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A Look at In re Fabian A.: Examining the Extension of Due Process Protections and Failure to Object as Waiver in the Juvenile Justice System

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A Look at *In re Fabian A.*: Examining the Extension of Due Process Protections and Failure to Object as Waiver in the Juvenile Justice System

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I. INTRODUCTION

There is little doubt as to the importance of the protection provided by due process to defendants in the American judicial system. It is of particular importance, however, where it applies to the notion of informed consent, specifically as it pertains to plea canvasses and whether a guilty plea has been entered into "knowingly and voluntarily."[1]

Recently, the Supreme Court of Connecticut established a rule requiring that the due process protection of informed consent be extended to plea canvasses in the juvenile process. This decision is in line with the national movement towards recognizing that, while the adult and juvenile justice systems must be different in order to reflect the inherent differences between adult and juvenile offenders, certain due process protections must apply to *both* systems.[2]

Shortly after the Connecticut Supreme Court's decision in *In re Jason C.*,[3] another issue arose with regards to informed consent—namely, to what extent must the court inform a juvenile defendant during a plea canvass[4] of circumstances surrounding his commitment and sentence in order to ensure that the plea is made knowingly and voluntarily? As seen in the case of *In re Fabian A.*,[5] the failure of the court in *In re Jason C.* to establish a specific standard of the extent of information provided during a plea

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[1] *See* Boykin v. Alabama, 395 U.S. 238, 243 n.5 (1969) (citing McCarthy v. United States, 394 U.S. 459, 466 (1969) which establishes, at a federal level, that "if a guilt[y] plea is not equally voluntary and knowing, it has been obtained in violation of due process and is therefore void"); State v. Godek, 438 A.2d 114 (Conn. 1980) (establishing the "knowing and voluntary" requirement at a state level).

[2] *See In re* Winship, 397 U.S. 358 (1970) (applying criminal standard of proof beyond a reasonable doubt to juvenile proceedings); *In re* Gault, 387 U.S. 1, 41, 57 (1967) (applying requirements for adequate notice of hearing and confrontation of witnesses to juvenile adjudicatory proceedings).

[3] *See In re* Jason C., 767 A.2d 710 (Conn. 2001).

[4] A plea canvass is a pre-trial proceeding during which time a trial court judge informs the defendant of his charges and conditions surrounding the entry of a guilty or nolo contendere plea, at which point the defendant either enters a plea or proceeds to trial. *See, e.g.,* CONN. SUPER. CT. R. 30a-4 (2011).

[5] *See In re* Fabian A., 941 A.2d 411 (Conn. App. Ct. 2008).

canvass resulted in the Appellate Court's finding that the plea had not been made knowingly or voluntarily because the court failed to adequately inform Fabian A. of circumstances under which his commitment might be extended.

While the notions of due process and informed consent are relevant, what is most surprising and troublesome about the case of *In re Fabian A.* is the defense counsel's failure to raise the issue of informed consent during the juvenile's initial plea canvass. As seen with due process generally, the adult and juvenile justice systems seem to be growing more and more similar. Does that—*should* that—mean that what would constitute a failure to preserve a claim (by failing to object during the plea canvass) in the adult system also amount to failure to preserve a claim in the juvenile system?

This Note will argue is that while it is important to extend the protection of due process to the juvenile justice system, it is of equal importance to preserve the flexibility and rehabilitative focus that for so long has differentiated the juvenile system from the adult. The general rule, which is to accept a failure to object as waiver of the right to pursue a claim at a later date, may be fair and appropriate in an adult criminal system. [6] However, extending such rigid restrictions to the juvenile system ultimately undermines its very purpose – to hold juveniles accountable for their unlawful behavior while at the same time protecting their best interest.

II. BACKGROUND: *IN RE JASON C.* AND *IN RE FABIAN A.*

A. In re Jason C.*: Establishing "Knowing and Voluntary" in the Juvenile System*

The development of the "knowing and voluntary" requirement during plea canvasses in the juvenile justice system in Connecticut began with the case of *In re Jason C.*[7] This case involved the commitment of two separate minors, Jason C. and Greily L., to the Department of Children and Families ("DCF"). Both juveniles pleaded nolo contendere to various charges brought against them and were committed to DCF during separate plea canvasses. To understand the application of the due process requirement of "knowing and voluntary" to the admission of a guilty plea, or in the cases of Jason C. and Greily L., a plea of nolo contendere, it is important to know the facts and history of each case.

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[6] *See* CONN. GEN. STAT. § 46b-121h (2011).
[7] *See In re* Jason C., 767 A.2d at 719.

1. In re Jason C.*: The Facts*

In August or September of 1996, Jason C., a sixteen-year-old male, "allegedly committed an act likely to impair the health and morals of a child under the age of sixteen in violation" of Connecticut law.[8] On February 10, 1997, the Superior Court adjudicated Jason C. a delinquent, following a plea of nolo contendere to the charge, and Jason C. subsequently was committed to DCF "for a period not to exceed eighteen months."[9] In March of 1997, prior to his commitment, Jason C. allegedly engaged in sexual conduct with a four-year-old child, once again violating the law of the State of Connecticut.[10] On October 30, 1997, Jason C. once again appeared before the trial court in a plea canvass, this time for the adjudication of the charge of sexual assault in the fourth degree.[11] He once again pleaded nolo contendere.[12] Pursuant to the two plea agreements, the court committed Jason C. to DCF for eighteen months, effective October 31, 1997. Subsequently, Jason C.'s commitment was extended by agreement between DCF and the court until October 30, 1999 – well beyond the original eighteen-month commitment period as originally agreed upon during the October 30, 1997 plea canvass. [13] On October 1, 1999, DCF again filed a petition, this time seeking to extend Jason C.'s commitment for an additional twelve months. It is important to note that at no time during either plea canvass, or after DCF filed its second petition for extension of commitment, did the trial court advise Jason C. of the possibility that DCF could petition for an extension of his commitment.[14]

The second juvenile defendant in *In re Jason C.* was Greily L., a seventeen-year-old female. On April 6, 1998, the Superior Court adjudicated Greily L. a delinquent following a plea of nolo contendere to the charge of violating a court order.[15] The Court committed Greily L. to DCF for a period not to exceed eighteen months. However, as it did during Jason C.'s plea canvasses, the Court failed to inform Greily L. of the possibility that DCF could petition for an extension of her commitment,

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[8] *Id.* at 712.

[9] *Id.* Under Connecticut law, "commitment of children convicted as delinquent by the Superior Court to the Department of Children and Families shall be for (1) an indeterminate time up to a maximum of eighteen months. . . ." CONN. GEN. STAT. § 46b-141 (2011).

[10] *In re* Jason C., 767 A.2d at 712.

[11] *Id.* at 712–13.

[12] *Id.* at 13.

[13] *Id.* Pursuant to CONN. GEN. STAT. § 46b-141 (2011), "[t]he Commissioner of Children and Families may file a motion for an extension of the commitment…(a) beyond the eighteen-month period on the grounds that such extension is for the best interest of the child or the community. The court shall give notice to the parent or guardian and to the child at least fourteen days prior to the hearing upon such motion."

[14] *In re* Jason C., 767 A.2d at 713.

[15] *Id.*

which DCF did on September 23, 1999.[16]

On November 22, 1999 and December 3, 1999, both Jason C. and Greily L., respectively, filed motions to dismiss the extension petitions, claiming in relevant part that "granting the petition to extend commitment would violate the plea agreement," that Conn. Gen. Stat. § 46b-141 was "void for vagueness," and that "granting the petition for extension of commitment would violate the prohibition against double jeopardy."[17] The trial court granted each motion to dismiss on the grounds that "[f]ailure to advise the respondents of a possible extension of delinquency commitment prevented them from entering a *knowing and voluntary* plea, thereby rendering the plea invalid."[18]

2. *The Effect of* In re Jason C. *on the Juvenile Justice Process*

The court in *In re Jason C.*, by granting the defendants' motions to dismiss, established a precedent in the Connecticut juvenile justice system that "when accepting a plea agreement, due process requires a court to advise a juvenile of possible extensions to the delinquency commitment."[19] Because neither defendant had been advised of the possibility that DCF could petition for an extension of commitment—an action that would bring their confinement beyond the eighteen month maximum as established by Connecticut law, the maximum time they believed they could be committed—they did not have "all the relevant information required by . . . long-standing and well settled [Connecticut] law."[20] Therefore, the Court concluded that "their pleas were not knowing and voluntary," and thus were invalid.[21] As a result of *In re Jason C.*, trial courts are now "required to advise a juvenile of the possibility that his or her delinquency commitment may be extended beyond the period of time stated in the plea agreement."[22]

The new standard for acceptance of a juvenile defendant's guilty plea during a plea colloquy mirrors the standard that has been well-established in the adult justice system in Connecticut, both in statute and at common law.[23] In essence, what the court in *In re Jason C.* did was extend the due

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[16] *Id.* DCF's petition sought to extend Greily L.'s commitment for an additional eighteen months. *Id.*

[17] *Id.*

[18] *Id.* at 713–14 (emphasis added).

[19] *Id.* at 714.

[20] *In re* Jason C., 767 A.2d 710, 716 (Conn. 2001); *see* CONN. GEN. STAT. § 46b-141 (2011).

[21] *In re* Jason C., 767 A.2d at 716.

[22] *Id.* at 714. This rule has since been codified into Connecticut law: "To assure that any plea or admission is voluntary and knowingly made, the judicial authority shall address the child or youth in age appropriate language to determine that the child or youth substantially understands . . . [t]he possible penalty, including any extensions or modifications." CONN. SUPER. CT. R. § 30a-4 (2011).

[23] *See, e.g.*, CONN. SUPER. CT. R. § 39-19 & 39-20 (requiring that the "judicial authority . . . not accept the [guilty] plea without first addressing the defendant personally and determining that he or she

process protection of informed consent required in the adult justice system to the juvenile justice system. In doing so, it acknowledged the Supreme Court's precedent that there are inherent differences between juveniles and adults, which require a difference in the law's treatment of each.[24] However, the court also acknowledged that courts must take special caution to balance state objectives in the juvenile justice system against notions of fundamental fairness.[25] Thus, "[b]ecause of the seriousness involved in the institutionalization of a juvenile, and the lack of a negative effect on juvenile proceedings," the court concluded that "a juvenile is entitled to be advised of the possibility of commitment extensions when making a plea. The status of being a juvenile does not warrant abandonment of the well established rule that a defendant be advised of the direct consequences of his plea."[26]

B. "Knowing and Voluntary" Meets Waiver: In re Fabian A.

The court in *In re Jason C.* made great strides towards extending due process protections inherent in the adult criminal justice system to the juvenile system in Connecticut. It laid out that basic rule that trial courts, before accepting a juvenile's guilty plea or plea of nolo contendere, must ensure that the juvenile is aware of the possibility of extension of his or her commitment and that the plea is made knowingly and voluntarily. However, the court failed to specifically enumerate the extent to which the court must advise the defendant so as to ensure that his or her plea is made knowingly and voluntarily. This issue arose in the context of *In re Fabian A.*

1. Background and Facts

On August 25, 2005, Fabian A., a fifteen-year-old male, pleaded guilty to charges of disorderly conduct and violation of probation.[27] The trial court adjudicated him delinquent and committed him to the custody of DCF for a period not to exceed eighteen months.[28] At the outset of the

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fully understands: (1) The nature of the charge to which the plea is offered; (2) The mandatory minimum sentence, if any; . . . [and] (4) The maximum possible sentence on the charge. . . ."); CONN. SUPER. CT. R. § 39-20 (ensuring that the defendant's plea is "voluntary and is not the result of force or threats or of promises apart from a plea agreement"). *See also* State v. Hall, 992 A.2d 343, 345 (Conn. App. 2010), *cert. granted in part*, 995 A.2d 638 (Conn. 2010) (finding that, by failing "to address [the defendant] personally or to determine that he understood that his immigration status might be adversely affected by his guilty pleas[,]" the court failed to substantially comply with Connecticut statute).

[24] *See* Schall v. Martin, 467 U.S. 253, 263 (1984) (acknowledging the necessity to maintain "informality and flexibility" in the juvenile setting).

[25] *In re* Jason C., 767 A.2d at 718 (looking at *In re* Steven G., 556 A.2d 131 (Conn. App. Ct. 1989).

[26] *Id.*

[27] *In re* Fabian A., 941 A.2d 411, 413 (Conn. App. Ct. 2008).

[28] *Id.*

plea canvass, the presiding Judge Wollenberg, advised Fabian A. that he could ask a question at any time.[29] Judge Wollenberg proceeded to ask him various questions, pursuant to the rule set forth by *In re Jason C.*, in order to establish that Fabian A.'s plea was made knowingly and voluntarily.[30] After accepting his plea, the court turned to the order of commitment. Upon learning from the probation officer that the requested commitment was for a period of eighteen months, the *prosecutor* asked the court to inform Fabian A. as to the possibility of recommitment.[31] In response, Judge Wollenberg stated, "Well, if [the eighteen month commitment] doesn't work and something happens, you can be recommitted, do you understand that?"[32] Initially, Fabian A. failed to respond verbally and the court instructed him that he must respond with a "yes" or "no," at which point he responded in the affirmative.[33]

Fabian A.'s commitment was set to expire on February 28, 2007. However, as a result of his behavior while in custody, DCF filed a motion to extend his commitment on January 29, 2007.[34] Fabian A.'s attorney opposed the motion to extend commitment, but on March 22, 2007 the court granted the motion and extended Fabian A.'s commitment to January 19, 2008.[35] The presiding Judge Gleeson found that at the time Fabian A. had entered his guilty plea he had been "advised adequately as to the possibility that his commitment could be extended."[36]

Counsel for Fabian A. filed an appeal on April 9, 2007, asserting that Fabian A.'s plea was not entered knowingly or voluntarily because the court had failed to properly inform the defendant of the circumstances that may lead to an extension of his commitment. Namely, the court had only inquired as to the sentence *after* accepting the guilty plea, the court "failed to make any inquiry of [Fabian A.'s] understanding of the sentence, the maximum penalty or the possibility of an extension," and that it was "only at the suggestion of the prosecutor, *after* the plea had been accepted, that the court informed the defendant of a 'recommitment possibility.'"[37] Upon reviewing the transcript from the plea canvass, the court held that Fabian A. "could not have possessed an understanding of the law in relation to the facts because the court, in canvassing him, did not include all the relevant

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[29] *Id.*

[30] *Id.* Specifically, the court asked Fabian A. "his age, what grade he was in at school, if anyone had forced him to plead guilty, if anyone had promised him anything if he pleaded guilty, whether his attorney had informed him of how a trial would work and whether he was satisfied with the representation of his attorney."

[31] *Id.* at 413–14 (emphasis added).

[32] *In re* Fabian A., 941 A.2d 411, 414 (Conn. App. Ct. 2008) (internal quotation marks omitted).

[33] *Id.*

[34] *Id.*

[35] *Id.*

[36] *Id.*

[37] *Id.* at 416 (emphasis added).

information concerning the commitment. As a result . . . the plea of the respondent was not knowingly or voluntarily made."[38]

C. The Defense's Silence

The court in *In re Jason C.* established the rule that a juvenile's plea must be made knowingly and voluntarily; however, it failed to instruct future courts as to what exactly is required to ensure that a juvenile is indeed making his or her plea knowingly and voluntarily. Thus, it is no surprise that the court found that Fabian A. had not been properly informed of the circumstances that could lead to an extension of his commitment; as a result, his plea was not made knowingly or voluntarily and was thus invalid. It is important to note that, during the plea canvass, neither Fabian A. nor his counsel asked any questions regarding commitment, and counsel "did not make a motion to withdraw [the] guilty plea or in any other way indicate that Fabian [A.] did not understand the judge's advisement that his commitment could be extended."[39]

III. EVOLUTION OF DUE PROCESS IN THE JUVENILE SYSTEM

As this Note previously mentioned, there is a general movement in both federal and state criminal justice systems towards extending many of the protections of due process inherent in the adult system to the juvenile justice system. Included in these protections are the right to counsel, the right to confront and cross-examine witnesses, the right to reasonable search and seizure, and the privilege against self-incrimination.[40] There seems to be a general consensus that the juvenile justice system requires a balance between a strict application of due process rights in the juvenile setting and judicial flexibility regarding procedural process, so long as "constitutional demands are satisfied."[41] Although these rights are neither identical to nor as extensive as those rights guaranteed to adult offenders, they may be curtailed for legitimate reasons when doing so "serves the state's interests in promoting the health and growth of the child."[42]

If we are to view the extension of due process protections to the

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[38] *In re* Fabian A., 941 A.2d 411, 417 (Conn. App. Ct. 2008).

[39] Brief of Appellee at 5, *In re* Fabian A., 941 A.2d 411 (Conn. App. Ct. 2008) (No. 28704).

[40] *See generally In re* Gault, 387 U.S. 1 (1967) (finding that the Due Process Clause of the Fourteenth Amendment requires that children charged with criminal acts enjoy several procedural protections). It is worth noting that, while there is a general consensus among most state courts that juveniles should be afforded most of the due process protections afforded to similar adult offenders, some states disagree that such an expansion of due process rights to juvenile offenders is warranted. *See, e.g.*, Petitioner F v. Brown, 306 S.W.3d 80, 90 (Ky. 2010) (holding that juvenile offenders are not afforded all constitutional rights that adult offenders receive; instead, they should be afforded only "right to fair treatment").

[41] 47 AM. JUR. 2D *Juvenile Courts, Etc.* § 83 (2006).

[42] *Id.*

juvenile justice system as a realization of the necessity to protect the "vulnerable dependents" within our society,[43] it would necessarily follow that protections outside of due process may be appropriate in the juvenile system as well. This section will address the development and goals of the juvenile justice system, as well as the concept of waiver generally. It will ultimately argue that the rigidity associated with waiver in the adult criminal justice system is incompatible with the goals of the juvenile justice system – namely, the juvenile justice system was specifically designed to be flexible and individualized, affording judges discretion not only in their procedures, but in their sentences, so as to keep in line with the system's goals of not only punishment, but rehabilitation.[44]

A. History of the Juvenile Courts and Due Process in the Juvenile Justice System

The first juvenile court was established in Chicago in 1899, the direct result of a progressive movement in the criminal justice system that recognized the fundamental differences between adult and juvenile offenders.[45] The new court "combined the new conception of children as vulnerable dependents with the rehabilitative orientation" of the progressive movement.[46] In the new juvenile court system, the state took on a parens patriae role and, as such, "assessing criminal responsibility became subordinate to assuring the social welfare of the child."[47] Because the courts were viewed to be "benign" and implementing intervention strategies in the children's best interest, leaders of the progressive movement "rejected the [adult] criminal law's jurisprudence and procedural safeguards" finding them to be unnecessary.[48] Unfortunately, juvenile courts frequently sentenced children to commitment in juvenile institutions, often without the due process afforded to adult offenders who faced the same deprivation of liberty.[49] It is no surprise, then, that the lack of procedural protections in the juvenile court system, combined with the "sweeping custodial powers [afforded to] juvenile court judges," soon caught the eye of critics and judicial reformers.[50]

The most impressive reform of the juvenile court system occurred in 1964 after the annual meeting of the National Council of Juvenile Court

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[43] Mary Berkheiser, *The Fiction of Juvenile Right to Counsel: Waiver in the Juvenile Courts*, 54 FLA. L. REV. 577, 586 (2002).

[44] *See* CONN. GEN. STAT. § 46b-121h (2011).

[45] *See* Berkheiser, *supra* note 43, at 585–86.

[46] *Id.* at 586.

[47] *Id.*

[48] *Id.* at 587 (citing Barry C. Feld, *The Transformation of the Juvenile Court – Part II: Race and the "Crack Down" on Youth Crime*, 84 MINN. L. REV. 327, 337–38 (1999)).

[49] *See Id.*

[50] *Id.*

Judges.[51] It was during this meeting that Chief Justice Earl Warren boldly announced that, while great latitude is given to juvenile courts with regards to procedure, decisions, and sentencing, those courts, like adult criminal courts, "must function within the framework of the law and provide juveniles with due process protection against capricious decisionmaking" to "satisfy the basic requirements of due process and fairness . . . ."[52]

Though the Chief Justice failed to elaborate as to the specific protections of due process which should apply in the juvenile setting, his remarks served to refocus the goals of the juvenile system and opened the door to decisions that very quickly began extending almost all of the due process protections from adult criminal courts to those in the juvenile system. The first of the cases to tackle the issue of due process in the juvenile court system, thus marking a new era of juvenile justice, was *In re Gault*.[53] The Supreme Court, upon careful examination, observed that, in the juvenile justice system, "the child receives the worst of both worlds: . . . he gets neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children."[54] Thus, in the fundamental fairness guarantee, the court found the "jurisprudential basis for affording the essential protections of the adult criminal process while preserving the rehabilitative goals, confidentiality, and other benevolent features of the juvenile court process."[55] The years following the Supreme Court's decisions in *Gault* saw a continued expansion of juveniles' due process rights and a restructuring of the juvenile court system so it more closely resembled the adult system in terms of procedural process protections. At the same time, the new juvenile courts remained distinct by preserving the system's original goals: flexibility, rehabilitation, confidentiality, and other benevolent features unique to the juvenile system.[56]

B. Goals of the Modern Juvenile Justice System

The United States Supreme Court, beginning with its decision in *In re Gault*, acknowledged the inherent differences between the adult and

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[51] *Id.* at 588.

[52] *Id.* at 588–89 (internal quotation marks omitted).

[53] 387 U.S. 1 (1967). Gerald Gault was fifteen when he was adjudicated delinquent. The juvenile court, in exercising the discretion afforded to it by the Arizona Juvenile Code, committed Gault to a State Industrial School "for the period of his minority, unless sooner discharged by due process of law." *Id.* at 7–8. The Supreme Court of Arizona found that the Code was invalid because it permitted a juvenile to be committed to a state institution in proceedings in which the court had "virtually unlimited discretion." *Id.* at 10.

[54] *Id.* at 18 n.23 (citing Kent v. US, 383 US 541, 556 (1966)).

[55] Martin Guggenheim & Randy Hertz, *Reflections on Judges, Juries, and Justice: Ensuring the Fairness of Juvenile Delinquency Trials*, 33 WAKE FOREST L. REV. 553, 558 (1998).

[56] *See id;* Berkheiser, *supra* note 43, at 593.

juvenile justice systems, and emphasized that, where the goals of the adult criminal justice system are deterrence and retribution, the goals of the juvenile justice system should balance the goals of accountability with those of rehabilitation and the best interest of the child.[57]

Connecticut, too, acknowledges the inherent differences between the two systems, and, through its courts and legislature, has tried "to strike a balance—to respect the informality and flexibility that characterize juvenile proceedings . . . and yet to ensure that such proceedings comport with the fundamental fairness demanded by the Due Process Clause."[58] The handling of juvenile matters in Connecticut exemplifies the "attempt to balance fundamental fairness with the unique characteristics of the juvenile justice system. . . ."[59] According to Conn. Gen. Stat. § 46b-121h, the "juvenile justice system [is intended to] provide individualized supervision, care, accountability and treatment in a manner consistent with public safety to those juveniles who violate the law."[60] The statute recognizes that, while one goal is to "[h]old juveniles accountable for their unlawful behavior," punishment must be balanced against efforts to reintegrate the juvenile into society.[61] The statute provides for "programs and services that are community-based and are provided in close proximity to the juvenile's community," seeks to "[r]etain and support juveniles in their homes whenever possible and appropriate," and "[p]romote[s] the development and implementation of community-based programs including, but not limited to, mental health services, designed to prevent unlawful behavior and to effectively minimize the depth and duration of the juvenile's involvement in the juvenile justice system."[62] "Thus, it is clear that [Conn. Gen. Stat.] § 46b-121h includes both rehabilitation and accountability as desired goals of the juvenile justice system."[63]

IV. WAIVER

As we have seen, the juvenile justice system emerged as separate and distinct from the adult justice system with an eye towards rehabilitation of minors, as opposed to mere punishment and retribution. The juvenile system recognizes that the characteristics and needs of juvenile offenders

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[57] *See In re* Jason C., 767 A.2d 710, 717 (Conn. 2001); Michelle Haddad, *Catching Up: The Need for New York State to Amend Its Juvenile Offender Law to Reflect Psychiatric, Constitutional and Normative National Trends Over the Last Three Decades*, 7 CARDOZO PUB. L. POL'Y & ETHICS J. 455, 457 (2009) (distinguishing the goals of the modern juvenile justice system from those of the adult system).

[58] Schall v. Martin, 467 U.S. 253, 263 (1984) (internal citations and quotation marks omitted).

[59] *In re* Jason C., 767 A.2d 710, 718 (Conn. 2001).

[60] CONN. GEN. STAT. § 46b-121h (2011).

[61] *Id.*

[62] *Id.*

[63] *In re* Jason C., 767 A.2d at 717 n.12.

are different than those of their adult counterparts, and as such juvenile offenders require a separate system for the administration of justice.[64] While the juvenile system is distinct from the adult system in terms of its goals and enhanced judicial discretion, it has become increasingly similar to the adult system in terms of its processes and procedural protections. As the two systems become more similar, it raises questions as to whether the juvenile justice system should not only adapt the protections afforded to defendants in the adult system, but also other procedures inherent in the adult system.

In considering this expansion of processes, it seems there would be a split in opinion regarding an extension of the adult justice system's interpretation of actions or omissions on the part of the defendant that might constitute a waiver of the right to bring up that issue at a later date. One school of thought would argue that, because the courts have extended due process, almost in its entirety, to the juvenile justice system and applied its protections strictly, the juvenile courts should adopt the adult system's notion of waiver strictly as well. If a juvenile defendant has the right to counsel, just as an adult does, should he not be able to waive his right to counsel just as easily as an adult defendant? The other school of thought regarding juvenile waiver would argue that in order to preserve the fundamental fairness premise on which the juvenile justice system was founded–flexibility–the adult system's notion of waiver should be adopted, but applied with judicial discretion. For example, where an adult defendant's silence regarding improper jury instructions may result in an inability to object to the jury instructions on appeal, that claim may be preserved where a juvenile defendant makes a similar omission.

A. Waiver, Generally

The adult procedure that lies at the heart of this Note's analysis of the juvenile justice system, generally, and of *In re Fabian A.*, specifically, is waiver. In *Johnson v. Zerbst,* the Supreme Court held that the commonly recognized test for waiver of any right is "ordinarily an intentional relinquishment or abandonment of a known right or privilege."[65] In order to determine whether a defendant has validly waived a right requires that the court determine the person's knowledge or intent with regards to the relinquishment of that right. Namely, "[t]he rights holder first must know of the right and then make an intentional choice to relinquish it. Otherwise, there is no waiver."[66] However, a look at the decisions of

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[64] *See* 47 AM. JUR. 2D *Juvenile Courts, Etc.* § 4 (2006).

[65] Johnson v. Zerbst, 304 U.S. 458, 464 (1938); *see* Moore v. Michigan, 355 U.S. 155, 161 (1957) (extending the "competent and intelligent" standard to state court proceedings).

[66] Berkheiser, *supra* note 43, at 601.

courts throughout the country, federal and state, adult and juvenile, demonstrates that courts no longer adhere to the strict requirement that the rights-holder explicitly or intentionally choose to waive the right in dispute.

B. Waiver in Connecticut

In Connecticut, waiver is defined by not only the Connecticut Practice Book, but also by the Connecticut judiciary. For example, the Connecticut Practice Book is clear that, if an attorney fails to object or file a motion to dismiss within a reasonable amount of time, he fails to preserve his claim and is deemed to have waived his right to raise the issue at a later time (generally, on appeal).[67] Further, the "failure of a defendant not in custody, absent good cause shown, to appear after notice, shall constitute a waiver of that right and of any objection to the taking and use of the deposition based upon that right."[68] Clearly the Connecticut Practice Book deems a failure to positively act in a timely matter, be it filing a motion or appearing in court, to be an implicit waiver of the right that would otherwise be preserved. The Connecticut Supreme Court has held similarly.[69]

However, the Connecticut courts have gone further to define specific omissions on the part of counsel in *adult* proceedings as constituting waiver. Namely, the Connecticut courts are in consensus in finding that a failure to object or raise a claim–during trial or pretrial proceedings (more specifically a plea canvass)–results in an inability to raise the claim at a later point in time. For example, the Connecticut Appellate Court held that an attorney's failure to object to juror misconduct constitutes waiver.[70] Furthermore, the Appellate Court also held that failing to object to a court's ruling constitutes waiver.[71] The Connecticut courts have ruled similarly in matters where a defendant's fundamental rights are at issue. For example, the Appellate Court held that, where defense counsel fails to object to the State not proving each element of a crime, such omission

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[67] *See* CONN. SUPER. CT. R. § 10-32 (deeming "[a]ny claim of lack of jurisdiction over the person or improper venue or insufficiency of process or insufficiency of service of process [to be] waived if not raised by a motion to dismiss filed" in a timely manner); *see also* CONN. SUPER. CT. R. § 42-1 (stating that "a failure to elect a jury trial" at the time the court informs the defendant of his right to a jury trial "may constitute a waiver of that right.").

[68] CONN. SUPER. CT. R. § 40-55.

[69] *See* Kim v. Magnotta, 733 A.2d 809, 813 (Conn. 1999) (holding that lack of personal jurisdiction may be waived, unless challenged by a motion to dismiss filed in a timely manner); Lostritto v. Cmty. Action Agency of New Haven, Inc., 848 A.2d 418, 431 (Conn. 2004) (holding that a challenge to personal jurisdiction is waived if it is not raised in a motion to dismiss within 30 days of the filing of a complaint).

[70] State v. Tyson, 862 A.2d 363, 366 (Conn. App. Ct. 2004).

[71] State v. Lynch, 1 A.3d 1254, 1263–64 (Conn. App. Ct. 2010).

constitutes waiver.[72] It later laid out the blanket rule that a defendant in criminal prosecution may waive one or more of his fundamental rights.[73] Most relevant to the case of *In re Fabian A.*, however, is the Connecticut Supreme Court's holding in *State v. Golding* that a failure on the part of a defense attorney to object to jury instructions constitutes waiver.[74] If we are to read the *Golding* decision strictly, it would seem as though the Connecticut courts do not require that a waiver be explicit, even in situations where an objection may be directed towards the court's procedure.

So far, the courts in Connecticut have refused to extend the strict interpretation of failure to object as constituting waiver from the adult justice system to the juvenile system. However, it is worth noting that implicit waiver is not a completely foreign notion within the Connecticut juvenile justice system. In *In re Adrien C.,* the Connecticut Appellate Court held that a mother waived her right to contest the court's jurisdiction when she failed to comply with the thirty-day requirement for filing a motion to dismiss the State's claim.[75] The Connecticut Superior Court followed suit, holding that a mother's failure to object to the late scheduling of an initial hearing regarding the termination of her parental rights "constitute[d] a waiver of any right she might have to do so."[76] Again, the court interpreted an *adult's* failure to object as waiver. However, what is still relevant is the court's *reasoning* for interpreting such omission as waiver. The court in *In re Adrien C.* emphasized, and the court in *In re Samantha B.* reiterated, that the time restriction on filing a motion to dismiss was the result of legislative concerns for delay in the juvenile process and as a way to promote the best interest of the child involved.[77] Admittedly, there are vast differences between a juvenile delinquency hearing and a termination of parental rights hearing; however, a unifying theme between the two is the court's attention to the best interest of the child (or minor) involved.

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[72] State v. Cooper, 664 A.2d 773, 777 (Conn. App. Ct. 1995).

[73] State v. Hudson, 998 A.2d 1272, 1278 (Conn. App. 2010), *cert. denied*, 4 A.3d 1229 (Conn. 2010).

[74] State v. Golding, 567 A.2d 823 (Conn. 1989). It is important to note that the Court's decision in *Golding* has narrow application. The Court stated that a failure to object will only constitute waiver if four criteria are met: "(1) the record is adequate to review the alleged claim of error; (2) the claim is of constitutional magnitude alleging the violation of a fundamental right; (3) the alleged constitutional violation clearly exists and clearly deprived the defendant of a fair trial; and (4) if subject to harmless error analysis, the state has failed to demonstrate harmlessness of the alleged constitutional violation beyond a reasonable doubt." *Id.* at 827.

[75] *In re* Adrien C., 519 A.2d 1241, 1245–46 (Conn. App. Ct. 1987).

[76] *In re* Samantha B., 722 A.2d 300, 300 (Conn. Super. Ct. 1997).

[77] *In re* Adrien C., 519 A.2d at 1245.

C. *Waiver in Other Jurisdictions*

There is a great weight of federal authority supporting the notion that, by failing to object, defense counsel waives the right to pursue a claim on appeal. For example, the Supreme Court in *U.S. v. Gagnon* held that, in the absence of an objection, the defendant had waived his right to be present at all stages of his criminal trial.[78] In *Levine v. U.S.*, the Court held that counsel's failure to object to the closing of a courtroom was a waiver of the right to a public trial.[79] Finally, in *U.S. v. Bascaro*, the Eleventh Circuit Court held that, because defendant raised the defense of double jeopardy for the first time on appeal after failing to raise an objection to the charges at trial, he had waived his right to assert such a defense.[80] The federal courts are clear regarding waiver in adult proceedings: unless defense counsel makes an objection during trial (or during a pretrial hearing), he is deemed to have waived the right to argue the specific claim–no matter how fundamental a right the claim is asserting to protect–at a later date.

State courts throughout the country generally follow the same rule and accept that an adult defendant may implicitly waive various rights. The Tennessee Supreme Court held in *State v. Walker* that a conspiracy defendant's failure to object at trial to the admission of his co-conspirator's statements made to the defendant's sister constituted a waiver of his right to raise the issue in his motion for a new trial.[81] In *State v. Gove*, the Wisconsin Supreme Court found that the defendant had waived his right to challenge on appeal that the trial court, in a witness unavailability ruling, violated his right to confront his accuser when he failed to object to the court's ruling during trial.[82] Finally, the Maryland Court of Appeals held in *Berry v. State* that defense counsel's failure to object to the admission of handgun evidence constituted a waiver of defendant's right to raise the evidence's admission on appeal.[83] State courts, like their federal counterparts, rigidly interpret an attorney's failure to object as constituting waiver. But how rigidly should state juvenile courts apply the waiver standard to a juvenile defense counsel's failure to object?

Cases regarding waiver, implicit and explicit alike, in juvenile settings are much more limited. However, the cases identified by this author seem to point to a tendency among courts to strictly interpret juvenile defense counsel's initial failure to object as a waiver of the right to pursue the claim at a later time. For example, the Utah Supreme Court held in *State*

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[78] U.S. v. Gagnon, 470 U.S. 522, 528 (1985).
[79] Levine v. U.S., 362 U.S. 610, 619 (1960).
[80] U.S. v. Bascaro, 742 F.2d 1335, 1365 (11th Cir. 1984).
[81] State v. Walker, 910 S.W.2d 381, 388 (Tenn. 1995).
[82] State v. Gove, 437 N.W.2d 218, 220 (Wis. 1989).
[83] Berry v. State, 843 A.2d 93, 109 (Md. Ct. Spec. App. 2004).

ex rel. Christensen v. Christensen that a defendant waived his right to object, on appeal, to the admission of testimony "as to matters which were not embraced within the allegations of the petition for rehearing of the case" because defense counsel "failed to object to the admission of such testimony at the hearing."[84] In North Dakota, its Supreme Court held in *In the Interest of R.D.B.* that a juvenile who was with his parents at the time of a juvenile court proceeding effectively waived his right to counsel, and that he "knowingly, intelligently, and voluntarily waived [his] right to counsel at the adjudicatory hearing." [85] The court went on to reject the claim that a waiver of the right to counsel should be valid only when the representation given by the parents is of the same caliber as the child would have received from an attorney.[86] Thus, the court emphasized that the juvenile defendant's waiver need not be explicit to prevent him from objecting to inefficient or lack of counsel on appeal; rather, the mere representation by his parents sufficiently constituted waiver.

D. Waiver of Counsel in the Juvenile Setting as a Model

Unfortunately, there seems to be no case law or statutory guidance for determining whether defense counsel's failure to object to an insufficient plea canvass may constitute waiver in a juvenile court setting. However, there has been extensive research conducted regarding implicit waiver with regards to defendants' *right to counsel* in juvenile delinquency hearings. While the right to counsel derives more directly from due process protections found in the Constitution, both the right to counsel and informed consent affect whether a juvenile defendant receives a fair trial, which is also a constitutionally-based right.

In her article *The Fiction of Juvenile Right to Counsel: Waiver in the Juvenile Courts*, Mary Berkheiser refers to a myriad of "social-psychological studies showing that most children are developmentally incapable of exercising a valid waiver."[87] The studies reveal that "juveniles as a class have limited decisionmaking abilities, lack an adequate understanding of their legal rights, and as a result are incapable of exercising an effective waiver."[88] If this inability on the part of juveniles

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[84] State *ex rel.* Christensen v. Christensen, 227 P.2d 760, 762–63 (Utah 1951). It is important to note that this case was decided before the Supreme Court's decision in *In re Gault*, which extended procedural protections to the juvenile justice system. However, this decision is still good law in Utah and is therefore a good example of how some states apply not only rigid adult procedural protections to juvenile matters, but a rigid interpretation of failure to object as constituting waiver.

[85] *In re* R.D.B., 575 N.W.2d 420, 423 (N.D. 1998).

[86] *Id.*

[87] Berkheiser, *supra* note 43, at 581.

[88] *Id. See generally* Marty Beyer, *Immaturity, Culpability & Competency in Juveniles: A Study of 17 Cases*, 15 CRIM. JUST. 26 (2000); Wallace J. Mlyniec, *A Judge's Ethical Dilemma: Assessing a Child's Capacity to Choose*, 64 FORDHAM L. REV. 1873 (1996).

to even *explicitly* waive their right to counsel is true, one can easily argue that under no circumstances can a juvenile defendant *implicitly* waive his right to counsel merely by failing to object to lack of counsel's presence at any stage of the judicial proceedings.

Further, the Connecticut Supreme Court often warned that judges "should indulge 'every reasonable presumption' against waiver" where defendants' constitutional rights are at stake.[89] "Yet juvenile court practices as revealed in the reported cases [of waiver of right to counsel] demonstrate a total disregard for that presumption."[90] As a result, there have been many cases where juvenile court judges have found "waiver by inaction."[91] For example, in *In re Christopher T.*, when a juvenile defendant showed up for his adjudication hearing without counsel, the court inferred that he had waived his right to counsel and, as a result, proceeded directly to adjudication.[92] This trend of finding "waiver by inaction" occurs even in states with detailed statutes that identify and limit circumstances under which a judge may accept that a juvenile defendant has waived his right to counsel.[93]

There are many cases that indicate juvenile court judges have a tendency to infer juvenile defendants' waiver of their right to counsel "by inaction." However, there has been a trend among appellate courts to reverse trial decisions based on an abuse of discretion by the trial court judge in finding that the juvenile defendant had implicitly waived his right to counsel.[94] This trend is hopeful and it serves to reinforce the fundamental principle of *Gault* that none of the due process protections it mandated should undermine the beneficial qualities of juvenile court proceedings.[95] Taking this statement at face value, one may infer that the *Gault* Court sought to strike a balance between strict application of due process protections in *all* juvenile settings against the preservation of judicial discretion to be used in situations that may not warrant such a rigid

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[89] Berkheiser, *supra* note 43, at 611.

[90] *Id.*

[91] *In re* Christopher T., 740 A.2d 69, 71 (Md. Ct. Spec. App. 1999).

[92] *Id.*

[93] Berkheiser, *supra* note 42, at 617. Berkheiser specifically focuses her analysis on Florida, which has one of the most specific waiver rules of any state: "Rule 8.165 of the Florida Rules of Juvenile Procedure requires the court to advise the child of his or her right to counsel and to appoint counsel 'unless waived by the child at each stage of the proceedings.'" *Id.* at 618. However, Florida has one of the highest rates of appellate decisions overturning juvenile waiver of right to counsel based on noncompliance with state statute. *Id* at 618, 661-60.

[94] *See* McBride v. Jacobs, 247 F.2d 595, 596 (D.C. Cir. 1957) (holding that, where the court had informed the juvenile defendant's mother of his right to counsel but failed to notify the defendant himself, any waiver, by parent or child, must be "an intelligent, knowing act"); Shioutakon v. District of Columbia, 236 F.2d 666, 670, 670 n.26 (D.C. Cir. 1956) (holding that "where the [right to counsel] exists, the court must be assured that any waiver of it is intelligent and competent," as determined by the child's "age, education, and information, and all other pertinent facts").

[95] *In re* Gault, 387 U.S. 1, 25–27 (1967).

application of the due process doctrine.

V. IMPLICATIONS OF EXTENDING STRICT WAIVER RULES TO THE JUVENILE SYSTEM

As the previous section illustrated, courts throughout the country, including those in Connecticut, are relatively unanimous in their decisions interpreting an attorney's failure to object as a waiver of the right to raise the claim in later proceedings. This interpretation of attorney silence as waiver holds true not just in adult adjudicatory settings, but in the juvenile justice system, as well. So I pose the question: *Should* it?

A. Recommendations for Connecticut

It is clear that the divide in opinion regarding a strict application of waiver to the juvenile justice system may have an impact on the system's procedural flexibility and general attainment of its goals. For example, as applied to *In re Fabian A.*, if we are to strictly adhere to the adult justice system's notions of waiver, Fabian A.'s attorney would be deemed to have waived his client's right to an appeal based on the fact that he failed to object to the judge's insufficient canvass. As a result his client's plea was not made knowingly or voluntarily. However, if we are to adopt a more lenient interpretation of waiver in the juvenile justice system (as would be in line with the system's generally flexible character), one might argue that in order for a minor to waive his right to an appeal, the waiver must be explicit, rather than a mere failure to object. In this case, Fabian A.'s right to an appeal would be preserved, regardless of the fact that his attorney failed to object to the deficient canvass.

So what is Connecticut to do? Unfortunately, "neither the presumption against waiver nor the enactment of detailed statutory waiver procedures have been effective constraints against juvenile court judges' continued exercise of their 'discretion' to deny juveniles their right to counsel."[96] This statement illustrates the catch-22 that lies at the heart of the juvenile justice system: on one hand, judicial discretion preserves the flexibility and individualized attention upon which the juvenile justice system was founded; on the other hand, judicial discretion allows a judge to ignore statutory due process requirements, such as right to counsel, under the guise of addressing the child's best interest. The latter instance is quite distressing. For that reason, I would recommend that Connecticut not only pass a statute that implements a strict no-waiver policy, unless the waiver is explicit and made in writing, but also go a step further and include in it the threat of sanctions against any judge that violates the no-waiver policy.

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[96] Berkheiser, *supra* note 42, at 611.

Though such a rigid, and arguably severe, rule goes against juvenile justice notions of flexibility and discretion, such a statute may counteract the possible abuse of discretion by juvenile court when deciding whether to preserve a defendant's claim by placing judges who abuse their discretion at risk of sanctions.

B. Implications for In re Fabian A.

The United States Supreme Court and legal scholars alike have long recognized that "the right to counsel is fundamental to the exercise of other procedural rights by those accused of criminal acts. As early as 1932, the Court stated that without the 'guiding hand of counsel,' an accused's 'right to be heard would be, in many cases, of little avail.'"[97] Unfortunately, as seen in the case of Fabian A., counsel is not always adequate or effective in advocating and protecting a juvenile defendant's best interest and fundamental rights. As I recommended in the previous section, Connecticut juvenile courts should move away from the national state court trend of rigidly interpreting counsel's failure to object as a waiver, and instead allow for judicial discretion in instances where counsel's failure to object carries with it the potential for the juvenile defendant's deprivation of liberty after entering a plea that is neither knowing nor voluntary.[98] If Connecticut courts were to afford juvenile judges greater discretion, there is a chance that a court hearing Fabian A.'s case on appeal may allow the juvenile defendant to pursue the claim that his guilty plea was made neither knowingly nor voluntarily. However, if the court disallows Fabian A. to pursue his claim (even in a judicial system that requires explicit waiver rather than a mere failure to object), he may be able to pursue an alternative course of action and bring a claim against his attorney for ineffective counsel. Allowing such a claim would not only encourage juvenile defense attorneys to be more attentive during plea canvasses (especially in the case of Fabian A., where defense counsel even failed to object to the canvass after the *prosecuting* attorney raised the issue of insufficiency), but may also allow juvenile defendants who would otherwise not be able to appeal an extension of commitment to do so.

VI. CONCLUSION

The history of the juvenile justice system is defined by dueling opinions as to how juvenile defendants should be treated. At its inception, the "juvenile court replicated the historical *parens patriae* practice of the courts of chancery in England and the United States to exercise jurisdiction

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[97] *Id.* at 580 (quoting Powell v. Alabama, 287 U.S. 45, 69 (1932)).

[98] A possible repercussion for judges who abuse this discretion could be sanctions.

for the protection of the unfortunate child[,]" focusing on benevolence and intervention as opposed to punishment and retribution.[99] Because their focus was on a child's best interest, rather than merely locking him or her up and throwing away the key, early juvenile courts saw the due process procedural protections inherent to adult courts as unnecessary in their newly-established judicial sphere.[100] Judicial reformers challenged the view that, because the juvenile court was a benevolent parent, focused on serving the juvenile defendant's best interest. They pointed out that, in reality, the juvenile court system afforded children "fewer rights under the law, based on the children's presumed lack of capacity to exercise good judgment."[101] As such, the juvenile court system began a procedural movement increasingly similar to its adult counterpart, specifically by adapting due process protections inherent in the adult system.

The divide between the adult and juvenile court systems has been gradually narrowing as juvenile courts continue to adapt procedural protections and procedural rigidity. An examination of courts across the country shows a clear trend among juvenile judges to rigidly apply adult procedure regarding failure to object and implicit waiver. This trend is incongruous with the fundamental premises upon which the juvenile system is based–flexibility and fundamental fairness. As a result, juvenile defendants–whom the courts have identified as not only unique from their adult counterparts but who may also lack the capacity and maturity to fully understand their legal situation or consequences–are often deprived of many rights and opportunities a less rigid and more discretionary system might—and should—afford them.

By analyzing the history of the juvenile justice system and tracking court trends regarding due process and waiver, this Note attempted to address the issues raised by the Connecticut Superior Court in the case of *In re Fabian A.* While it is, as of now, unclear which way the court will rule on the basis of waiver, the decision either way will be a watershed decision regarding Connecticut courts' stance on the rigid interpretation of absence of objection as constituting waiver.

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[99] *Id.* at 586 (internal quotation marks omitted).
[100] *Id.* at 587.
[101] *Id.* at 623.