of A Single Judge Adjudicating Multiple Delinquency Cases for a Single Child in Light of the Rules Governing the Admissibility of Prior Juvenile Adjudications of Delinquency

Consider the case of a child who has five pending cases set for trial on the same day. The child clearly has an absolute right to go to trial in all five cases. Assume that she exercises this right and is adjudicated delinquent in the first four cases and wishes to testify in the fifth case. In

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63 Florida Rule of Evidence 90.610(1) (emphasis added).
order to comply with the state rules of evidence cited above, the judge would have to adjudicate the fifth case as if she had no knowledge that the child was adjudicated delinquent in the first four cases. Given that she herself adjudicated the child delinquent, that is simply not possible. While, in theory, the judge should be able to judge each case independent of the other, studies on judicial bias support the argument that it is simply not possible. Studies on judicial bias support the theory that when juvenile judges are exposed to inadmissible information, they cannot separate this from the admissible evidence before them. Thus, this practice chills the child’s Constitutional right to testify in her own defense.

In a 2005 study, Andrew J. Wistrich, Chris Guthrie and Jeffrey J. Rachlinski concluded that “judges are generally unable to avoid being influenced by relevant but inadmissible information of which they are aware. Nevertheless, judges displayed a surprising ability to do so in some situations.” In the study, 265 sitting judges participated. All of the participating judges were appointed rather than elected but the study did not include any juvenile judges. Of most relevance to this article is the study’s conclusion concerning whether judges were able to disregard an inadmissible criminal conviction. The scenario presented to the judges was a civil case in which the only issue to be decided was the appropriate damage award for pain and suffering. The judges in the non-control group were told that the defendant in a products liability case sought to introduce evidence that the badly-injured plaintiff had a criminal record for operating schemes pursuant to which he stole the life savings of elderly retirees. The

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65 Id. at 1279-80.
66 Id. at 1280.
67 Id. at 1304.
68 Id. at 1305.
69 Id at 1306.
conviction was fourteen years old and the plaintiff had spent two years in prison.\textsuperscript{70} The judges in the non-control group were asked to rule on the admissibility of the prior conviction and both groups of judges were asked to state how much they would award in pain and suffering damages.\textsuperscript{71} The study concluded that the judges who ruled the defendant’s criminal history was inadmissible awarded an average of 12\% less in pain and suffering damages than did the judges with no exposure to the defendant’s criminal history.\textsuperscript{72} Interestingly, most of the judges ruled to suppress the plaintiff’s criminal history.\textsuperscript{73} The study concluded that “[m]uch like mock jurors, judges seemed unable to ignore a prior conviction.”\textsuperscript{74}

Two years later, the same authors studied how judges decide cases.\textsuperscript{75} This study concluded that “judges generally make intuitive decisions but sometimes override their intuition with deliberation.”\textsuperscript{76} The authors propose an “intuitive-override” model of judging pursuant to which judges would “use deliberation to check their intuition.”\textsuperscript{77}

Prior to these two studies, Professors Hertz and Guggenheim demonstrated that there were “substantial reasons to question the accuracy of [the] premise” that judges can be as fair as jurors in assessing guilt or innocence in juvenile delinquency trials.\textsuperscript{78} Professors Guggenheim and Hertz noted as the first and most distorting influence the fact that judges in juvenile cases are exposed to inadmissible, extra-record evidence. For example, juvenile judges preside over suppression hearings and then over the trial in the same matter. A jury cannot know about

\textsuperscript{70} Id.
\textsuperscript{71} Id.
\textsuperscript{72} Id.
\textsuperscript{73} Id. at 1307.
\textsuperscript{74} Id.
\textsuperscript{75} See Guthrie, Chris, Rachlinski, Jeffrey J., and Wistrich, Andrew J., Blinking on the Bench: How Judges Decide Cases, 93 Cornell L. Rev. 1 (November, 2007).
\textsuperscript{76} Id. at 9.
\textsuperscript{77} Id. at 22.
\textsuperscript{78} Guggenheim, Martin and Hertz, Randy, Reflections on Judges, Juries, and Justice: Ensuring the Fairness of Juvenile Delinquency Trials, 33 Wake Forest Law Rev. 553 (Fall 1998).
suppressed evidence, but the current system maintains the fiction that a juvenile judge can suppress a child’s statement and then fairly and impartially preside over the child’s trial. They also point out that judges who sit in juvenile court often hear the same stories over and over and become biased against such testimony.\(^7\) The impact of this finding is, of course, magnified when a child testifies in multiple cases before the same judge on the same day. Justice Blackmun noted in one case that, when scientists compared individual and group decision-making, groups performed better.

The Guggenheim-Hertz article notes an earlier study that found that judges are more likely than juries to convict in criminal cases.\(^8\) A review of appellate decisions where the trial below was before the court suggested that “judges often convict on evidence so scant that only the most close-minded or misguided juror could think the evidence satisfied the standard of proof beyond a reasonable doubt.”\(^9\) The authors then give some examples of cases in which a judge adjudicated a child delinquent where a jury likely would not have.\(^10\)

The author came to juvenile court after having practiced in adult court for many years in civil, criminal and capital post-conviction cases. At a certain point, one believes that one cannot be shocked by the injustices of the “justice” system. The author’s first eighteen months representing children in delinquency court caused a level of shock and despair that she did not believe she was capable of experiencing anymore. One case from the author’s first few months working with children exemplifies the problems inherent in the current system. The client, a very intelligent 17-year old with aspirations of joining the Marines had grown up in foster care after having been given back to the State by his family not once, but twice. He had a “record” if

\(^7\) *Id.* at 558.
\(^9\) *Id.* at 564.
\(^10\) *Id.*
one can call it that consisting of two batteries. At first glance, it sounds as if the child might have anger and/or impulse control issues. However, it turned out that both incidents took place at a group foster home where the police are called on a regular basis for what most people would consider normal age-appropriate misbehavior. This young man’s “record” consisted of throwing a pencil at another student during class and chest-bumping a staff member. The author’s office represented the young man when he was charged in delinquency court for the third time.

A friend of the client’s got into a fight and a staff member at the group home dialed 911. The phone was a corded phone on a desk. The young man did not want his friend to get in trouble, so he pressed down the “hook” mechanism of the phone to disconnect the call. The call to 911 was completed on a staff member’s cell phone. Unbelievably, the young man was charged with Tampering with or Harassing a witness, victim or informant – a third degree felony.\textsuperscript{83} A reading of the plain language of the statute demonstrated that the young man had not violated the statute as the statute specifically requires that physical force be used against a \textit{person}.\textsuperscript{84} On the morning of trial, the State offered a plea to the felony with a recommendation of probation. The State informed the young man that if he went to trial and was adjudicated delinquent, the State would recommend commitment to a residential juvenile program. The young man had just turned eighteen, was in the process of completing his GED and was looking forward to life as an independent young adult. Counsel advised the client not to take the plea and proceed to trial. The client, terrified of going to a commitment program, accepted the plea against legal advice. During the plea hearing, counsel for the young man argued that the court should not accept the plea as there was no factual basis. The court accepted the plea, but gave the young man the right to appeal whether there was a factual basis for his plea. On appeal, the

\textsuperscript{83} See Fl. St. Ann. 914.22(1), (2)(a).
\textsuperscript{84} \textit{Id.}
State did not argue that the young man had used physical force against a person. Rather, the State argued that due to a purported defect in the plea colloquy, the appellate court lacked jurisdiction. In a footnote, the State argued that the young man had violated the statute by engaging in “misleading” conduct – an argument it made for the first time on appeal. The State’s argument should have been further foreclosed by the fact that the Petition did not charge the young man with “misleading” conduct. The State failed to explain how hanging up a phone is “misleading.” Given that the State failed to argue the merits on appeal, the author believed that the young man would not have to suffer the life-long consequences of having a felony on his record. The appellate court issued a per curiam affirmance.

One would be hard-pressed to believe that a jury would have convicted the young man had he been six months older and charged in criminal court. A jury would not have known about the young man’s “priors” and, presumably, some jurors would have been young and sympathetic to a young person who did something that, while certainly not laudable, should not be a crime. Based upon the above studies, a jury would likely have found that the State did not meet its burden of proving physical force against a person. Even if the jurors were convinced that, on some technical level, there was such force, a jury has the power to nullify and could possibly have done so under these facts. While it is not possible to know what the judge was thinking, it is very easy to imagine that he was influence by the young man’s prior “record.” The judge did not know that the two battery charges consisted only of a chest bump and one teenager throwing a pencil at another – conduct that would almost certainly not have been prosecuted in a middle class suburban high school. The prejudice to young people who are charged in delinquency court rather than being disciplined at school is unimaginable. This felony will haunt the young
man for the rest of his life. Had the judge not known about his “prior record” it is quite possible he would not have accepted the plea.

In many states, battery on a school employee is a felony.\textsuperscript{85} It is not uncommon for children at alternative schools who have behavior issues and mental health issues to have multiple charges under this statute.\textsuperscript{86} One child the author represented had five such charges. On its face, this sounds like the fourteen year-old child routinely beat up his teachers. A look at the facts proved otherwise. One charge was based on the child’s touching a teacher’s chest with his fingers when the teacher looked over his shoulder while the child was on a school computer. Another charge was based on the child lightly smacking a teacher’s arm when she tried to move him during a lineup. The cases were all before the same judge. Four were set for trial on the same day. At trial on the first charge, counsel argued that it violates the Eighth Amendment to put a felony on the record of a child who has mental health issues for such minor misconduct. Counsel also argued that the child’s mental health diagnosis prevented him from forming the requisite intent. Under applicable law, battery is considered a violent felony that can never be expunged.\textsuperscript{87} A juvenile adjudication of delinquency for battery on a teacher would, therefore, limit the child’s future access to student loans, preclude him from participating in college athletics, preclude him from many government jobs, preclude him from becoming a police officer or firefighter and possibly bar him from entering some branches of the military.\textsuperscript{88}

\textsuperscript{85} See, e.g., Fl. St. Ann. 784.081(2)(c), 784.03; Massachusetts General St. Ann. 265 § 13(d).
\textsuperscript{87} See, e.g., Fl. St. Ann. § 943.
\textsuperscript{88} Under the guidelines of some athletic programs, if a child is arrested for any violent felony, possession of a weapon on school grounds, possession/sale of drugs on school grounds, or any other offense that can lead to expulsion from school, the child athlete may become ineligible to participate in the athletic program of the school including band and cheerleading. (For further information, call NCAA Academic and Membership Affairs 317-917-6008). The Army has a “waiver” process of an applicant who has received a conviction or juvenile adjudication for a serious offense, but waivers for serious offenses are rarely granted; the Navy and Marines require an explanation for...
judge adjudicated the child delinquent, but told counsel afterwards that they had made a compelling argument. One can only wonder what the result would have been if the judge had not known that the child had four other identical charges pending. A jury would not have known about the other charges and quite possibly would have found that, due to his mental health issues, the child could not form the requisite intent. 89

Studies have shown that the earlier a child enters the delinquency system, the more likely it is that she will acquire an extensive juvenile record. 90 Thus it is even more important with young children that the judge decide each case independently and impartially. Once a child has prior adjudications of delinquency, the chances of them remaining in the system are very high, especially given the difficulty at-risk kids have with complying with the strict terms of probation.

Similarly, given that rehabilitation and treatment are often secondary goals of the juvenile system, 91 and given that children do not have a right to a jury, the impartiality of juvenile judges is crucial. Studies have shown that disqualification rules and statutes are rarely used in juvenile

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89 In another case, a ten-year old child was charged with felony battery on a teacher because he purportedly tried to knock a camera out of a teacher’s hand with a piece of cardboard. It is hard to believe a jury would put a felony on a child’s record for such minor age-appropriate misbehavior. The case has not yet gone to trial.

90 See Danziger, Gloria, Delinquency Jurisdiction in a Unified Family Court: Balancing Intervention, Prevention and Adjudication, 37 Fam. L.Q. 381, 386 (2003) (“[T] hose who began offending as young children were more likely to become violent offenders . . . the earlier a youth entered the juvenile justice system, the more likely he or she was to acquire an extensive juvenile record.”) (citing Snyder, Howard N., Epidemiology of Official Offending, in Child Delinquents: Development, Intervention, and Service Needs (Rolf Loeber and David P. Farrington, eds. 2001) and Snyder, Howard, N., Prevalence and Development of Child Delinquency, Child Delinquency Bulletin (March 2003).

91 See supra.
court, even in unified family court. Research has shown that judges who have access to
information that would be inadmissible in a criminal trial have difficulty separating admissible
from inadmissible evidence when presiding over a juvenile delinquency trial.

Prior to sentencing (which is called disposition in juvenile court in many states), the state
prepares a report that recommends where the child should be placed. This report is replete with
information that would be inadmissible at a criminal trial, including an extensive social history.
Reports about a child’s behavior are often hearsay, there is often detailed information about a
child’s behavior that is not supported by evidence and has not been proven in court. If the child
is released from a commitment program and is arrested again and is before the same judge, that
judge will be in possession of quite a bit of inadmissible information about the child. As noted,
studies have shown that while judges try to be impartial, they have trouble separating admissible
from inadmissible information.

To test this hypothesis, most public defender offices in Florida were surveyed to
determine practices in their circuit. Most do not have unified family court (meaning that one
judge hears each child’s delinquency and dependency cases). In most circuits, if a child has

93 See supra.
94 See supra
95 Initially, an email was sent to the head of the juvenile division in the public defender’s office in each circuit. The email asked the attorneys to answer the following questions:
   1. How many judges are there in your circuit that handle juvenile delinquency?
   2. Does your circuit have Unified Family Court?
   3. If your circuit has more than one judge that hears juvenile delinquency cases, are all pending cases for one child assigned to the same judge?
   4. If all cases are assigned to the same judge, is this a local rule, or just a custom in your circuit?
   5. What are your thoughts on a judge’s ability to consider each case individually?
   6. Do you believe that having all of the cases in front of the same judge makes juveniles less likely to testify in any one individual case?
   7. If your jurisdiction has Unified Family Court, do you believe that helps or hurts the child in their delinquency case?
multiple delinquency cases, the cases will be heard by the same judge. However, in at least one circuit, all pending cases are assigned to the same judge but on the day of trial they are separated to different judges. The public defenders surveyed had mostly negative views on whether a judge can be impartial if she hears several cases for one child. One response stated “well, judges make lousy jurors to begin with!” Another noted that “good judges can consider each case individually and bad judges are bad with one case or more than one case.” A different respondent noted that judges tend to group kids into “good kids” and “bad kids.” Surprisingly, most public defenders thought that the fact that one judge hears multiple case for one child does not impact the child’s decision to testify. There were many who felt otherwise, however. One respondent noted that “juveniles throw their hands up case after case.” Another said it depends on the individual cases. One respondent noted “I do believe that because the Judge hears and knows all about the kid before we even get to trial, they are not believed by the Judge, so it really doesn’t matter if they testify or not. The judge is not going to believe them.” Several public defenders noted that, in their opinion, judges don’t find children accused of delinquent acts credible under any circumstances.

IV. CONCLUSION AND RECOMMENDATIONS

The above demonstrates that the practice of having a single judge hear all of a child’s delinquency cases can chill the child’s Constitutional right to testify in her own defense because if she has been adjudicated delinquent in other cases by the same judge, the judge will necessarily take the other adjudications of delinquency into account when assessing the child’s credibility. Therefore, it is recommended that a child be required to give notice if she plans to testify.

96 The detailed results of the survey are on file with the author can be obtained via request. Many public defenders said that a judges ability to hear each case independently depended on the judge, some are better than others. One characterized judges’ ability to separate cases as “poor.” One respondent wrote “In my opinion, the Judges are not able to consider each case individually. Our current Judge in particular, is unable to do that.”
testify. That way, the case in which the child desires to testify can be heard by a judge who is unaware of the child’s delinquency history. While a child would maintain the right to testify without notice if the facts at trial develop in such a way that she desires to testify, the above rule would ensure that juvenile judges hear a child’s testimony without pre-judging whether the child is “good” or “bad” or “credible” or “not credible.”

Children, like adults, are entitled to an impartial trier of fact. The relevant due process standard is fundamental fairness. Based upon the above studies and the experience of juvenile lawyers across the State, it is apparent that the trier of fact cannot be impartial if she is aware of a child’s delinquency history, especially if that history is lengthy. Thus, the practice of having one judge decide all of a child’s delinquency cases denies the child her Constitutional right to an impartial trier of fact.

97 See McKeiver, supra.