

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-005366-09

STATE OF NEW JERSEY : JUVENILE ACTION
IN THE INTEREST OF : On Appeal from a Judgment
O.S., : of the Superior Court,
: Chancery Division, Camden
: County
APPELLANT : Sat Below:
: Hon. Charles Dortch, JSC

BRIEF OF AMICI CURIAE
JUVENILE LAW CENTER, RUTGERS URBAN LEGAL CLINIC,
NATIONAL JUVENILE DEFENDER CENTER, AMERICAN CIVIL LIBERTIES
UNION OF NEW JERSEY, ADVOCATES FOR CHILDREN OF NEW JERSEY, AND
NEW JERSEY INSTITUTE FOR SOCIAL JUSTICE

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STATEMENT OF INTEREST

Amici curiae are advocacy groups committed to protecting the legal and constitutional rights of young people. Rutgers Urban Legal Clinic, Rutgers School of Law–Newark (ULC); Juvenile Law Center; National Juvenile Defender Center (NJDC); Advocates for Children of New Jersey (ACNJ); American Civil Liberties Union of New Jersey (ACLU-NJ); New Jersey Institute for Social Justice (NJISJ) (collectively "Amici") sought to submit this brief in light of the significance of the questions presented to this Court and the important role this case may play in protecting the integrity of the juvenile justice system in New Jersey. As advocates for youth involved in the juvenile justice system, Amici have a substantial interest in ensuring that New Jersey's juvenile courts continue to exercise their jurisdiction to protect the safety, well-being, and successful re-entry of children committed to the State's juvenile institutions.

STATEMENT OF IDENTITY OF AMICI CURIAE

RUTGERS URBAN LEGAL CLINIC, RUTGERS SCHOOL OF LAW–NEWARK (ULC): The ULC is a clinical program of Rutgers Law School – Newark, established more than thirty years ago to assist low-income clients with legal problems that are caused or exacerbated by urban poverty. The Clinic's Criminal and Juvenile Justice section, taught by clinical professor Laura Cohen,

provides legal representation to individual clients and undertakes public policy research and community education projects in both the juvenile and criminal justice arenas. In recent years, ULC students and faculty have worked with the New Jersey Office of the Public Defender, the New Jersey Institute for Social Justice, the Essex County Juvenile Detention Center, Covenant House - New Jersey, staff of the New Jersey State Legislature, and a host of out-of-state organizations on a range of juvenile justice practice and policy issues. During the past 18 months, the ULC has acted as a team leader of the New Jersey Juvenile Indigent Defense Action Network, an initiative of the John D. and Catherine T. MacArthur Foundation that, among other efforts, seeks to provide post-dispositional legal representation to young people committed to the New Jersey Juvenile Justice Commission. The ULC last appeared as amicus curiae before the New Jersey Supreme Court in State in the Interest of P.M.P., 200 N.J. 166 (2009).

JUVENILE LAW CENTER: Juvenile Law Center, founded in 1975, is the oldest multi-issue public interest law firm for children in the United States. Juvenile Law Center advocates on behalf of youth in the child welfare and criminal and juvenile justice systems to promote fairness, prevent harm, and ensure access to appropriate services. Recognizing the critical developmental differences between youth and adults, Juvenile Law Center works

to ensure that the child welfare, juvenile justice, and other public systems provide vulnerable children with the protection and services they need to become healthy and productive adults. Juvenile Law Center advocates for the protection of children's due process rights at all stages of juvenile court proceedings, from arrest through disposition and from post-disposition through appeal. Juvenile Law Center participates as *amicus curiae* in state and federal courts throughout the country, including the United States Supreme Court, in cases addressing the rights and interests of children.

NATIONAL JUVENILE DEFENDER CENTER: The National Juvenile Defender Center was created to ensure excellence in juvenile defense and promote justice for all children. The National Juvenile Defender Center responds to the critical need to build the capacity of the juvenile defense bar in order to improve access to counsel and quality of representation for children in the justice system. The National Juvenile Defender Center gives juvenile defense attorneys a more permanent capacity to address important practice and policy issues, improve advocacy skills, build partnerships, exchange information, and participate in the national debate over juvenile justice.

The National Juvenile Defender Center provides support to public defenders, appointed counsel, child advocates, law school

clinical programs, and non-profit law centers to ensure quality representation and justice for youth in urban, suburban, rural and tribal areas. The National Juvenile Defender Center also offers a wide range of integrated services to juvenile defenders and advocates, including training, technical assistance, advocacy, networking, collaboration, capacity building and coordination.

ADVOCATES FOR CHILDREN OF NEW JERSEY (ACNJ): Advocates for Children of New Jersey (formerly Association for Children of New Jersey and hereinafter known as ACNJ), is a statewide non-profit child research and advocacy organization, dedicated to improving programs and policies for New Jersey's children and families. ACNJ maintains its principal place of business in Newark, New Jersey. Administered by a thirty member Board of Trustees, ACNJ gives a voice to the needs of children by educating and engaging state leaders and educating the public through research, policy and legal analysis and strategic communications. Its Board of Trustees, membership and professional staff represent a broad cross-section of individuals and organizations strongly committed to the rights and welfare of children.

Juvenile justice joined child welfare as one of two issues which brought ACNJ into existence in 1978. One of ACNJ's

earliest research efforts was to examine the characteristics of children placed in detention facilities and shelters, providing descriptive information and analysis of the programs, policies and budgets of these "temporary" residences. The results were published in a 1979 report entitled Children in Detention and Shelter Care: Surveying the System in New Jersey. In 1983, ACNJ was asked assist the Assembly Law and Public Safety Committee in drafting a separate Juvenile Code for New Jersey, which was signed into law in 1984. In 1986, ACNJ undertook an evaluation of the new law releasing its findings in a 1988 report entitled Out of Balance: New Jersey's Juvenile-Family Crisis Intervention System. This report revealed a "severe contradictions between the 1984 Juvenile Code and its implementation." ACNJ helped to develop the legislative reforms to the juvenile justice system in 1995 resulting in the formation of a new Juvenile Justice Commission (JJC). ACNJ is currently a member of the statewide New Jersey Council on Juvenile Justice Systems Improvement.

AMERICAN CIVIL LIBERTIES UNION OF NEW JERSEY (ACLU-NJ) :

The ACLU-NJ is a private, non-profit, non-partisan membership organization dedicated to the principle of individual liberty embodied in the Constitution. Founded in 1960, the ACLU-NJ has approximately 14,000 members and supporters in New Jersey. The ACLU-NJ is the state affiliate of the American Civil Liberties

Union, which was founded in 1920 for identical purposes, and is composed of nearly 500,000 members and supporters nationwide.

The ACLU-NJ is a strong supporter and protector of the due process rights of individuals in the criminal justice system and the rights of juveniles generally. The ACLU-NJ specifically recognizes that the well-documented vulnerabilities of children and the State's unique role in protecting them through the juvenile justice system require meaningful, and quick, access to courts. In addition to litigation on behalf of juveniles generally (see, e.g., State v. Best, 201 N.J. 100 (2010) (establishing standard of suspicion necessary to search a student's car in a school parking lot); State in the Interest of P.M.P., 200 N.J. 166 (2009) (establishing time at which juvenile cannot waive Miranda rights without an attorney); Joye v. Hunterdon Central Regional High Sch. Bd. of Educ., 176 N.J. 568 (2003) (challenging random student drug testing); see also Betancourt v. West New York, 338 N.J. Super. 415 (App. Div. 2001) (challenging juvenile curfew ordinance)), the ACLU-NJ takes an active role in juvenile justice, visiting juvenile detention centers throughout the state, conducting know your rights workshops for young people, and actively challenging policies and practices in public schools that channel children out of schools and into the juvenile and criminal justice systems. The ACLU-NJ is also the local affiliate of the

national American Civil Liberties Union, which brought the case In re Gault, 387 U.S. 1, 87 S. Ct. 1428, 18 L. Ed. 2d 527 (1967), before the U.S. Supreme Court, leading to the landmark victory which secured the right to counsel for children facing the equivalent of criminal charges.

NEW JERSEY INSTITUTE FOR SOCIAL JUSTICE: The New Jersey Institute for Social Justice ("NJISJ" or "the Institute") is a Newark-based non-partisan research and advocacy organization dedicated to the advancement of New Jersey's urban areas and residents. NJISJ advances its agenda through policy-related research and analysis, development and implementation of model programs, advocacy efforts, operational partnerships with government, and public education. Established eleven years ago by Alan Lowenstein, co-founder of the law firm Lowenstein Sandler PC, the Institute is committed to challenging barriers that prevent urban areas and residents from reaching their full potential.

NJISJ has provided its expertise to the New Jersey appellate courts on multiple occasions. By way of example, the Institute has appeared as *amicus curiae* in cases including State v. Meyer, 192 N.J. 421 (Sept. 19, 2007); State in the Interest of S.S., 130 N.J. 20 (2005) (per curiam); New Jerseyans for a Death Penalty Moratorium v. New Jersey Department of

Corrections, 185 N.J. 173 (2005); Associates Home Equity Serv., Inc. v. Troup, 343 N.J. Super. 254 (App. Div. 2001); In re Adoption of the 2003 Low Income Hous. Tax Credit Qualified Allocation Plan, 369 N.J. Super. 2 (App. Div. 2004); N.J. State Conf.-NAACP v. Harvey, 381 N.J. Super. 155 (App. Div. 2005), *certif. denied*, 186 N.J. 363 (2006); and Association of New Jersey Rifle & Pistol Clubs, Inc. v. The City of Jersey City, 201 N.J. 444, 992 A.2d 1 (2010) (dismissing appeal as moot based on passage of L. 2009, c. 104, and vacating Association of New Jersey Rifle & Pistol Clubs, Inc. v. The City of Jersey City, 402 N.J. Super. 650, 955 A.2d 1003 (App. Div. 2008), in which NJISJ also appeared as *amicus curiae*).

The Institute has a deep and longstanding interest in issues affecting vulnerable children and families. Its myriad activities in this area include, *inter alia*, having played a significant role in bringing the Juvenile Detention Alternatives Initiative ("JDAI") to New Jersey, and facilitated its implementation in the Essex Vicinage where it has resulted in a 53% reduction in juvenile detention with no increase in either reoffending or failure-to-appear rates. In the realm of child welfare, the director of the Institute's Legal Program, on loan to the Governor's Office, served as the principal author of "A New Beginning: The Future of Child Welfare in New Jersey," the statewide child welfare reform plan required by the settlement

in Charlie H. v. Whitman, 83 F.Supp.2d 476 (D.N.J. 2000), and available at <http://www.njstatelib.org/digit/humanSvs/newBegining.pdf> (last visited February 2, 2011).

PRELIMINARY STATEMENT

This appeal raises a critically important issue of first impression before this Court: does the Juvenile Court retain jurisdiction to hear evidence regarding the status of young people committed to the custody of the State's Juvenile Justice Commission and, when necessary and appropriate, to modify its own dispositional orders to ensure their health and safety? Amici curiae respectfully submit that, pursuant to the State's Juvenile Code and in keeping with national standards, the Juvenile Court has both the authority and an obligation to exercise it. Amici respectfully urge this Court to reverse the judgment of the court below and remand this matter for an evidentiary hearing on Appellant's motion for recall.

PROCEDURAL HISTORY

Amici adopt and incorporate by reference the Procedural History section set forth in the Brief for the Appellant, O.S.

STATEMENT OF FACTS

Amici adopt and incorporate by reference the Statement of

Facts section set forth in the Brief for the Appellant, O.S.

ARGUMENT

I. THE TRIAL COURT'S REFUSAL TO HEAR O.S.'S RECALL MOTION WAS CONTRARY TO THE LAW AND THE FACTS AND ENDANGERED THE SAFETY OF O.S.

A. New Jersey Juvenile Courts Have Jurisdiction to Consider Requests for Post-Disposition Relief in Order to Correct, Change, or Modify Dispositions That Are Contrary to the Rehabilitative Purpose of the New Jersey Code of Juvenile Justice.

Once a child is adjudicated delinquent, New Jersey law requires the juvenile court to order a disposition that "provide[s] for [his] care, protection, and wholesome mental and physical development... [through a] program of supervision, care, and rehabilitation" and "secure[s] for him custody, care and discipline as nearly as possible equivalent to that which should have been given by his parents." N.J.S.A. §§ 2A:4A-21(a), (b), (d), 2A:4A-24(a). A disposition that places a child in a secure juvenile facility where he is unsafe and where the staff fail to protect him from harm, as was the case with Appellant O.S., violates the purpose of the New Jersey Code of Juvenile Justice. See id.

Youth who are adjudicated delinquent become "wards of the State... entitled to the protection of the State, *which may*

intervene to safeguard them from neglect or injury.” N.J.S.A. § 2A:4A-21(e) (emphasis added). Indeed, under New Jersey Rules of Court, juvenile courts retain jurisdiction over every action in which they have entered a disposition order, and are authorized to correct, change, or modify the disposition at any time. R. 5:24-5(a), 5:24-6. These provisions, read in conjunction with the purpose clause of the New Jersey Code of Juvenile Justice, impose an obligation on the juvenile court to change or modify a disposition when a child is being harmed. Simply put, a court cannot impose confinement on a juvenile under its *parens patriae* authority and then wash its hands of its continuing obligation to ensure that juvenile’s safety and care while confined.

Moreover, regulations governing facilities operated by the Juvenile Justice Commission (JJC) reinforce the rehabilitative purpose of the Code of Juvenile Justice. The JJC’s mission is to promote public safety, accountability and rehabilitation of juvenile offenders. N.J.A.C. § 13:90-1.1(a). To that end, the Code guarantees committed youth the right to treatment and rehabilitation in keeping with their needs. N.J.A.C. § 13:101-3.1(a)(11). It also guarantees unrestricted and confidential access to the courts as a means to ensure that their conditions of confinement are consistent with the rehabilitative purpose of the juvenile justice system. N.J.A.C. §§ 13:95-15.1(a); 13:101-3.1(a)(7).

In the instant case, the trial court's denial of Appellant's recall motion cut off his access to the courts and thus any possibility that Appellant could seek timely and effective relief from the physical assaults to which he has been subjected to at his current court-ordered placement. Contrary to the court's suggestion below, after-the-fact lawsuits for damages, habeas petitions, or administrative grievances simply will not provide the timely and effective remedies that only an immediate review by the juvenile justice court can give. TR - 6, 11-13, State v. O.S., No. FJ-04-0497-10 & FJ-2349-09 (N.J. Super. Ct. Law Div. June 10, 2010). Further, it would be inappropriate for the court to forego its responsibility to address matters appropriately before it.

B. Oversight of Conditions in Secure Juvenile Facilities is Critical to Ensure the Safety of Incarcerated Youth.

Recent reports detailing the abuses and even deaths of children in juvenile justice facilities in New Jersey and elsewhere vividly demonstrate why children such as O.S. need the juvenile court to act as a "watchdog" over these placements. By retaining jurisdiction, courts can ensure that the facilities to which juveniles are committed by the court keep them safe and actually provide treatment and education. These reports underscore the importance of vesting the New Jersey juvenile

courts with authority to modify a youth's disposition, including ordering that his or her placement be changed if the youth is subjected to physical abuse.

The National Survey of Youth in Custody released in January 2010 found that an estimated 12 percent of youth in state juvenile facilities and large non-state facilities (representing over 3000 youth nationwide) reported experiencing one or more incidents of sexual victimization by another youth or facility staff in the past 12 months or since admission, if less than 12 months. Allen Beck, Paige Harrison & Paul Guerino, Bureau of Justice Statistics Special Report: Sexual Victimization in Juvenile Facilities Reported by Youth, 2008-2009, 1, U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics (2010). Of the youth at the New Jersey Training School who responded to the survey, 23 percent reported one or more incidents of sexual victimization, almost twice the national average. Id. at 4. Of the youth at New Jersey's Juvenile Medium Security Facility, where O.S. was housed, 16 percent reported one or more incidents of sexual victimization. Id. at 31.

These findings are consistent with previous reports of abuse or mistreatment of children in juvenile justice facilities. For example, California's Department of Juvenile Justice reportedly failed to provide youth with adequate medical

and mental health treatment and was found to have regularly used pepper spray on youth. Michael Rothfeld, Juvenile Prison System Needs Reform Lawyers Say, L.A. Times, Feb. 18, 2008, at B1; Investigative findings letter from Ralph F. Boyd, Jr., Assistant Attorney General, Civil Rights Division, U.S. Department of Justice, to Yvonne B. Burke, Chair, Los Angeles County Board of Supervisor. Rev. Stat., (Apr. 9, 2003), available at http://www.justice.gov/crt/about/spl/documents/la_county_juvenile_findlet.pdf (last visited February 1, 2011). In Indiana, juvenile corrections staff exposed youth to sexually explicit content in one facility, and failed to protect youth from violence in several others. Investigative findings letter from Bradley J. Schlozman, Acting Assistant Attorney General, Civil Rights Division, U.S. Department of Justice, to Indiana Governor Mitch Daniels, (Sept. 9, 2005), available at http://www.justice.gov/crt/about/spl/documents/split_indiana_southbend_juv_findlet_9-9-05.pdf (last visited February 1, 2011). In Mississippi, staff in two juvenile facilities hog-tied youth, stripped them, and put them in dark rooms for twelve hours a day. Adam Nossiter, Lawsuit Filed Over Treatment of Girls at State Reform School in Mississippi, N.Y. Times, July 12, 2007, at A15; Investigative findings letter from Ralph F. Boyd, Jr., Assistant Attorney General, Civil Rights Division, U.S. Department of Justice, to Mississippi Governor Ronnie Musgrove,

(June 19, 2003), available at http://www.justice.gov/crt/about/spl/documents/oak_colu_miss_findinglet.pdf (last visited February 1, 2011). See also, Doug Swanson, Officials Indicted in Abuse at TYC, Dallas Morning News, Apr. 11, 2007, at 1A (Committed youth filed hundreds of complaints charging physical and sexual abuse and in Texas Youth Commission facilities); Greg Garland & Annie Linskey, Restraint Called Common at School; Youths Describe Practices at Facility Where Boy Died, Baltimore Sun, Feb. 2, 2007, at 1B; Nancy Amons, Youth Center on DCS's Radar Before Deaths, WMSV News, (June 27, 2007), <http://www.wsmv.com/news/13583136/detail.html> (last visited February 1, 2011). (In Maryland and Tennessee, staff restrained youth on the ground using dangerous restraint techniques. Three youth died as a consequence of such restraints.)

Indeed, in a landmark report commissioned by the federal Office of Juvenile Justice and Delinquency Prevention and published in 1994, researchers conducted a comprehensive survey of all public and private juvenile facilities to study conditions of confinement. Dale G. Parent, et al., Conditions of Confinement: Juvenile Detention and Corrections Facilities: Research Report, Office of Juvenile Justice and Delinquency Prevention, Executive Summary 1-2 (Aug. 1994). The researchers found wide ranging instances of abuse in facilities across the

country, including high rates of physical injuries to youth, suicidal behavior and inadequate health services. Id. at 5, 7. Based on the average rate of youth-on-youth assaults in facilities in a given 30-day period, the OJJDP study estimated that more than 24,000 youth are assaulted by other youth in juvenile facilities each year. Id. at 7.

In addition to physical abuse and inadequate medical and mental health treatment, juvenile justice facilities nationwide fail to provide adequate education or comply with federal and state education requirements. Mark Soler, Dana Shoenberg & Marc Schindler, Juvenile Justice: Lessons for a New Era, 16 Geo. J. on Poverty L. & Pol'y 483, 507 (2009). Facilities routinely ignore achievement levels of incarcerated youth, assigning them all to the same classroom, and fail to identify youth in need of special education services and to provide such youth with a free and appropriate public education (FAPE). See Sue Burrell & Loren Warboys, Special Education in the Juvenile Justice System, Juvenile Justice Bulletin, U.S. Dep't of Justice (July 2000) (available at http://www.ncjrs.gov/html/ojjdp/2000_6_5/contents.html) (last visited Feb. 2, 2011).

Attorneys representing youth in the juvenile justice system are expected to bring post-disposition matters to the court's attention - particularly those related to unsafe conditions of

confinement and failure to provide needed services. See IJA-ABA, Juvenile Justice Standards: Standards Relating to Counsel for Private Parties, Standard 2.3 cmt. (1980). If courts decline to review these post-disposition requests for relief, however, children's attorneys will be unable to protect their young clients from harm. See generally, ABA Juvenile Justice Ctr., A Call for Justice: An Assessment of Access to Counsel and Quality of Representation in Delinquency Proceedings 39-40 (1995).

Juvenile court jurisdiction over post-disposition matters is particularly important in New Jersey now, where the Office of the Child Advocate, the state-wide ombudsman program charged with investigating grievances in New Jersey juvenile facilities, has been de-funded and closed down. See Susan K. Livio, N.J. Gov. Chris Christie's Proposed Budget Eliminates Office of the Child Advocate, The Star-Ledger, Mar. 25, 2010 at 13; Editorial, N.J.'s Child Advocate Office Still Necessary, The Star-Ledger, Apr. 5, 2010 at 8 ("Gov. Chris Christie's decision to eliminate \$1.3 million for the Office of the Child Advocate could leave kids vulnerable to abuse.").

C. New Jersey Appellate Courts Have Long Recognized the Authority and Obligation of Trial Courts to Ensure that People Committed to State Custody Receive Appropriate Treatment.

On appeal, the State asserts that Appellant O.S. sought "constitutional" relief in his motion for recall. BR-5, In re

O.S., No. A-5366-09T1 (Super. Ct. N.J. App. Div. Jan. 19, 2011). To the contrary, Appellant merely asked the juvenile court to grant relief that lay within its statutory obligation to “provide for [his] care, protection, and wholesome mental and physical development ... ” and “secure for him custody, care and discipline as nearly as possible equivalent to that which should have been given by his parents.” N.J.S.A. §§ 2A:4A-21(a), (d), :4A-24(a). In other contexts, New Jersey appellate courts have recognized and upheld the authority of a trial-level court to ensure that state agencies provide necessary treatment and care to people committed to state custody pursuant to that court’s order, even where administrative grievance procedures exist.¹ For example, in In re Commitment of K.D., 357 N.J. Super. 94, (App. Div. 2003), the appellant, who was civilly committed pursuant to the Sexually Violent Predator Act, N.J.S.A. §§ 30:4-27.24 - 27.38 (SVPA), requested that the Court order an individualized treatment plan during a review hearing mandated by the SVPA. The State opposed the motion, asserting that the customary program offered to sexual offenders was sufficient and objected to an evidentiary hearing on the issue. 357 N.J. Super. at 97.

¹ Judicial Review of the actions of other branches of government is, of course, firmly embedded in American jurisprudence. See Marbury v. Madison, 5 U.S. 137; 2 L. Ed. 60 (1803).

In remanding the matter for another review hearing at which the appropriateness of the committee's treatment plan would be considered, the Appellate Division concluded that "a court has the inherent power to examine the conditions of confinement, including treatment, prescribed by the SVPA." Id. at 99 (emphasis added). Going one step further, the Court also concluded that "to stifle a particular individual's voice about inadequate diagnosis and treatment would be constitutionally inappropriate." Id., citing Jackson v. Indiana, 406 U.S. 715, 737-38, 92 S.Ct. 1845, 1858, 32 L.Ed.2d 435, 451 (1972) ("due process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed."). See also, In Interest of R. G. W., 145 N.J. Super. 167 (J. & D.R. Ct. 1976) (The juvenile court that found a youth not guilty by reason of insanity had authority to consider the adequacy of the treatment provided that youth at a state-run hospital, and to direct the youth's placement elsewhere).

Although the State's child welfare laws compel ongoing court review of the status of children in foster care, See N.J.S.A. 9:6-8.54(b), appellate courts have upheld orders by Family Court judges that tread into areas within which the Executive Branch traditionally claimed administrative discretion. See, e.g., In re C.R., 364 N.J. Super. 263 (App. Div. 2003) (even when foster parents had pursued available

administrative remedies, Family Court's determination that it lacked jurisdiction to enter order regarding child's foster care placement was error).

Like the appellant in K.D., O.S. sought relief from the Juvenile Court pursuant to a statutory scheme that confers a right to rehabilitative services, see N.J.S.A. § 2A:4A-21, and vests ongoing jurisdiction in the trial court for the duration of an order of disposition, N.J.S.A. § 2A:4A-45. In light of the clear rehabilitative purpose of the Juvenile Code and the retention of jurisdiction by the juvenile court, it was incumbent upon the court to conduct a hearing on O.S.'s motion. In refusing to do so, it "stifled the voice" of O.S., leaving him without meaningful legal recourse or protection from harm.

D. The Juvenile Justice Commission's Administrative Grievance Procedure is Insufficient to Protect O.S. From Harm.

The actual duration of any juvenile placement in New Jersey rests on the State Parole Board's determination that the youth has successfully completed the requirements of the program. N.J.A.C. §10A:71-3.24(b). While the court commits the child for a maximum number of weeks or months, the Juvenile Panel of the Parole Board may reduce the parole release date. Id. Committed youth are reviewed quarterly and annually for parole, and at each hearing the Juvenile Panel is empowered to extend or shorten the youth's tentative release date, depending on his or

her disciplinary record and participation in institutional programming. N.J.A.C. § 10A:71-3.24(a)-(d). The Board is not empowered to address a young person's claims of institutional maltreatment and, although its decisions often require children to complete specific rehabilitative programs before they may be released, the Board cannot compel the JJC administration to make such programs available to individual youth.

In addition, review hearings by the Juvenile Panel occur behind closed door. Rev. Stat., and the Board's administrative policies prohibit attorneys from being present. See N.J.A.C. § 10A:71-3.27(a). Thus, when a youth like Appellant O.S. suffers assaults by other youth and is experiencing daily anxiety over his personal safety, the Juvenile Panel can repeatedly extend his term of confinement, with no participation by counsel, for failure to progress in treatment.

Contrary to the State's assertion below and in its brief on appeal, the JJC's grievance procedure does not provide meaningful due process protections to O.S. and other committed youth. Young people in secure care are required to comply with a disciplinary and grievance structure much like that governing the adult correctional system. When youth first enter JJC custody, they receive both the "Juvenile Handbook" and the "Handbook on Discipline," which outline, inter alia, their "rights and responsibilities". N.J.A.C. § 13:101-2.1(a).

(Pursuant to N.J.A.C. § 13:101-2.1(e), if a young person cannot read, the contents of the "Juvenile Handbook," describing institutional programs and rules, must be "verbally communicated" to him or her; however, the regulations do not contain a similar requirement with regard to the "Handbook on Discipline.") Youths who, like O.S., suffer abuse at the hands of other residents or staff, have not received necessary medical or mental health treatment, or have been segregated from the general population in contravention of the relevant regulations, must submit written grievances and pursue their claims without the assistance of counsel, often in the face of a real or perceived threat of retaliation.

According to the JJC's own estimates, 57% of the children in its care require special education services pursuant to the Individuals with Disabilities Education Act, JJC Special Educ. Annual Data Report (2007), 63% are in need of mental health services, 34% were diagnosed as having more than one psychiatric disorder, and 39% enter custody with a history of child welfare system involvement. Bruce D. Stout, Community Re-Entry of Adolescents from N.J.'s Juvenile Justice System, N.J. Inst. for Soc. Justice (NJISJ) (2003). Because of their emotional, psychological and cognitive deficits, incarcerated juveniles are ill-equipped to understand and assert their legal rights in administrative hearings without counsel. Studies examining

juveniles' ability to comprehend Miranda warnings, for example, demonstrate that many juveniles do not understand the terms of Miranda well enough to make a valid waiver. Thomas Grisso et al., Juveniles' Competence to Stand Trial: A Comparison of Adolescents' and Adults' Capacities as Trial Defendants, 27 Law & Hum. Behav. 333, 356 (2003). Even when they understand the words, it is difficult for juveniles to understand their rights as entitlements that they can exercise without adverse consequences. Barry C. Feld, Police Interrogation of Juveniles: An Empirical Study of Policy and Practice, 97 J. Crim. L. & Criminology 219, 229-30 (2006).

Additionally, children are more likely than adults to acquiesce to authority figures rather than assert their legal rights. Id. at 230. Social science research also demonstrates that youth in the juvenile justice system have higher documented rates of mental health disorders, developmental immaturity, illiteracy, and poor academic performance than youth in the general population. Nancy Cowardin, Learning Disabilities and Illiteracy in the Juvenile and Criminal Justice System, in Sentencing Advocacy Resource Manual 1, Nat'l Ass'n of Sent'g Advo. (1997).

Given their developmental limitations, their lack of access to counsel in administrative review hearings, and the dissolution of the Office of the Child Advocate, youth like O.S.

cannot be expected to protect their own interests and safety without heightened safeguards, including post-disposition access to juvenile courts. And when, as in O.S.'s case, counsel asserts that a child's placement has failed to provide treatment in a rehabilitative environment, juvenile courts are empowered to correct, change, or modify the disposition. See N.J.S.A. §§ 2A:4A-43(4), (6), (7), :4A-45; N.J. Ct. R. 5:24-5, 5:24-6. The trial court clearly erred in finding that it did not have such authority. See id.; see also TR at 11-12, State v. O.S., No. FJ-04-0497-10 & FJ-2349-09 (N.J. Super. Ct. Law Div. June 10, 2010).

II. THE NEED FOR ONGOING JUDICIAL OVERSIGHT OF YOUTH IN CUSTODY IS WELL-DOCUMENTED AND WELL-ESTABLISHED.

Juvenile court standards, legal commentatOr. Rev. Stat., and state courts and legislatures around the country recognize that youth need post-disposition access to the juvenile court over and above any available administrative remedies to ensure that their placements are serving the court's rehabilitative purpose. These writings, statutory provisions, and judicial opinions reflect an emerging national consensus regarding the critical importance of court monitoring and oversight to the safety of young people while they are in custody and their potential for successful re-entry to the community upon release.

A. Caselaw and Statutes from Other Jurisdictions Recognize the Critical Role Courts Play in Protecting Children Following Adjudication and Post-Disposition

New Jersey is far from alone in granting the juvenile court ongoing jurisdiction over the care and custody of incarcerated youth. According to "Reconnecting: The Role of the Juvenile Court in Reentry," juvenile courts in four states are accorded statutory authority over the handling of state-committed youth from the beginning to the end of the process, including re-entry, while an additional forty-two states, including New Jersey, maintain jurisdiction, oversight, or some other form of jurisdiction throughout a youth's time in custody.

"Reconnecting: The Role of the Juvenile Court in Reentry."

(Reno: 2004 at 38).

This authority takes a variety of forms. In keeping with the national standards discussed above, numerous states provide for regularly-scheduled reviews of adjudicated juvenile cases. This retention of jurisdiction is explicit, and implemented in both state statute and case law. For example, in Kentucky, the statute dealing with juvenile matters grants the court "continuing jurisdiction over a child" to review dispositional orders and conduct hearings. Kt. Rev. Stat. Ann. §610.010. Massachusetts courts have held that the juvenile court "retains control over the treatment of the child who is adjudicated a

CHINS [child in need of services] and the dispositional order is revisited periodically." In re Angela, 445 Mass. 55,60 (2005).

In Alaska, the court retains jurisdiction over the juvenile and is authorized to grant a new hearing at any time "in the exercise of its power of protection over the minor and for the minor's best interest." Alaska Stat. § 47.12.160. Juvenile courts in California, Nebraska, Louisiana, and Kentucky possess similar authority. In California, the court is authorized to "join in the juvenile court proceedings [of] any agency" that the court determines has failed to meet a "legal obligation to provide services to the minor" and Kentucky courts may continue or terminate orders of commitment due to a lack of adequate treatment. Cal. Welf. & Inst. Code § 727; Ky. Rev. Stat. Ann. § 610.125. California case law shows that the court's authority may be invoked when it is apparent that the California Youth Authority has failed in its care of a juvenile. Massachusetts courts may consider whether the "purposes of the dispositional order have been accomplished" when making a decision on whether to extend an order. In re Anotine D., Cal. App. 4th 1314, 1325 (2006); Mass. Gen. Laws ch. 119 §39G.

Juvenile justice agencies in Louisiana and Nebraska are required to submit to court ordered- modifications of original orders. The Louisiana Department of Public Safety and Corrections is required to comply with any modifications of the

original disposition, even after the “adjudicated juvenile has been placed in the custody of the department” and the Nebraska Juvenile Code permits the court, when acting in the juvenile’s best interest, to modify the original plan, propose an alternative, or implement another plan. La. R.S. 15:901; Neb.Rev.Stat. §43-284.01.

In addition to the juvenile court’s authority to act on its own accord, several states allow, or require, courts to conduct periodic dispositional review hearings of juvenile cases. In Pennsylvania, judicial review hearings may be held at any time but at least every six months when youth are removed from their homes. Pa.R.J.C.P. No. 610. The Alaskan, Indiana, Maine, and New Hampshire courts are all authorized to review their disposition orders on an annual basis, or, at any time. Alaska Delinquency R. 25 (2010); Ind. Code Ann. § 31-37-20-2 (2010); Me. Rev. Stat. 15 § 3315; N.H. 169-D:21.

In Iowa, the court holds review hearings to “determine the future disposition status of the child.” Iowa Code § 232.50. Michigan courts are required to conduct “periodic hearings to review dispositional orders” in certain types of delinquency placement cases. Mich. Ct. Rules 3.945. These reviews can be conducted at intervals decided upon by the court and allow the court to modify or amend the original order. Id. See also

OK. Stat. Ann. § 2-2-504 (requiring six-month reviews); R.I. Gen. Laws 1956 § 14-1-42 (hearing to modify or revoke dispositional order may be conducted at any upon petition of parent, guardian, or counsel for child; court may order "any other arrangements for the child's care and welfare that the circumstances of the case may require."); Va. Code Ann. §§ 16.1-285.2 and 16.1-289 (permitting review hearings in all cases and requiring hearings in matters involving "serious offenders."); Wis. Stat. Ann. §938.357 (change in placement permitted upon request of child or parent); Wyo. Stat. Ann. §14-6-229(e) (ii) (B) (mandatory court reviews every six months when child placed out of the home). Cf. N.Y. F.C.A. § 355.3 (annual extension of placement hearing mandated when juvenile held past minimum placement term).

A number of states require placement agencies to submit periodic reports to the court and, in turn, grant the court authority to conduct review hearings to address issues raised in those reports. In Oregon, for example, the placement agency must file reports as often as the committing court requires. Or. Rev. Stat. 419C.620. The reports must include, inter alia, an "analysis of the need for services and assistance, . . . [and] a proposed reformation plan or case plan . . . including, where applicable, a description of services to be provided in

furtherance of the youth offender's reformation and safe return to the community." Or. Rev. Stat. 419C.623. Upon receiving such a report, the court is permitted to hold a review hearing; the court also is required to hold a review hearing upon request of the youth or the youth's attorney or parents or a number of other relevant agencies or on its own motion. Or. Rev. Stat. 419C.626. Similar schemes have been adopted in Maryland (see Md. Cts. & Jud. Proc. Code Ann. §3-826); Utah (see Utah C.J.A. 7-305); Wyoming (Wyo. Stat. Ann. §14-6-229(e)(ii)(A) (mandatory report every three months)).

Even where no explicit statutory mandate compels regular judicial review of the status of youth committed to state custody, many appellate courts have interpreted "ongoing jurisdiction" provisions to permit such oversight and intervention. In Louisiana, for example, the state Supreme Court upheld the juvenile court's authority to order the transfer of youths from a state facility in the face of unconstitutional conditions of confinement, even though classification and institutional assignments generally fall within administrative discretion. State of Louisiana In re R.C. et al., v. La. Dep't of Pub. Safety and Corr., 838 So.2d 714, 2002-3025 (2002). See State in the Interest of S.D., 02-0672 (La.App. 4th Cir.11/6/02), 832 So.2d 415; In re Julianna B. ,

179 Md.App. 512, 947 A.2d 90 (2008), appeal dismissed as moot, 407 Md. 657, 967 A.2d 776 (2009) (juvenile court abused its discretion in refusing to modify dispositional order to compel placement agency to grant juvenile home passes and other relief).

**B. National Standards as well as CommentatOr. Rev. Stat.
Urge Judicial Involvement in Post-Disposition Proceedings**

As early as 1977, the Institute of Judicial Administration and the American Bar Association recognized the need for continuing jurisdiction and judicial oversight of dispositional orders throughout the length of a young person's incarceration. The IJA/ABA Standards for Juvenile Justice mandate, inter alia, stating that juvenile court orders "may be modified by that court at any time when it has jurisdiction over the matter . . . upon petition of a party or by the juvenile court sua sponte": that "every order committing any juvenile to the custody of the state . . . should be reviewed . . . without the request of a party not less than once every six months; and, most strikingly, that "the juvenile, his or her parents . . . or guardian may petition the juvenile court to inquire into the adequacy of the treatment being afforded the juvenile." Barbara Danziger Flicker, Standards for Juvenile Justice: A Summary and Analysis, "Appeals and Collateral Review," IJA/ABA, Part VI, §§ 6.1, 6.3, 6.4 (emphases added).

More recently, the National Council of Juvenile and Family Court Judges (NCJFCJ), the country's leading juvenile court policy and professional organization, published the Juvenile Delinquency Guidelines (Reno: 2005) ("Guidelines"), a comprehensive set of principles and standards for delinquency proceedings. Two of the Guidelines' key principles affirm the central importance of post-dispositional judicial oversight:

13. Juvenile delinquency court judges should ensure effective post disposition review is provided to each delinquent youth as long as youth is involved in any component of the juvenile justice system.

14. Juvenile delinquency court judges should hold their systems and the systems of other juvenile delinquency court stakeholders accountable

Guidelines at 23. According to the Guidelines, "Juvenile courts should use their statutory oversight authority to the fullest extent possible in reviewing placed youth. [Even] if the juvenile delinquency court does not have oversight authority, it should work together with the governmental systems that do have oversight authority to ensure that all delinquent youth are being held accountable and are receiving needed services in a timely fashion." Id. at 177.

Pursuant to the Guidelines, juvenile court judges, in reviewing the status of committed youth, should:

1. Ensure the placement provider, probation officer, child protection worker, and corrections system staff is providing the services that have been ordered by the court, and that the services are available in a timely manner;
2. Determine if the youth and parent or legal guardian are following through with the delinquency court's orders;
3. Ensure that the youth and parent are making progress, or if not, appropriate responses occur;
4. Resolve disputes regarding placement and reentry planning and approve modifications to the court approved plan as needed; and
5. Reinforce positive change of the youth and parents.

Id. at 180. The Guidelines further urge courts, where possible, to join government agencies and other service providers as parties to the post-dispositional review hearing, " a valuable method to engage service providers, education systems, and agencies that do not appear to be providing needed services, and to encourage them to fulfill their statutory duties." Id. at 180-181. Although the Guidelines acknowledge that it is not the purpose of the court to interfere in the day-to-day administration of facilities, they leave no doubt about the central role juvenile courts must play in ensuring that young people receive necessary assistance and protection.

The NCJFCJ again acknowledged the essential nexus between post-dispositional judicial oversight and successful re-entry in "Reconnecting: The Role of the Juvenile Court in Reentry." (Reno: 2004). This manual, which was written by a group of juvenile court judges, probation officers, prosecutOr. Rev. Stat., defense attorneys, and legal academics, accords post-dispositional review a central place in its "Guiding Principles." These include the following:

Principle 6: The committing court should remain informed about the progress of youth committed to institutional care;

Principle 7: The court should have the authority to conduct pre-release and post-release review hearings on committed juveniles;

Principle 12: The court should have the authority to hold . . . agencies accountable for failures to comply with court orders or meet their legal responsibilities; and

Principle 13: The court should give consideration to the effect of its orders on institutional discipline, programming, and available resources.

Id. at ix-x.

A survey of juvenile justice literature, furthermore, reveals a growing recognition of the importance of post-dispositional review. According to Laurence Steinberg and Ron Haskins, for example, "Monitoring results is a must for conducting a modern juvenile correctional system that can gauge its success and make changes based on the effects produced by

its programs.” Laurence Steinberg & Ron Haskins, The Future of Children, Keeping Adolescents Out of Prison 6 (2008), www.campaignforyouthjustice.org/documents/NR_KeepingAdolescents.pdf. Another commentator observed: “The lack of mandatory review hearings and of post-dispositional representation is a cause for great concern. . . . Review hearings and post-dispositional advocacy, which are often the lowest priority for delinquency attorneys and the court system, have the power to reduce recidivism, decrease juvenile justice expenditures, and prevent institutional abuse.” Sandra Simkins, Out of Sight, Out of Mind: How the Lack of Post-Dispositional Advocacy in Juvenile Court Increases the Risk of Recidivism and Institutional Abuse, 60 Rutgers L.Rev. 100, 103 (2007). See also, Marsha Levick & Neha Desai, Still Waiting: The Elusive Quest to Ensure a Constitutional Right to Counsel at All Stages of the Juvenile Court Process, 60 Rutgers L. Rev. 175, 182 (2007); Robin Walker Sterling, National Juvenile Defender Center, Role of Juvenile Defense Counsel in Delinquency Court, 4-6 (2009), www.njdc.info/pdf/role_of_juvenile_defense_counsel.pdf.

CONCLUSION

The trial court’s denial of Appellant’s recall motion leaves O.S. – a child who was assaulted repeatedly by other youth, so severely that his jaw was broken – to fend for himself

in an unsafe placement, despite New Jersey law which mandates that the court intervene to safeguard wards of the State from injury. See N.J.S.A § 2A:4A-21(e); TR - 6. Incarcerated youth require heightened safeguards to ensure that the care provided to them remains "as nearly as possible equivalent to that which should have been given by their parents." N.J.S.A § 2A:4A-21(d). Fundamental to invoking and enforcing these safeguards is unfettered access to the courts. McCarthy v. Madigan, 503 U.S. 140, 153 (1992) (finding that the right to file a court action is a fundamental right, preservative of all other rights). Indeed, "a juvenile's need for access to the courts may even be greater than an adult's in that access to the courts assists the rehabilitative process." John L. v. Adams, 740 F. Supp. 288, 292 (M.D. Tenn. 1990), aff'd, 969 F.2d 228 (6th Cir. 1992). Accordingly, the trial court's ruling - which cut off Appellant O.S.'s access to the courts, endangered his personal safety and disregarded the law - should be reversed.

Dated: February 3, 2011

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