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MEMORANDUM

TO: Members of the Juvenile Defense Attorney Interim Committee

FROM: Richard Sweetman

DATE: August 5, 2013

SUBJECT: Summary of relevant law in Colorado concerning the appointment of counsel for a juvenile in a delinquency proceeding

I. Introduction

For the benefit of the interim committee members who are *not* attorneys practicing in the area of juvenile delinquency, I have prepared this memo to hopefully serve as a quick-reference summary of the laws and cases that you are most likely to hear about during the committee's deliberations this interim.

II. Statutory Law

There are few provisions in the Colorado Revised Statutes that explicitly concern the appointment of counsel for a juvenile in a delinquency proceeding. The most relevant provisions are sections 19-2-706 (2), 21-1-104 (1), and 21-2-103, C.R.S. (These provisions are described on pages 26-27 of the Winter 2012 report from the National Juvenile Defender Center entitled *Colorado: An Assessment of Access to Counsel and Quality of Representation in Juvenile Delinquency Proceedings*.)

Section 19-2-706 (2), C.R.S., appears within article 2 of the Children's Code (title 19), which article concerns the Colorado juvenile justice system. This provision requires the court to appoint counsel for a juvenile with insufficient financial means to retain counsel, or whose parents refuse to retain counsel for him or her:

> **19-2-706. Advisement.** (2) (a) If the juvenile or his or her parents, guardian, or other legal custodian requests counsel and the juvenile or his or her parents, guardian, or other legal custodian is found to be without sufficient financial means, or the juvenile's parents, guardian, or other legal custodian refuses to retain counsel for said juvenile, the court shall appoint counsel for the juvenile.
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> (b) If the court appoints counsel for the juvenile because of the refusal of the parents, guardian, or other legal custodian to retain counsel for the juvenile, the parents, guardian, or legal custodian, other than a county department of social services or the department of human services, shall be

ordered to reimburse the court for the cost of the counsel unless the court finds there was good cause for such refusal.

Section 21-1-104 (1), C.R.S., appears in article 1 of title 21, which concerns the office of the state public defender. This provision concerns the duty of the state public defender to counsel and defend an indigent juvenile who is filed on as a delinquent:

> **21-1-104. Duties of public defender.** (1) When representing an indigent person, the state public defender, only after the conditions of section 21-1-103 have been met, shall:
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> (a) Counsel and defend him, whether he is held in custody, ***filed on as a delinquent***, or charged with a criminal offense or municipal code violation at every stage of the proceedings following arrest, detention, or service of process; and
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> (b) Prosecute any appeals or other remedies before or after conviction that the state public defender considers to be in the interest of justice, except as limited in subsection (3) of this section. [Emphasis added.]

Section 21-2-103, C.R.S., appears in article 2 of title 21, which concerns the office of alternate defense counsel. This section requires the office of alternate defense counsel to provide counsel to indigent persons in cases involving conflicts of interest for the state public defender:

> **21-2-103. Representation of indigent persons.** (1) On and after January 1, 1997, the office of alternate defense counsel shall provide legal representation in the following circumstances:
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> (a) Cases involving conflicts of interest for the state public defender as determined pursuant to subsection (1.5) of this section.
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> (2) In cases involving conflicts of interest for the state public defender, the determination of indigency shall be made by the state public defender in accordance with section 21-1-103.
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> (4) The office of alternate defense counsel shall provide legal representation for indigent persons by contracting with licensed attorneys and investigators pursuant to section 21-2-105.

In addition to these three statutory provisions, Rule 3 (a) (2) of the Colorado Rules of Juvenile Procedure addresses a juvenile's right to counsel in a delinquency proceeding. The rule requires the court to advise the juvenile of this right at the juvenile's first appearance before the court:

> **Rule 3. Advisement**
> (a) At the first appearance before the court, the juvenile and parent, guardian, or other legal custodian shall be fully advised by the court, and the court shall make certain that they understand the following:
> (2) The juvenile's right to counsel and if the juvenile, parent, guardian, or other legal custodian is indigent, that the juvenile may be assigned counsel, as provided by law;

III. Jurisprudence

There are five United States Supreme Court cases that are particularly relevant to the deliberations of the interim committee. In chronological order, they are *Gideon v. Wainwright*, *In re: Gault*, *Roper v. Simmons*, *J.D.B. v. North Carolina*, and *Miller v. Alabama*. I will briefly summarize each of these cases.

In ***Gideon v. Wainwright***, 372 U.S. 335 (1963), the Court unanimously ruled that the Fourteenth Amendment requires state courts to provide counsel in criminal cases for defendants who cannot afford to hire their own attorneys. The ruling incorporates the Sixth Amendment right to counsel under the due process clause of the Fourteenth Amendment.

In ***In re Gault***, 387 U.S. 1 (1967), the Court held that juveniles accused of crimes in a delinquency proceeding must be afforded many of the same due process rights as adults, including the right to counsel.

> Just as . . . the assistance of counsel is essential for purposes of waiver proceedings, so we hold now that it is equally essential for the determination of delinquency, carrying with it the awesome prospect of incarceration in a state institution until the juvenile reaches the age of 21. *In re: Gault*, at 36-37.

In ***Roper v. Simmons***, 543 U.S. 551 (2005), the Court held that the imposition of the death penalty on offenders who were under the age of 18 when they committed their crimes is prohibited by the Eighth Amendment to the U.S. Constitution, which prohibits "cruel and unusual punishments". The 5-4 decision overturned the standard established in *Stanford v. Kentucky*, 492 U.S. 361 (1989), which had permitted the execution of offenders as young as 16 years of age.

In his majority opinion, Justice Kennedy wrote that since *Stanford v. Kentucky*, a "national consensus" that "the death penalty is a disproportionate punishment for juveniles" had developed. *Roper*, at 564. Justice Kennedy compared the case to the Court's recent decision in *Atkins v. Virginia*, 536 U.S. 304 (2002), in which the court had ruled that the use of capital punishment on mentally retarded persons violated the Eighth Amendment. As in *Atkins*, Kennedy wrote, the question in *Roper* necessarily involved an inquiry into our

society's "evolving standards of decency" (see *Roper*, at 589).

In ***J.D.B. v. North Carolina***, 131 S. Ct. 2394 (2011), the Court ruled that a juvenile's age is relevant to a determination of whether the juvenile is "in custody" for Miranda purposes. That is, in determining whether a law enforcement agency holds a juvenile "in custody", and is therefore required to read the juvenile his or her "Miranda rights" before interrogating him or her, a court should consider the fact of the juvenile's age.

> The State and its amici contend that a child's age has no place in the custody analysis, no matter how young the child subjected to police questioning. We cannot agree. In some circumstances, a child's age "would have affected how a reasonable person" in the suspect's position "would perceive his or her freedom to leave" [citing *Stansbury v. California*, 511 U.S. 318, 325 (1994)). That is, a reasonable child subjected to police questioning will sometimes feel pressured to submit when a reasonable adult would feel free to go. We think it clear that courts can account for that reality without doing any damage to the objective nature of the custody analysis. *J.D.B.*, at 2402-03.

Finally, in ***Miller v. Alabama***, 132 S.Ct. 2455 (2012), the Court ruled that the Eighth Amendment prohibits the imposition on juvenile offenders of mandatory life sentences with no possibility of parole. Just three years earlier in *Graham v. Florida*, 558 U.S. 811 (2009), the Court had ruled that juvenile life sentences without parole were unconstitutional for crimes *excluding murder*. Justice Kagan's 5-4 majority decision in *Miller* extends this constitutional prohibition to apply to *all* offenses, including murder.

I hope this is helpful. If you have any questions about the contents of this memo or otherwise relating to the business of the Juvenile Defense Attorney Interim Committee, please contact Richard Sweetman at (303) 866-4333.