Lost in Translation: The Right to Competency and the Right to Counsel for Mentally Retarded Children in the Juvenile Justice System

Kathleen A Murphy
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Introduction

Consider Vernon, a fourteen year old boy with borderline mental retardation. Vernon violated the terms of his probation, a sentence he received for his first, an only, offense of armed robbery. Vernon’s low intellectual quotient (“IQ”) brought into question his competency to stand trial for his violation of probation charge. His initial evaluation revealed he was incompetent for trial. The permanency of his disability made it unlikely he would ever achieve a level of competency sufficient for adjudication. With no suitable treatment facility available and no statutory or constitutional guidance, the court kept Vernon in detention pending restoration. The court was reluctant to send Vernon home because evidence at both his robbery and violation of probation hearings suggested that other children in his neighborhood were aware of his diminished capacity and took advantage of his suggestibility and desire to please others. After growing concern over Vernon’s lengthy incarceration, the court ordered a status hearing and sought placement for Vernon elsewhere. One by one, members from Child Mental Health Services and the Department of Family Services informed the court that Vernon did not meet the criteria for placement in other facilities because his disabilities were not

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1 This was a real case heard before Chief Judge Kuhn in the Family Court of Delaware in July of 2005. The last name of the child has not been given to protect his identity.
severe enough. Facilities that better suited his needs did not have available beds. Vernon was sent back to the juvenile detention home.²

The problems presented by Vernon’s case are common among mentally retarded children in the juvenile justice system. Studies indicate that up to 12% of incarcerated children have mental retardation, not including all the other children that are currently in the juvenile justice system but not in detention.³ Minors with a diminished capacity often pass through the juvenile justice system undiagnosed because their disabilities are misunderstood or mischaracterized as deviant and rebellious.⁴ This misunderstanding leads to the unnecessary detention of mentally retarded children because they are mistaken as dangerous or flight risks.⁵ Intensifying the confusion is the little known fact that there is no right for children to be competent when adjudicated, although the right explicitly exists for adults. In theory, this seems logical because the juvenile justice system was designed to account for a children’s inherent diminished capacity. In practice, however, this has resulted in disaster for all children in the juvenile justice system and is only exacerbated for mentally retarded children.

The lack of a constitutional right to be competent when tried for juveniles is the main reason for the resulting confusion in the juvenile justice system. Lower courts have no constitutional guidance on the application of a competency standard in juvenile proceedings. This problem is acute when a lower court is faces with the problems attendant to adjudicating a case concerning a mentally retarded child. The lack of a right

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² Vernon was eventually released back into the custody of his mother and allowed to go home. Judge Kuhn determined that absent a finding of dangerousness, Vernon should be released.
³ http://www.urban.org/publications/410885.html
to competency and the related lack of any constitutional standard in the juvenile justice system is especially pronounced because an incompetent juvenile cannot effectuate any of the other constitutional rights that the Supreme Court has recognized in the juvenile justice context.

This Article argues that juveniles should have a constitutional right to competency in the juvenile justice system. Competency is important for all juvenile offenders to exercise their constitutional rights and for mentally retarded children, it is essential. In part I, I review the constitutional rights currently recognized in the juvenile court system. In part II A, I explore the right to competency as it applies in adult criminal proceedings. In part II B, I discuss the inconsistent approaches that have developed as a result of the lack of an established right. In part II C, I explain the characteristics of mental retardation and in parts II C 1 and 2, I examine how these characteristics are often misunderstood and result in unnecessary pretrial detention. In Part III, I discuss the constitutional implications that have resulted by not extending the right in the juvenile system. I part IV, I opine possible solutions to this problem.

I. The Constitutional Foundation: Rights Afforded in the Juvenile Justice System

Over a century ago, the legal community recognized that the diminished moral and intellectual capacities of children warranted the creation of a separate justice system, a system that would rehabilitate troubled children rather than punish them. Justice Fortas described the system as one “in which a fatherly judge touched the heart and conscience

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7 Id.
of the erring youth by talking over his problems, by paternal advice and admonition, and in which, in extreme situations, benevolent and wise institutions of the State provided guidance and help to save him from downward career.\textsuperscript{8}

But as juvenile crime skyrocketed and the juvenile justice system became more punitive, the necessity of more constitutional protections in the system became apparent.\textsuperscript{9} As discussed below, the Supreme Court has carefully considered the application of many of the constitutional rights afforded criminal defendants to the juvenile justice system.\textsuperscript{10} In each decision, the Court has carefully considered the impact each right would have on the juvenile justice system and has only designated those that would comport with fundamental fairness while preserving the parens patriae doctrine.\textsuperscript{11}

\textbf{A. Kent v. United States: Right to a hearing, access to psychological evaluations, and justification for certification to criminal court}

First in the juvenile justice revolution was the Supreme Court’s 1966 decision in \textit{Kent v. United States}.\textsuperscript{12} Morris A. Kent, Jr. was arrested and fingerprinted in 1959 on charges of housebreaking and attempted purse snatching when he was 14 years old.\textsuperscript{13} Kent received supervised probation for the charges. Juvenile Court officials interviewed Kent periodically during his probationary period and placed the contents of the interviews

\begin{footnotesize}
\begin{enumerate}
\item \textit{In re Gault}, 387 U.S. 1, 26 (1967).
\item Elizabeth S. Scott, Thomas Grisso, \textit{Developmental Incompetence, Due Process, and Juvenile Justice Policy}, 83 N.C.L. Rev. 793, 806 (2005) (The juvenile courts were also blamed for the spike in violent juvenile crime and responded to this criticism by handing down sentences designed to punish delinquent children rather than rehabilitating them).
\item \textit{Id.}
\item \textit{Id}.
\item \textit{Id.}, at 543.
\end{enumerate}
\end{footnotesize}
in his “Social Service file.” On September 5, 1961, Kent was arrested a second time because fingerprints taken from the apartment where a rape and burglary occurred matched those of Kent. During incarceration, Kent was interrogated without an attorney and detained in a juvenile delinquency home for almost a week without an arraignment or determination of probable cause.

Once retained, Kent’s attorney arranged for a psychiatric evaluation, which suggested hospitalization for psychiatric treatment, and later filed a motion opposing waiver of juvenile court jurisdiction. The statute authorizing waiver of jurisdiction did not set forth standards to govern the transfer decision. Kent’s attorney hoped to persuade the judge that Kent was a viable candidate for rehabilitation and filed the results of his client’s psychological evaluation in a motion contesting the transfer. He also requested access to Kent’s “Social Service file”, created during his probationary period. None of the requested actions were taken and the Juvenile Court judge, without any findings of fact or reasoning, simply issued an order waiving jurisdiction. On appeal, the Supreme Court declared that, while judges should have considerable discretion to determine whether to retain jurisdiction over a child, the discretion was not absolute and “does not confer upon the Juvenile Court a license for arbitrary procedure.” Waiving jurisdiction subjected Kent to a new set of consequences and therefore he was entitled to

14 Id., at 543.
15 Id., at 543.
16 Id., at 544.
17 Id., at 545.
18 Id., at 547.
19 Id., at 545.
20 Id., at 545-46.
21 Id., at 546.
22 Id., at 553.
a hearing, access to state conducted psychological evaluations and the judicial reasoning behind the waiver.23

B. In re Gault: Notice of charges, counsel, confrontation of witnesses and privilege against self-incrimination.

In 1967, shortly following its landmark decision in Kent, the Supreme Court significantly expanded the due process protections afforded by juveniles in In re Gault.24 Gerald Francis Gault, who was already on probation for an earlier incident, was taken into custody around 10:00 a.m. on June 8, 1964 for making lewd phone calls to his neighbor, Mrs. Cook.25 The questions asked of Mrs. Cook were of the “irritatingly offensive, adolescent, sex variety.”26 Mr. and Mrs. Gault were both working at the time of their son’s arrest.27 Mrs. Gault was working when Gerald was arrested and arrived home to find that her son was missing.28 It was not until a neighbor informed her of the arrest did she learn of her son’s whereabouts.29 Mrs. Gault visited her son in the detention home later that evening and learned from a probation officer that a hearing would take place in juvenile court the next day but received no other information regarding the hearing.30 The probation officer did not inform Mrs. Gault of a petition he

23 Id., at 557.
24 In re Gault, 387 U.S. 1 (1967).
25 Id., at 4.
26 Id.
27 Id.
28 Id., at 5.
29 Id.
30 Id.
filed with the court alleging that Gault was a delinquent minor and requested a court order committing him.\textsuperscript{31}

A hearing occurred the following day where Gault, his mother, older brother, and the probation officers were present.\textsuperscript{32} Mrs. Cook, the complainant, and Gault’s father did not attend the hearing.\textsuperscript{33} The presiding judge never spoke with Mrs. Cook either in person or over the phone and the probation officer had one phone conversation with her.\textsuperscript{34} No one was sworn in at the hearing and no transcript was taken.\textsuperscript{35} The judge questioned Gault about the phone calls and there are three different accounts of his response to the judge’s questions.\textsuperscript{36} His mother recalled that Gault only admitted to dialing the number, but claimed he then handed the phone over to his friend.\textsuperscript{37} The probation officer and the judge remembered that Gault admitted to actually making the lewd comments.\textsuperscript{38} At the conclusion of the hearing, the judge remarked that he would consider Gault’s disposition and Gault was taken back to the detention home.\textsuperscript{39} A few days following the hearing, without notice, Gault was released and driven home, with no explanation justifying his continued detention or eventual release.\textsuperscript{40}

On the same day as Gault’s release, Mrs. Gault received a note, written on plain paper and signed by the probation officer, informing her of another hearing regarding her son’s delinquency allegations.\textsuperscript{41} The complainant, Mrs. Cook, did not attend this hearing.
either. Because no record was kept of the proceedings, there were conflicting reports regarding Gault’s testimony and admissions during the hearing. His parents stated, and the probation officer agreed, that Gault did not admit to making any of the lewd remarks at this hearing. The presiding judge, however, recalled that Gault had confessed to making some of the inappropriate comments. At the conclusion of the second hearing, the judge committed Gault to detention “for the period of his minority.” An adult convicted of the same offense would have received a $5 to $50 fine and a maximum of two months imprisonment.

Gault filed a petition for a writ of habeas corpus, and a hearing regarding the writ was held in August of 1964. It was only then that Gault’s parents learned about the existence and contents of the petition filed by the probation officer at the first hearing, which had occurred more than two months earlier. During the habeas hearing, the juvenile court judge was cross-examined regarding the basis of his decision. The judge admitted that he based part of his ruling on another incident involving Gault even though a “lack of material foundation” prevented those charges from proceeding. He also factored in Gault’s admission that he had made inappropriate phone calls in the past. The Superior Court of Arizona dismissed the writ and the Supreme Court of Arizona

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42 Id.
43 Id., at 7.
44 Id.
45 Id.
46 Id.
47 Id (the age of majority in Arizona was 21).
48 Id., at 8-9. Gault was charged under §13-377 of the Arizona Criminal Code which lists use of vulgar, abusive, or obscene language in the presence of a woman or child as misdemeanor.
49 Id., at 8.
50 Id., at 6.
51 Id., at 8.
52 Id.
affirmed.53 Gault appealed the dismissal and petitioned the United States Supreme Court to declare the Juvenile Code of Arizona unconstitutional because it allowed for a juvenile to be removed from the custody of his parents and placed in a state detention facility at the total discretion of the juvenile court without the protection of basic due process rights.54

In a detailed opinion, the United States Supreme Court reversed the decision of the Arizona Supreme Court and held that the proceedings that resulted in Gault’s sentence failed to comport with due process.55 The Court stressed the importance of due process protections to preserve freedom and to ensure the accuracy of juvenile proceedings.56 In recognition of the significant role due process protections played in the administration of justice, the Court extended to all juveniles alleged delinquent the right to notice of charges, right to counsel, right to confrontation of witnesses, and privilege against self-incrimination.57

In *Gault*, the Court compared a finding of delinquency with a felony conviction because of the significant loss of liberty.58 The Court further opined that a juvenile needs counsel “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.”59 The Court explained that its decision to implement certain procedural due process protections into the juvenile justice system was not an attempt to abandon the system or

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53 Id., at 10.
54 Id.
55 Id., at 19.
56 Id., at 20-21.
57 Id., at 55.
58 Id., at 36.
59 Id., at 36.
its substantive benefits. In the Court’s opinion, valuable aspects of the juvenile justice system still existed, such as processing and treating children separately from adults. Further, the Court encouraged juvenile court proceedings to label children as delinquent rather than criminal and expressly stated that its holding was not to disrupt those practices. This recognition is the lynchpin of the Supreme Court’s juvenile due process cases.

3. In re Winship: Proof beyond a reasonable doubt

Changes in the juvenile court system continued in the 1970’s with the decision in In re Winship. Samuel Winship was arrested and charged with delinquency for stealing $112 from a woman’s purse. The presiding judge conceded that the proof against Winship may not have established guilt beyond a reasonable doubt, but held that the Fourteenth Amendment did not require such a standard for juveniles. The Supreme Court reversed the decision on the grounds that proof beyond a reasonable doubt for a criminal charge was required by the text of the constitution.

The Court justified its decision by stating that “the same considerations that demand extreme caution in factfinding to protect the innocent adult apply as well to the

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60 Id., at 21.
61 Id., at 22.
62 Id., at 22.
63 See e.g. Id., Kent, at 553, In re Winship 397 U.S. 358, 366 (1970).
65 Id., at 359.
66 Id., at 360. The judge relied on §744(b) of the New York Family Court Act which states that any conclusion drawn regarding the actions of a juvenile only needed proof by the preponderance of the evidence.
67 Id., at 362.
innocent child." The Court rejected the argument that this standard did not apply to
delinquency proceedings. This decision echoed the sentiment of *Gault*, rejecting the
notion that the constitutional rights of juveniles should be suspended simply because the
proceedings were meant to be informal and non-adversarial. The Court disagreed that
the imposition of this constitutional standard would interfere with the parens patriae
philosophy. In its conclusion, the Court stated that the reasonable doubt standard had
the same constitutional significance as the rights afforded in the *Gault* decision.


The next Supreme Court decision addressing constitutional rights in the juvenile
justice system was the 1975 decision of *Breed v. Jones*. Gary Steven Jones was
arrested when he was seventeen for armed robbery. During the delinquency
proceeding, the court heard testimony from witnesses and Jones, and determined that
Jones had committed the alleged acts. At a disposition hearing, the court concluded that
Jones would not benefit from treatment as a juvenile and certified him to be prosecuted as
an adult. Jones filed a habeas corpus petition in Juvenile Court on the grounds that
double jeopardy had attached, but it was denied by both the Juvenile Court and an

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68 Id., at 365.
69 Id.
70 Id., at 366
71 Id.
72 Id., at 368.
74 Id., at 520.
75 Id., at 521-522.
76 Id., at 524.
appellate court. At his criminal trial, Jones entered a plea of not guilty and argued that he had already been placed in jeopardy on the charge in his delinquency proceeding. His argument was unsuccessful and Jones was found guilty and sentenced to the California Youth Authority. He did not appeal his conviction, instead filing a writ of habeas corpus in federal district court. The court denied his petition, but the circuit court of appeals reversed on the grounds that affording double jeopardy protection to juveniles would not interfere with the juvenile justice system’s rehabilitative goals. The circuit court further opined that denying double jeopardy protection would allow criminal court prosecutors to review a defendant’s argument in advance, which would deny the defendant a fair trial.

The Supreme Court began its decision by discussing recent holdings that applied constitutional protections normally associated with criminal prosecutions to juvenile court proceedings. The Court reasoned that jeopardy attaches when a defendant is tried by a trier of fact, regardless of the venue, so jeopardy attached in Jones’ case when the juvenile court judge began to hear evidence on the alleged crime. The Court went on to expressly reject the argument that juveniles are not put in jeopardy by juvenile court hearings because, despite the proceeding’s label as civil, the end result is incarceration.

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77 Id.
78 Id., at 525.
79 Id (the length of his sentence is not mentioned in the case).
80 Id.
81 Id., at 526.
82 Id., at 527.
83 Id., at 528-529.
84 Id., at 531.
against the juvenile’s will.\textsuperscript{85} Therefore, the Court concluded, juveniles must be afforded the due process protection against double jeopardy.\textsuperscript{86}

5. \textit{McKeiver v. Pennsylvania: Trial by Jury}

Although the Supreme Court has provided constitutional protections in some juvenile justice contexts, it denied the constitutional right to a trial by jury in its 1970 decision, \textit{McKeiver v. Pennsylvania}.\textsuperscript{87} The Court began its opinion by acknowledging the critical function that juries serve in maintaining fairness in adult criminal trials, but ultimately held that the application of this right in the juvenile court context would hinder the principles underlying the juvenile justice system rather than further them.\textsuperscript{88} In its opinion, the Court expressed concern that the extension of jury trials to delinquency proceedings would “put an effective end to what has been the idealistic prospect of an intimate, informal protective proceeding.”\textsuperscript{89}

6. \textit{Schall v. Martin: Pre-adjudicatory detention}

The Court’s holding in its 1985 decision, \textit{Schall v. Martin},\textsuperscript{90} marked a departure from the concern expressed in previous opinions.\textsuperscript{91} The issue in \textit{Schall} centered around a New York statute that allowed for confinement of juveniles to a detention home prior to

\begin{footnotesize}
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\item \textsuperscript{85} Id., at 529
\item \textsuperscript{86} Id.
\item \textsuperscript{87} \textit{McKeiver v. Pennsylvania}, 403 U.S. 528 (1970).
\item \textsuperscript{88} Id., at 540 (citing \textit{Duncan v. Louisiana}, 391 U.S. 145 (1968)).
\item \textsuperscript{89} Id., at 545.
\item \textsuperscript{90} 467 U.S. 253 (1984).
\item \textsuperscript{91} Bart Lubow, Joseph B. Tulman, \textit{The Unnecessary Detention of Children in the District of Columbia}, 3 D.C.L. Rev. IX. IX (1995).
\end{itemize}
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their trial if the juvenile posed a serious risk to the community by committing additional crimes.92 Gregory Martin was a fourteen year old in possession of a loaded weapon when he was arrested at 11:30 p.m. on multiple charges and taken to a detention facility.93 During his initial appearance in family court the next morning, the judge ordered Martin to remain in detention because the possession of a loaded weapon and the late hour of the arrest indicated a lack of parental supervision.94 Martin was eventually adjudicated delinquent and sentenced to two years’ probation.95 Between his initial appearance before the family court judge and his eventual adjudication, Martin spent fifteen days in detention.96 Martin later filed a habeas petition class action on behalf of others that were currently detained under the New York statute authorizing pre-adjudicatory detention.97 The petition sought a declaratory judgment that the New York statute violated the Due Process and Equal Protection Clauses of the Fourteenth Amendment.98 The District Court granted the petition on Due Process grounds and ordered the release of all members of the class currently in custody.99 The Court of Appeals affirmed.

The Supreme Court reversed, reasoning that the deprivation of a child’s freedom was fundamentally fair under due process considerations because the state had a legitimate interest in protecting both the welfare of the child and the community at large.100 The pre-adjudicatory detention statute was constitutional because it “serve[d] a legitimate regulatory purpose compatible with the ‘fundamental fairness’ demanded by

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92 Schall, 467 at 254.
93 Id., at 257.
94 Id., at 258.
95 Id.
96 Id.
97 Id., at 261.
98 Id.
99 Id., at 262.
100 Id., at 264-266.
the Due Process Clause in juvenile proceedings.” In doing so, the Court rejected the argument that pre-adjudicatory detention was punishment before conviction. The Court reasoned that pretrial detention was not punitive because of its limited duration and because the state statute authorizing the detention expressed no intent that the detention was for a punitive purpose. The Court further opined that although juveniles had an interest in their own freedom, that interest is limited because juveniles are always in some form of custody.

Common in the analysis of each of the cases discussed above is the balance struck between providing a just juvenile court system while preserving the ideals of parens patriae. Although the decisions in *Kent*, *Gault*, *Winship* and *Breed* granted many of the due process rights enjoyed by adults in criminal court, the Court never reached the issue of competency to stand trial. The juvenile court system was structured around the assumption that juveniles lacked the same level of maturity and capacity, as evidenced by the non-adversarial proceedings and rehabilitative sentences. Competency was never a concern for the court because the informal nature and non-punitive sentences accounted for a child’s diminished capacity. This next section examines the right to competency and its impact in adult criminal prosecutions and juvenile delinquency hearings.

II. The Right to be Competent When Adjudicated

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101 Id., at 268.
102 Id., at 269-270.
103 Id.
104 Id., at 265.
105 See e.g. Kent, at 22.
106 Redding, Frost, supra, note 125, at 354.
107 Id.
108 Id.
In addition to the cases discussed above, there are other Supreme Court decisions that have an indirect impact on the analysis of the right to competency in the juvenile justice system.\textsuperscript{109} The cases discussed in this next section explore the constitutional right to be competent when adjudicated as it applies in adult criminal proceedings.\textsuperscript{110} The absence of this constitutional right in the juvenile justice context has had a significant impact on all children in the system, but a particularly harmful effect on mentally retarded children in the juvenile justice system.\textsuperscript{111} Although most states have extended the right through legislation or judicial precedent, these laws and opinions extend a right that varies drastically from state to state.\textsuperscript{112} While most of the states have recognized the right in the juvenile court context, few states have established restorations services for children that are deemed incompetent.\textsuperscript{113} This presents a particular problem for mentally retarded children because, if determined to be incompetent, it is unlikely they will be restored because of the permanence of their disability.

A. Competency in Adult Criminal Proceedings

\textsuperscript{111} Id.; In addition to due process protections, the Supreme Court has extended other constitutional protections to juveniles in the justice system. In Thompson v. Oklahoma and Roper v. Simmons, the Court declined to avail juvenile criminals to the death penalty. 487 U.S. 815 (1988), 543 U.S. 551 (2005). The Court began its analysis in Thompson with a quote from Justice Powell, which said “the experience of mankind, as well as the long history of our law, recognizing that there are differences which must be accommodated in determining the rights and duties of children as compared with those of adults.” Roper. 543 U.S. at 569. The conclusion that execution of a minor was unconstitutional rested mainly on the understanding that the punishment should fit the level of culpability of the defendant. Id. These considerations influenced the Court’s holding that due to the lessened culpability of juveniles, execution of minors would be a violation of the Eighth and Fourteenth Amendments. The Court’s considerations reflected the original motivations for creating the juvenile justice system. Id.
\textsuperscript{112} Redding, Frost at 371 (citing A.R.S. §8-291.06(D); N.Y. FAM. CT. ACT §322.2; TEX. FAM. CODE ANN. §55.43).
\textsuperscript{113} Id.
The Supreme Court recognized that the right to be competent when tried for a criminal offense in its 1966 decision, *Pate v. Robinson*. The right to be competent when tried is derivative of defendants’ right to be present during their trial because an incompetent defendant, although present physically, is deemed not present mentally. The Supreme Court later set forth the three requirements for competency in *Dusky v. United States*. The Court held that competency required more than just that the defendant be “oriented to time and place and (has) some recollection of events.” Instead, the test for constitutional competency was that the defendant must have “sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and whether he has a rational as well as factual understanding of the proceedings against him.” In *Drope v. Missouri*, the Supreme Court added the requirement that the defendant must also have the requisite capacity to assist counsel in preparing his defense. In the adult context, competency requires that defendants have a factual and rational understanding of the proceedings and the ability to communicate sufficiently with their counsel to prepare a competent defense.

Although the Supreme Court set forth standards by which to evaluate a defendant’s capacity in the adult context and required state courts to establish procedures protecting this right, the standards provide merely a conclusion for trial courts and not the

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117 *Dusky*, at 402.
118 *Id*.
119 *Drope*. 420 U.S. at 162.
120 *Id*, at 171
121 *Id* at 171-172.
means by which to reach that determination. The practical result is that even in adult courts, defendants need only display a minimal capacity. 123 These cases give little guidance for lower courts to implement the competency determinations, giving judges a considerable amount of discretion on the matter. 124 Dusky’s factual understanding requirement focuses more on the defendant’s ability to learn about possible pleas, penalties, and litigation in general, than on whether the information is ever adequately processed and understood. 125 The standard focuses on the defendant’s ability not the actual comprehension of the information. 126 Rational understanding, another requirement under Dusky, examines whether the defendant can comprehend the consequences of the trial process, which may become difficult if the defendant is lacking in their factual understanding of the proceedings. 127

With regard to third consideration developed in Dusky/Drope, whether the defendant can properly assist their attorney trial, courts often look for three types of abilities. 128 The first examines the defendant’s ability to communicate information to counsel in order to properly prepare a defense. 129 The second requires the defendant to achieve a rational understanding of the attorney’s function and services within the context of the proceedings. 130 The third requires the defendant posses the ability to decide whether or not to plead guilty or if certain Constitutional rights should be asserted. 131 These abilities require a somewhat sophisticated understanding of court proceedings and
their implications, as well as the capacity to understand and assist in making strategic legal decisions.132

**B. Competency in the Juvenile Justice System**

There is no Constitutional standard requiring juvenile defendants to be competent to stand trial because the Supreme Court has never explicitly granted the right through precedent.133 The United States Congress has not chosen to take up the issue either, resulting in no federal statute regulating juvenile competency standards.134 Concern arose, however, when the direction of the court began to resemble the formal adult model.135 As it stands now, states are left to determine individually if juveniles have the right to be competent to stand trial and if so, by what standards to make that determination.136

The state legislatures that have dealt with the issue have taken three different directions.137 A small minority of states have decided that because of the rehabilitative nature of the juvenile court system, the right to be competent to stand trial is unnecessary.138 In the vast majority of states that have tackled the issue, they have extended the right to competency in juvenile justice proceedings and have incorporated

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132 *Id.*
133 *Id.*
134 *Cf. Id.*
136 *Id.*, at 354.
137 *Id.*, 369-370.
138 *Id.*, at 372.
the Dusky/Drope standards verbatim into their juvenile competency statutes.139 Lastly, some states have not only granted the right to be competent in juvenile justice proceedings, but have developed a set of standards different from those established in Dusky/Drope.140 The statutes discussed below illustrate how different states treat the issue of juvenile competency.

1. No right to competency

A nice example is the legislation of the state of Oklahoma. The statute is silent on the issue of juvenile competency, but its courts have explicitly denied the right to be competency when tried in juvenile court proceedings.141 The Oklahoma statute for competency in criminal proceedings reads that “no person shall be subject to any criminal procedures after the person is determined to be incompetent”, and makes no mention of whether the provision applies to juveniles in delinquency proceedings.142 When faced with that question in G.J.I v. Oklahoma, the Court of Criminal Appeals of Oklahoma determined that the statute’s silence on the issue meant the right did not apply in juvenile court.143 G.J.I challenged the outcome of his delinquency hearing on the ground that he was not competent enough to assist counsel in developing his defense.144 The lower court relied on the rehabilitative nature of the proceedings to conclude that the structure of the system presumed all juveniles incompetent and therefore the right to competency

139 Id.
140 Id., at 373
143 778 P.2d 485.
144 G.J.I, 778 P.2d at 487.
was not applicable. The statute has not since been amended and the case is still good law.

2. Competency under the Dusky/Drope Standard

The majority of states have taken the opposite approach by recognizing competency as an instrumental protection in juvenile justice proceedings and incorporating the same standard applied in adult criminal trials directly into its statutes and case law. Minnesota provides an excellent example of that approach. The Minnesota Rules of Juvenile Procedure prohibit adjudication of a child that lacks the same level of competency as adults. In *In re Welfare of D.D.N.*, the Minnesota appellate court rejected the prosecutor’s argument that the rehabilitative nature of the dispositions in juvenile court justified a lower level of competency. The court began its analysis by citing to the statute that spoke directly to the issue. The court conceded that rehabilitative sentences are not for retributive or deterrent purposes, but they are still a form of punishment that often result in a significant loss of the child’s liberty.

3. Competency determination with a new evaluation

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145 *G.J.I.*, at 487.
147 Minn. R. Juv. P. 20.01(1)(B)); DC ST §16-2315((b)(3)(B).
149 *Id.*
150 *Id.*
Florida has gone further in its competency statutes than the majority of other states. Florida’s statute explicitly prohibits adjudication of a juvenile that is of questionable competence and sets forth detailed procedures for evaluating their exact level of competency. The standard for competence is analogous to most adult and juvenile competency statutes. The uniqueness of Florida’s statute, however, is not in its competency standard but in the means it employs to make that determination. The legislature allowed for a finding of incompetence based on two separate considerations. The first consideration for competency is the presence of mental retardation or mental illness. A finding of competency could also be based, however, purely on the age and maturity level of the juvenile. Additionally, a child found incompetent based on age or immaturity cannot be committed for treatment or restoration.

Virginia’s juvenile competency statute is similar to Florida’s statute, but differs in a significant way. The language of Virginia’s juvenile competency statute, like Florida, mirrors that found in its statutes governing adult standards of competency. Virginia’s statute differs from the statute in Florida, however, because it plainly forbids a finding of incompetence on age or immaturity alone. In effect, mental illness or

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153 F.S.A. §985.19.
155 Id.
156 Id.
157 Id.
158 F.S.A. §985.19.
160 Id.
161 Va. Code Ann. §16.1-356(f)(“a finding of incompetency shall not be made based solely on any or all of the following: (i) the juvenile’s age or developmental factors, (ii) the juvenile’s claim to be unable to remember the time period surrounding the alleged offence, or (iii) the fact that the juvenile is under the influence of medication”)

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mental retardation must be present for a finding of incompetency in a juvenile proceeding in Virginia.\textsuperscript{162} Without such a determination, the child is presumed competent to stand trial.\textsuperscript{163}

4. Shifting the presumption based on the crime

The Arkansas legislature took yet another route in drafting its legislation.\textsuperscript{164} The legislature created a provision in the statute that presumed a child under the age of thirteen charged with either capital murder of first degree murder incompetent to proceed.\textsuperscript{165} The Arkansas state legislature presumed that a thirteen year old that committed such a violent act lacked the capacity to “possess the necessary mental state required for the offense charged, conform his or her conduct to the requirements of the law, and appreciate the criminality of his or her conduct.”\textsuperscript{166} A child found unfit to proceed will remain in the custody of the Department of Health and Human Services or residential treatment facility for a period not to exceed nine months.\textsuperscript{167} In this situation, the standard for competency was not based on standard set forth by the Supreme Court, but purely on the nature of the act and the age of the perpetrator.\textsuperscript{168}

This section illustrated the different standards states have developed to address potentially incompetent juveniles. Without a Supreme Court precedent establishing or defining the constitutional right in the juvenile justice context, states are free to develop

\begin{enumerate}
\item REDDING, FROST, at 385.
\item See id.
\item SCOTT, GRISSO, at 845, (citing A.C.A. §9-27-502(b)(1)(A)).
\item Id.
\item Id.
\item A.C.A. §9-27-502(b)(1)(A)
their own standards of evaluation that may not fully protect children’s constitutional interests. This confusion and inconsistency is exacerbated for mentally retarded children because their disability is often unrecognized and misunderstood. These misunderstood children are then held to an uncertain standard.

C. The characteristics of mentally retarded children

This next section discusses the problems that arise with the adjudication of mentally retarded children in the juvenile justice system. The first section explains the characteristics of mentally retardation and the complications this disability presents for children in the juvenile justice system. The second section discusses the problems that arise for mentally retarded children because of the lack of restoration services provided by states. The third section examines children that are identified as mentally retarded and deemed incompetent and why they are often held in juvenile detention homes that fail to properly treat and rehabilitate them.169

1. Mentally retarded juvenile defendants

Mental retardation is defined as “significantly sub-average intellectual functioning, deficits or impairments in adaptive functioning that presents itself before the age of eighteen.”170 These impairments referenced in the definition mean that mentally retarded children do not develop socially, learn, or mature the same way as normally

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169 Cf. Lubow and Tulman, supra note 109, at xviii.
developed children of the same age.\textsuperscript{171} Children with these developmental deficiencies will not develop in deviant or defiant ways, but slower than others in their same peer group.\textsuperscript{172} For example, children with mental retardation will take longer learning to speak, to walk, or to dress themselves and there may be some skills they simply never learn.\textsuperscript{173} Unlike mental illness, which temporarily affects emotional and thought processes, mental retardation permanently affects a child’s abilities to lean.\textsuperscript{174}

Mentally retarded children are often unrecognized or misunderstood in the justice system because their disability manifests in a variety of forms.\textsuperscript{175} Persons with developmental disabilities often give deceptively normal answers in response to questions from police officers, attorneys, and judges.\textsuperscript{176} For example, when posed with questions about socially acceptable behavior, children with mental retardation will often answer in the affirmative simply because they believe that is the desired answer, and in the negative when asked about inappropriate behavior.\textsuperscript{177} Leading questions also make these individuals vulnerable to giving inaccurate answers.\textsuperscript{178} During interrogations or cross examinations, police and prosecutors often take for granted a mentally retarded child’s inability to respond to questions quickly and accurately.\textsuperscript{179} Mentally retarded children are usually ignorant to the roles that police and attorneys play in the justice system because the curriculum in special education classes is more limited than general

\textsuperscript{171} Mental retardation article
\textsuperscript{172} C.F. Ellis, Luckasson, at 422.
\textsuperscript{173} NAT’L DISSEMINATION CTR. FOR CHILDREN WITH DISABILITIES, Fact Sheet 8, (Jan. 2004), available at http://www.nichcy.org/pubs/factshe/fs8txt.htm
\textsuperscript{174} Ellis, Luckasson at 423-424 (these defects are not mutually exclusive and a small percentage of mentally retarded children also suffer from mental illness)
\textsuperscript{175} Id., at 427, see also Cowen and McKee, at 639.
\textsuperscript{176} Ellis, Luckasson, at 428.
\textsuperscript{177} Ellis, Luckasson, at 428.
\textsuperscript{178} Ellis, Luckasson, at 428.
\textsuperscript{179} Leone, Zaremba, Chapin, Iseli, at 395.
education classes and therefore disabled children do not develop the same general body of knowledge.\textsuperscript{180}

Additionally, those that suffer from a mental disability exert tremendous energy into “passing” as normal.\textsuperscript{181} These children often mitigate the effects of their disability by overestimating their skills and abilities.\textsuperscript{182} Children with mental retardation are frequently reluctant to inform their interrogator that certain questions are beyond their ability.\textsuperscript{183} This often stems from a motivation to please authority figures, which is particularly symptomatic in these children.\textsuperscript{184} This vulnerability in the presence of authority figures is particularly problematic during police questioning and in the attorney–client relationship.\textsuperscript{185} Police officers are traditionally regarded as trustworthy and therefore an individual suffering from mental retardation will be unable to distinguish when a neutral discussion with an officer turns into an adversarial interrogation.\textsuperscript{186} Problems arise in the attorney-client relationship because a consistently agreeable client is not likely to raise questions of competency and therefore their disability goes unnoticed.\textsuperscript{187}

These children face additional challenges in the juvenile justice system because the effects of mental retardation are mistaken for violent and deviant behavior.\textsuperscript{188} Often, youths with mental retardation act out in angry, disrespectful or irritable ways which is

\begin{footnotes}
\footnote{180}{Ellis, Luckasson, at 431.}
\footnote{181}{Cowden, McKee, at 639.}
\footnote{182}{Ellis, Luckasson, at 430.}
\footnote{183}{\textit{Id}, at 428.}
\footnote{184}{Cowden, McKee, at 639-640; Cloud, at 512.}
\footnote{185}{Cloud, \textit{supra} note 222, at 512.}
\footnote{186}{\textit{Id}.}
\footnote{187}{Cowden, at 640.}
\footnote{188}{Leone, at 393.}
\end{footnotes}
often mistaken in the juvenile justice system as dangerous. Their behavior is likely the result of poor judgment skills and a short attention span in addition to lacking in impulse control. Youths with mental retardation may also exhibit negative self-image or express irrational fears. These factors often indicate a risk of flight, rather than the presence of a disability, to a juvenile court judge. During a delinquency hearing, a mentally retarded defendant testifying on their own behalf may appear obstinate if they avoid certain questions because they cannot understand them. The inability to control their impulses often forces them to answer questions without considering the consequences of their answers. Combined, these misunderstandings lead to incorrect, or even harmful, dispositions for mentally retarded juveniles.

2. Restoration services

If a child is evaluated and determined incompetent, the court will order restoration services to prepare the child for trial. This aspect of the procedure presents a unique problem for mentally retarded juveniles because if they are incompetent, it is likely they are unrestorable. As previously stated, mental retardation is a permanent impairment, unlike mental illness, which is temporary or cyclical. The term “restoration” is inappropriate with respect to mentally retarded incompetent defendants because it

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189 Id.
190 Ellis, Luckasson, at 429.
191 Peter E. Leone, Ph.D., Barbara A. Zaremba, Michelle S. Chapin, Curt Iseli, Understanding the Overrepresentation of Youths with Disabilities in Juvenile Detention, 3 D.C.L. REV. 389, 393 (1995)
192 Leone, at 393.
193 Ellis, Luckasson, at 429.
194 Cloud, at 513.
195 Leone, at 394.
196 See e.g. Redding, at 371.
197 See Ellis, Luckasson, at 424.
198 Id, at 423.
assumes they were once competent, but those suffering from retardation have been incompetent since birth. After a finding of incompetency, a juvenile is often held in a detention facility until restored. This presents a major constitutional concern because detention pending restoration for a mentally retarded juvenile often results in an unjustly long period of time in juvenile detention.

In *Jackson v. Indiana*, the Supreme Court held that the constitution prohibited commitment of an unrestorable defendant for an indefinite period of time without a finding of dangerousness. Theon Jackson was a deaf mute with the mental capacity of a small child and declared incompetent to proceed on his robbery charges. Jackson was committed to the Indiana Department of Mental Health until such time he was declared “sane.” His attorney filed a petition, stating there was insufficient evidence to suggest that Jackson would ever achieve a level of competency needed to stand trial and that his commitment “amounted to a life sentence.” The State responded that Jackson’s detention may only be temporary and cited the lack of specificity a psychiatrist can predict the course of a mental illness. The Court disagreed based on the findings in the record and held that Jackson was unresorably incompetent.

In justifying its statute and subsequent actions, the State relied on the Supreme Court’s prior holding in *Greenwood v. United States*. The facts of *Greenwood* were similar to *Jackson* except the defendant was committed under a federal, and not a state,
The federal statute regulating commitment for incompetency conditioned release upon restoration or when the defendant was no longer dangerous, which ever occurred first. Therefore, a detention could never be “indefinite” because otherwise unrestorable defendants would be released upon a finding that they were no longer a danger to themselves or others. The Court went on to impose a “rule of reasonableness” upon state restoration statutes, mandating that a defendant may only be held the reasonable amount of time necessary to determine if restoration is possible in the foreseeable future absent a finding of dangerousness. Statutes that condition release only upon attaining competency will not pass constitutional review.

A few states that have dealt with juvenile competence standards have also established restoration procedures. The options for an unrestorable juvenile vary from state to state, with some allowing a dismissal of the charges, but the amount of time that must transpire before this happens varies drastically. In Arizona, if the court finds that there is a “substantial” probability that restoration will not happen within eight months, then the charges shall be dismissed, with prejudice. In Virginia, by contrast, the statute allows for dismissal one year after the date of arrest for a misdemeanor and three years after the date of arrest for a felony. In addition to dismissal, statutes allow for probation, confinement or civil commitment, if necessary.

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208 Id, at 732 (citing Greenwood, at 737-374).
210 Id., at 733 (citing Greenwood, at 373-374).
211 Id., at 733.
212 Id.
213 Redding, Frost, supra note 125, at 371.
214 Id.
215 A.R.S. §§-291.08(D).
217 Redding, Frost, supra note 125, at 371 (citing A.R.S. §8-291.06(D); N.Y. Fam. Ct. Act §322.2; Tex. Fam. Code Ann. §55.43)
Surprisingly, however, most states statutes are silent on disposition procedures for unrestorable youths.\(^{218}\) It is in these states that mentally retarded children have the highest risk of a prolonged detention.\(^{219}\) As previously stated, mental retardation is often mistaken in the justice system as mental illness.\(^{220}\) As a result, defendants impaired by mental retardation receive treatment appropriate for a mental illness, which does nothing to improve their comprehension.\(^{221}\) If mentally retarded defendants receive treatment for a mental illness to improve competence for trial or to decrease their level of dangerousness, “the failure to provide rehabilitative services tailored to the defendant’s needs may result in needlessly protracted, possibly lifelong, confinement.”\(^{222}\) Further, the behavior associated with mental retardation is often misunderstood in the justice system and results in the unnecessary detention of juveniles.\(^{223}\) These children often display a negative self-image, or appear irritable, each of which may lead individuals in the justice system to believe these children are dangerous and thus delay their release from detention.\(^{224}\) It is an act of futility to send a mentally retarded defendant to a state hospital for the mentally ill with hopes that the defendant will return competent for trial because he will never reach a level of understanding necessary for trial and will continue to exhibit apparent dangerous qualities.\(^{225}\)

3. Unnecessary detention

\(^{218}\) Redding, Frost, at 371.
\(^{219}\) See, Redding, Frost, at 371.
\(^{220}\) Ellis, Luckasson, at 423.
\(^{221}\) Ellis, Luckasson, supra note 205, at 424.
\(^{222}\) Id., at 424-425.
\(^{223}\) Leone, Zaremba, Chapin, Iseli, supra note 233, at 389.
\(^{224}\) Id., at 393-394; see also Jackson, at 733.
\(^{225}\) Eillis, Luckasson, supra note 205, at 459-460.
A juvenile court judge may hold a child in a detention facility prior to trial if evidence exists that the child may be dangerous or a flight risk. As previously discussed, the characteristics of mental retardation often convey a false indication to the court that the child meets one of the detention criteria. Youths struggling with this disability may appear to be a danger to themselves or other because of their negative self-image and irrational fears. Their lack of good judgment and impulsive behavior might categorize them as a flight risk. These characteristics may mislead the court into ordering the juvenile detained because the child is dangerous or may flee under the Schall holding.

Juvenile detention homes do not provide proper rehabilitative services for mentally retarded children and while detained, these disabled children learn to mimic the destructive behavior of the other detainees. Once inside the detention facility, juveniles are not properly rehabilitated because the facilities are not conducive to that type of treatment. Additionally, as the Supreme Court correctly stated in its Roper v. Simmons decision, juveniles are more susceptible to negative outside influences. Mentally retarded juveniles are even more vulnerable to these influences, and inside a juvenile detention facility, their exposure to such negativity is constant. This results in the unwarranted detention of the child in a home where his level of dangerousness seems to increase because he mimics the violent behavior of his peers. As a consequence,

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226 Leone, Zaremba, Chapin, Iseli, at 393-394.
227 Id., at 393.
228 Id., at 392.
229 See Id., at 392; see also Jackson, at 733.
230 Ellis, Luckasson, at 424-425.
231 Roper, 543 U.S. at 569.
232 Lubow. Tulman, supra note 109, at XV-XVI.
233 See Id., at XV-XVI.
juveniles appears to remain dangerous to themselves or others, lengthening the duration of his stay, particularly if his detention is condition upon a finding of competency or no longer dangerous.235

III. The Constitutional Implications

This next section examines the parallels in the right to competency and the right to counsel and how without the right to competency, the right to counsel cannot be fully effectuated by incompetent juvenile defendants. In part A, I discuss the right to counsel extended to the juvenile justice system in \textit{Gault} in correlation with the three requirements of competency as established by the \textit{Dusky/Drope} test. In part B, I suggest possible solutions to this paradox.

A. The Right Competency and the Right to Counsel

The Supreme Court granted juveniles the right to counsel in \textit{Gault}, but the right to counsel is meaningless without the right to be competent when tried.236 In \textit{Gideon v. Wainwright},237 the Supreme Court of the United States granted the right to counsel under the due process clause of the Fourteenth Amendment, which is arguably the most important right in criminal procedure.238 All other constitutional rights granted to criminal defendants are meaningless without an attorney to assert and protect those

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\begin{enumerate}
\item[235] See Ellis, Luckasson, \textit{supra} note 205, at 424-425.
\item[236] See Cowden, McKee, \textit{supra} note 222, at 641.
\item[237] 372 U.S. 335 (1963).
\item[238] \textit{Gideon}, at 339.
\end{enumerate}
\end{small}
The right to counsel is directly linked to the right of competency when adjudicated because the third prong of the Dusky/Drope evaluation is whether the defendant can effectively communicate with their attorney in creating a defense.

Recognizing the right to counsel but not the right to be competent prior to adjudication in juvenile proceedings presents a major constitutional concern, without the right to be competent when adjudicated, the right to counsel is meaningless. This lapse was evident enough for one state court to comment that “this right to counsel means little if the juvenile is unaware of the proceedings or unable to communicate with counsel due to a psychological or developmental disability.” Mental retardation affects the right to counsel because attorneys often do not recognize the disability and therefore do not raise the issue of incompetence, children with diminished capacity have limited communication skills, and cannot process information at the same degree that other children of their same age group can.

As discussed above, children with mental retardation will often try to hide their disability, making it difficult for an attorney to detect the problem. During questioning, these children will deliver the answer they believe is desired by their interrogator rather than the truth. An attorney is not likely to question the capacity of a child that appears to agree with their proposed legal strategy.

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239 See Gideon, at 344-345 (quoting Powell v. Alabama, 287 U.S. 45, 68 (1932) “the right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel.”).
240 Drope, at 171.
242 Golden, 341 Ark. At 660.
243 Ellis, Luckasson, at 426, see also Cowden and McKee at 639
244 Ellis, Luckasson, at 428
245 Either Ellis, Luckasson or Cowden at 634
The limited communication skills possessed by mentally retarded children also adversely affect their ability to assist in the development of their defense.246 These children are often unable to comprehend the underlying facts of the incident that resulted in the delinquency charge, and therefore cannot effectively communicate them to their attorney.247 This inhibits an attorney’s ability to create an adequate defense from the facts giving rise to the charge.248 Therefore, counsel cannot construct an effective defense for their client because their client’s lack of competency prevents them from gathering pertinent information.249

Another complication for disabled children in the attorney-client relationship is the youth’s inability to process information provided by an attorney.250 An attorney may explain certain procedures and options to their client, such as waiver of jurisdiction or pleading, but it is doubtful that a mentally retarded juvenile has the requisite capacity to process this information and make a thoughtful decision.251 This may result in a guilty plea that child did not intend.252

The problems experienced by mentally retarded children are shared by all incompetent children in the juvenile justice system. Although the protections afforded to juveniles through other cases are critical to protecting children from the arbitrary whims of a juvenile court judge, they are meaningless for an incompetent juvenile lost in the system.253 The right to be competent to stand trial affects the fairness and accuracy of
juvenile court proceedings.\textsuperscript{254} Because the rights are interrelated, no incompetent child can effectively assist their attorney.\textsuperscript{255} These young defendants will never have their side of the story correctly told or understood.\textsuperscript{256}

IV. Possible Solutions

To properly adjudicate mentally retarded children, there should be an established constitutional right to competency. The standard should also account for their age and immaturity level coupled with their disability to determine exactly what level of understanding each juvenile maintains. Understanding their limits will prevent their detention for unconstitutionally long periods of time pending a restoration that is likely not to occur. It will also ensure that a juvenile is not inappropriately certified to criminal court. The parens patriae ideals need to be revived, but with constitutional protections.

A. Establish the Constitutional Right

The right to be competent to stand trial should be established by a Supreme Court precedent. With each due process right the Supreme Court extended to the juvenile court, the maintenance of the parens patriae ideals was always a concern. Granting the right to competency will only affirm what many state courts have already done and will not inhibit the principles that drive the juvenile court system. Leaving the decision to the

\textsuperscript{255} \textit{Id.}
\textsuperscript{256} \textit{Id.} at 643
states, however, has caused inconsistency and varying degrees of the right available to juveniles within the court system. A Supreme Court precedent will make the right and its enforcement uniform across state lines. As with every other due process decision handed down from the Supreme Court, the Court should make sure to include language expressly states that the establishment of this right is not to inhibit the parens patriae, but to further it because these children will receive the proper rehabilitative measures required by their disability. Properly treating a child now will serve to protect society better in the future because these children will be rehabilitated the first time they enter the system, rather than becoming repeat offenders that become more jaded by the process with each incident.

**B. The Competency Standard**

In order to establish an effective means of determining the exact level of competency, the Court should require that the court account for the totality of the circumstances. The court should first consider the age and maturity level of the juvenile and compare that against psychological standards for that age. Conducting this inquiry first will alert the parties of a possible mental defect if the child comes back significantly below average levels. Once this evaluation is completed and the findings presented to the interested parties, the court and attorneys will have a better understanding of exactly what level of capacity their client has achieved and can proceed to develop an effective pre-or post adjudicatory rehabilitation plan.
The standard of competency for a juvenile should be a more relaxed version of the *Dusky/Drope* standard. Again, the test determines the factual understanding of the adversarial proceedings, the rational understanding of the proceedings, and how effectively they can assist counsel. An incompetent mentally retarded child will most likely never completely achieve this level of understanding, but a relaxed standard allows for a finding of varying degrees of competency. As the *Dusky/Drope* test stands now, it allows for black-and-white determination of either competent or not. A more flexible standard allows treatment to be adjusted according to the specific finding of competency. This is the only way to comport with due process as defined by fundamental fairness because each child must be able to understand the proceedings around them, particularly if it results in a loss of liberty.

C. Pre-adjudicatory Detention

Pre-adjudicatory detention for a mentally retarded child should only occur in extremely rare situations where there is no immediate family, extended family, foster care or group home for the child to reside in. Detention centers as they currently exist do not provide nurturing atmospheres and do not comport with parens patriae. They do not provide the proper rehabilitative services that a child with mental retardation needs. Placement in a familial atmosphere will create an environment where the child will not learn violent and deviant behavior from the other detainees. Should the child present a serious threat to himself or others, then placement in a more restrictive facility is appropriate. The presumption against detention and only in the event of a finding of
dangerousness, protects the child’s best interest, but also protects the community at large from potential risks.

**D. Waiver of Jurisdiction**

There should be a rebuttable presumption against certification to be tried as an adult for mentally retarded children. As multiple Supreme Court cases have stated, juveniles with mental retardation are less culpable than adults. The philosophies justifying the criminal justice system of deterrence and retribution are not applicable to children with a diminished capacity. A mentally retarded child will learn nothing from a punitive sentence because they never completely understood why they committed the delinquent act in the first place. Waiving jurisdiction simply wastes resources. The presumption may be rebutted in certain extreme circumstances where the child maintains a higher level of competency and the act committed was particularly violent. The younger the child, the stronger the presumption against certification.

**Conclusion**

The juvenile justice system has evolved greatly since its inception. The initial informal proceedings that resulted in arbitrary decisions led to the granting of certain due process rights that the Supreme Court deemed fundamentally fair in delinquency proceedings. One critical right has been left out, the right to be competent when tried. The lack of this right has resulted in inconsistencies among state statutes. The
characteristics of this disability make detection difficult and when it is discovered, how to properly treat and restore children with mental retardation remains a mystery. Currently, the juvenile justice system is not meeting the needs of mentally retarded children. The lack of the right to be competent when tried also severely impairs a mentally retarded juvenile’s right to counsel. Mental retardation affects his ability to effectively communicate with their attorney, which impairs counsel’s ability to prepare a defense. The remedy to this problem involves establishing a right to be competent in delinquency proceedings, established by either the Supreme Court or Congress. The established standard should account for not only the presence of mental retardation but also for the age and immaturity of the defendant. Children that are determined to suffer from mental retardation should be either returned home with services or should be placed in foster care. There should also be a rebuttable presumption against certification to be tried as an adult for mentally retarded children. Implementation of these procedures should hopefully protect the rights of mentally retarded children and assist in their rehabilitation to become contributing members of society.