

**IN THE COURT OF APPEALS
FOR THE STATE OF NEBRASKA**

CASE NO. XX

**THE STATE OF NEBRASKA
IN THE INTEREST OF**

XX,

**A CHILD UNDER EIGHTEEN
YEARS OF AGE**

**Appeal from the Separate Juvenile Court of Lancaster County, Nebraska
The Honorable Reggie L. Ryder, Juvenile Judge**

BRIEF OF APPELLANT

TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
STATEMENT OF JURISDICTION.....	1
STATEMENT OF THE CASE.....	1
1. <u>Nature of the Case</u>	1
2. <u>Issues Tried in Court Below</u>	2
3. <u>How the Issues Were Decided</u>	2
4. <u>Scope of Review</u>	3
ASSIGNMENTS OF ERROR	3
SUMMARY OF ARGUMENT	3
PROPOSITIONS OF LAW	4
STATEMENT OF FACTS	6
ARGUMENT	11
CONCLUSION.....	18

TABLE OF AUTHORITIES

CASES

State v. Carlson, 260 Neb. 815, 619 N.W.2d 832 (2000).....13

In re Interest of Dakota M., 279 Neb. 802 781 N.W.2d 612 (2010)..... 4, 11

In re Dalton S., 273 Neb. 504, 730 N.W.2d 816, (2007).....4, 5, 6, 11, 12, 13

In re Gault, 387 U.S. 1 (1967)16

State v. Hunter, 138 N.M. 96, 117 P.3d 254 (2005)13

State v. Jennifer W., 3 Neb. App. 274, 526 N.W.2d 233 (1994).....4, 11

United States v. Johnson, 978 F.Supp. 1305 (D. Neb 1997)12

In re Joseph G., 196 Misc. 2d 904, 76 N.Y.S.2d. 455 (2003)16

State v. Kiett, 121 N.J. 483, 582 A.2d 630 (1990)16

State ex rel. K.M., 592 Utah Adv. Rep. 33, 173 P.3d 1279 (2007).....13, 14, 15

State ex rel. K.M., 546 Utah Adv. Rep. 3, 136 P.3d 1230 (2006).....13

State v. M.H., 227 Neb. 446, 418 N.W.2d 226 (1988).....4, 11

State v. Paul, 256 Neb. 669, 592 N.W.2d 148 (1999).3

State v. Williams, 276 Neb. 716, 257 N.W.2d 187 (2008).....6, 13

In re Interest of Wolkow, 206 Neb. 512, 293 N.w.2d 851 (1980).....1

STATUTES/REGULATIONS

NEB. REV. STAT. §§ 25-1901, *et. al.* (Reissue 2008)1

NEB. REV. STAT. §28-106(1) (Reissue 2008).....2

NEB. REV. STAT. § 28-519(4) (Reissue 2008).1

NEB. REV. STAT. § 43-272 (Revised 2008).....5

NEB. REV. STAT. § 43-279 (Revised 2008).....6, 12

NEB. REV. STAT. § 43-2,106.01 (Reissue 2008)1, 4, 11

STATEMENT OF JURISDICTIONSTATEMENT OF JURISDICTION

Appellant appeals from a judgment and a sentence rendered following an initial admission to criminal mischief, pursuant to the authority granted by NEB. REV. STAT. §§ 25-1911 (Reissue 2008); 25-1912 (Reissue 2008); 43-2,106.01 (Reissue 2008).

A. Judgment and orders to be reviewed include the denial of the Motion to Withdraw the admission and the disposition imposed thereafter by the Separate Juvenile Court of Lancaster County. Appellant was committed to the custody of Nebraska Department of Health and Human Services, Office of Juvenile Services, for placement at the highest level of residential treatment, Youth Rehabilitation and Treatment Center (“Y.R.T.C.”) in Kearney, Nebraska on May 6, 2010. (T5). For the purposes of a juvenile case, there can be no appeal until there has been a judgment or a final order in the court from which the appeal is taken. *In re Interest of Wolkow*, 206 Neb. 512, 516, 293 N.w.2d 851, 854 (1980).

B. No motions have been filed that toll the time within which to appeal.

C. On May 28, 2010, Appellant timely filed a notice of appeal and request to proceed in forma pauperis, (Supp. to Transcript)

D. This is not an interlocutory appeal.

STATEMENT OF THE CASESTATEMENT OF THE CASE

Nature of the Case.

On July 10, 2009, a Petition was filed in the Separate Juvenile Court of Lancaster County charging Appellant with Criminal Mischief, a Class II misdemeanor in violation of NEB. REV. STAT. § 28-519(4) (Reissue 2008). A Class II misdemeanor is punishable by a maximum of six months in prison, a \$1,000 fine, or both. NEB. REV. STAT. §28-106(1) (Reissue 2008); (T2). At

the initial adjudication hearing on August 13, 2009, Appellant appeared without counsel and admitted the charge in the Petition. (12:23-15:22). The Court inquired regarding the volition and the competence of the plea, and concluded that Appellant's admission was made freely, voluntarily, and intelligently with the consent of his parent. (16:1-19-3). The Court then requested the State to provide a factual basis for the charge. (19:4-20:4). After considering the factual basis for the charge, the Court accepted Appellant's admission and found the charge to be true. (20:17-24). The matter was then set for disposition. (24:7-9).

On April 2, 2010, Appellant appeared with counsel and moved to withdraw his previous admission prior to disposition. (27:2-7). The Court initially overruled Appellant's motion; however, the court withdrew its ruling and set the matter for further hearing. (27:8-10; 39:8-10). On April 12, 2010, the Court heard additional evidence on Appellant's Motion to Withdraw his admission and, again, set the matter for further hearing. (40:30-89:2). On May 6, 2010, the Court overruled Appellant's Motion to Withdraw the admission and proceeded to disposition (110:2-9).

2. Issues Tried in the Court Below.

The contested issue before the Juvenile Court was whether there was a fair and just reason which would have allowed Appellant to withdraw his initial admission.

3. How the Issues Were Decided.

The Appellant entered an admission to Criminal Mischief (12:23-25) and on May 6, 2010, the Court overruled Appellant's Motion to Withdraw his admission and committed Appellant to the Nebraska Department of Health and Human Services, Office of Juvenile Services at the highest level of residential treatment, the Y.R.T.C. in Kearney, Nebraska until his discharge or parole. (T4-5; 110:2-119:5)

4. Scope of Review.

The scope of review in an appeal is limited to the errors assigned and discussed in the appellant's brief and the appellate court's right to note plain error appearing on the record. *State v. Paul*, 256 Neb. 669, 677, 592 N.W.2d 148, 155 (1999). An appellate court reviews juvenile cases *de novo* on the record and reaches its conclusions independently of the juvenile court's findings. *In re Interest of Dakota M.*, 279 Neb. 802, 804, 781 N.W.2d 612, 614 (2010). To the extent an appeal calls for statutory interpretation or presents questions of law, an appellate court must reach an independent conclusion irrespective of the determination made by the court below. *Id.*

ASSIGNMENT OF ERROR

I. The Juvenile Court erred in denying the juvenile Appellant's Motion to Withdraw his admission, where that admission resulted from an unknowing and uncounseled waiver of his right to counsel.

SUMMARY OF ARGUMENT

I. Appellant's Motion to Withdraw his initial admission was improperly overruled by the Separate Juvenile Court of Lancaster County and a sentence of confinement was improperly imposed. Appellant's admission resulted from an unknowing and uncounseled waiver of his right to counsel. Like many children appearing in court for the first time, Appellant had no independent knowledge of the importance of counsel; and moreover, he did not understand what his rights were or fully appreciate the possible consequences of his admission. Nebraska criminal law provides that a court may allow a defendant to withdraw his plea for any fair and just reason as long as the prosecution had not been or would not be substantially burdened.

Juvenile courts have an even greater responsibility to apply the law appropriately to the children before them. In particular, a child's initial admission as well as any subsequent attempts to withdraw such admissions or waivers must be treated with special care. Here, not only is the fact that Appellant's admission was made unknowingly and uncounseled a "fair and just reason," but the fact that he has maintained and brought evidence to establish his innocence supports the withdrawal of his initial admission.

PROPOSITIONS OF LAW PROPOSITIONS OF LAW

I

An appellate court is to review a final order or judgment entered by a juvenile court in the same manner as an appeal from district court.

NEB. REV. STAT. § 43-2,106.01 (Reissue 2008);

State v. M.H., 227 Neb. 446, 447, 418 N.W.2d 226, 227 (1988).

II

An appeal from juvenile court is heard *de novo* upon the record and the appellate court must its conclusions independently of the juvenile court's findings.

In re Interest of Dakota M., 279 Neb. 802, 804, 781 N.W.2d 612, 614 (2010);

State v. Jennifer W., 3 Neb. App. 274, 278, 526 N.W.2d 233, 237 (1994).

III

When a juvenile is brought before a juvenile court, the court shall advise the juvenile of their right to retain counsel, their right to appointed counsel at the county expense if their family

cannot afford an attorney, and shall inquire as to whether they desire to retain counsel.

NEB. REV. STAT. § 43-272;

In re Dalton S., 273 Neb. 504, 510, 730 N.W.2d 816, 822 (2007).

IV

Whether a juvenile has knowingly, voluntarily, and intelligently waived the right to counsel is to be determined from the totality of the circumstances, including the age, intelligence, and education of the juvenile; the juvenile's background and experience generally, and more specifically, in the court system; the presence of the juvenile's parents; the language used by the court in describing the juvenile's rights; the juvenile's conduct; the juvenile's emotional stability; and the intricacy of the offense.

In re Dalton S., 273 Neb. 504, 510, 730 N.W.2d 816, 822 (2007).

V

The juvenile court's determination as to whether a juvenile's waiver of counsel was voluntary, knowing, and intelligent is reviewed *de novo* on the record for an abuse of discretion.

In re Dalton S., 273 Neb. 504, 509, 730 N.W.2d 816, 822 (2007).

VII

The juvenile court must also inform the parties of the nature of the proceeding and possible dispositions and the juvenile's rights against self-incrimination, to confront witnesses, to testify and to compel other witnesses to testify, to a speedy adjudication, and to appeal. After giving such warnings and admonitions, the court may accept an in-court admission by the

juvenile of all or any part of the allegations in the Petition if the court has determined from the examination of the juvenile that such admission is intelligently, voluntarily, and understandably made with an affirmative waiver of rights.

NEB. REV. STAT. § 43-279 (Revised 2008).

VIII

Courts should take special care in scrutinizing a purported confession or waiver by a child and employ language that the juvenile can understand and take the time necessary to conduct a sufficient inquiry into the juvenile's understanding of the right to counsel and the waiver thereof.

In re Dalton S., 273 Neb. 504, 515, 730 N.W.2d 816, 826-27.

IX

In criminal court, after the entry of a plea of guilty or no contest, but before sentencing, the court, in its discretion, may allow an adult defendant to withdraw his or her plea for any fair and just reason, provided that the prosecution has not been or would not be substantially prejudiced by its reliance on the plea entered. *State v. Williams*, 276 Neb. 716, 721, 257 N.W.2d 187, 192 (2008).

STATEMENT OF FACTS

On June 13, 2009, two youth reported to a Lancaster County Deputy Sheriff that they had witnessed three white juvenile males throwing rocks at an abandoned gas station building located in Hickman, Nebraska. (19:9-13; 97:19-20). The youth reported they had observed a glass window break causing an approximate eight inch by eight-inch hole and 43-inch crack to the

window. (19:14-16). The two youth also identified the three white juvenile males as Andrew Naderhoff, Austin Grant, and Appellant. (19:17-18). Appellant, Austin Grant and Andrew Naderhoff were contacted and admitted throwing rocks; however, they denied the damage was a result of them throwing rocks. (19:18-21). All three boys were cited for criminal mischief and the owner of the building was notified. (19:21-24). An estimate performed by Lincoln Glass, Inc. indicated that the replacement cost of the window is \$388.00. (19:25-20:2).

On July 10, 2009, a Petition was filed in the Separate Juvenile Court of Lancaster County charging Appellant with Criminal Mischief, a Class II misdemeanor in violation of NEB. REV. STAT. §28-519(4) (Reissue 2008). (T2). Appellant appeared without counsel at the initial adjudication hearing on August 13, 2010, which was the first time he had appeared in court before. (21:22-23). The Court explained Appellant's rights that applied to the charge. (5:2-9:8). Initially, the Court explained Appellant's right to be represented by an a "private attorney" or "if the family cannot afford the services of an attorney and you would like to have an attorney represent you on this case, I would appoint one at no cost to you if you were to make that request and I would determine that the family cannot afford an attorney." (5:12-24). The Court then told Appellant that he "can waive or give up your right to an attorney and proceed without the services of an attorney during the course of this proceeding." (5:25-6:2).

Next, the Court discussed potential consequences that could stem from the charge in the Petition. (9:9-11:23). The Court mentioned the possibility of placement at the Juvenile Detention Center but followed with, "hopefully that's not going to occur." (8:9-11). Additionally, in regard to the possible dispositions available to Appellant, the Court noted that the option of allowing Appellant to remain in his family home is "what we'd prefer to be able to do." (9:24-10:1). In response to the Court asking Appellant what he "would like to do as it relates to the

attorney,” Appellant asked if he could talk to his mother “about it.” (12:11-14). The record does not reflect any communication between Appellant and his mother; however, Appellant then provided the Court a one word response of “Proceed.” (12:17). After waiving his rights to an attorney, he admitted the charge in the Petition. (12:23-15:22). The Court inquired regarding the volition and the competence of the plea, and concluded that Appellant’s admission was made freely, voluntarily, and intelligently with the consent of his parent. (16:1-19-3). The Court then requested the State to provide a factual basis for the charge and after considering the factual basis, the Court accepted Appellant’s admission and found the charge to be true. (19:4-20:24). The matter was then set for disposition. (24:7-9).

On April 2, 2010, Appellant appeared with counsel and moved to withdraw his previous admission prior to disposition. (27:2-7). Appellant presented evidence indicating that disposition report was completely void of any police reports to sustain the allegations of the case. (27:11-20). Additionally, evidence was presented that since coming into the jurisdiction of the Juvenile Court, Appellant has denied that he threw a rock that may have caused damage to the vacant gas station building. (31:2-18). Appellant stated that the initial admission he made to the allegation was done without the advice of counsel, after hastily waiving his right to counsel. (35:5-17). Due to the lack of evidence corroborating the charge against Appellant, the fact that Appellant’s initial admission was uncounseled, and Appellant’s subsequent denials, Appellant argued that there is just and fair reason to withdraw his admission. (35:12-17). The Court initially overruled Appellant’s motion; however, the court withdrew its ruling and set the matter for further hearing. (27:8-10; 39:8-10).

On April 12, 2010, the Court heard additional evidence on Appellant’s Motion to Withdraw his admission. (40:3-89:2). Appellant’s mother testified that she had spoken to

Andrew Kerry (previously referred to as Andrew Naderhoff) on April 1, 2010, regarding the June 13, 2010 incident with him, Austin Grant and Appellant. (44:15-45:4). Additionally, she spoke with Austin Grant on April 8, 2010. (52:15-19). Based on her conversations with Andrew Kerry and Austin Grant, Appellant's mother was made to believe her son should withdraw his plea "because he didn't do it." (54:19-13). Appellant's mother testified that had she known there were at least two witnesses that claimed her son did not throw a brick at the abandoned gas station, she would not have allowed her son to make an admission in the case. (58:15-22). Furthermore, she testified she would like for the Court to allow Appellant to withdraw his admission to the Petition. (59:8-13).

The Court then questioned Appellant's mother regarding whether or not she had a chance to speak with Appellant about his right to be represented by an attorney at the August 13, 2009 hearing. (65:23-66:8). Appellant objected to the Court asking the witness questions other than clarifying questions, which was overruled. (66:13-66:18). The Court continued to question Appellant's mother regarding the August 13, 2009 hearing and subsequently overruled Appellant's continuing objections and Motion to Recuse the Judge from the case on the grounds of taking the position of a party in the case. (66:19-69:2). Appellant's mother further testified that at the time Appellant waived his right to counsel, she did not have funds for a lawyer and believed that the Court would appoint an attorney only based upon her earning capacity. (69:7-70:14). Appellant's mother clarified that she does not have any education in the legal field, she was not aware of all the facts surrounding the June 13, 2009 incident and had not been provided with any reports from law enforcement, County Attorney, or the Court on or before the August 13, 2009 hearing. (70:21-72:15). She further testified that her son had seemed confused as to his rights to confront witnesses, issue subpoenas, remain silent, a speedy adjudication, and the right

to have a trial or hearing where the prosecution prove the allegation contained within the Juvenile Petition beyond a reasonable doubt. (74:4-79:13).

Appellant testified that he did not throw a brick through the abandoned gas station window, that he is innocent of the allegation contained in the Petition, and that he has maintained his innocence throughout various interviews with personnel from the Sheriff's Office, Probation Office, Attention Center as well as mental health therapists and case workers. (85:18-21; 86:12-87:6). He further testified that prior to the August 13, 2009 hearing, he did not discuss the facts of the case with an attorney and that we would like the Court to allow him to withdraw his initial uncounseled admission. (85:22-86:3; 87:10-14). Appellant testified that the August 13, 2009 hearing was his first experience in court, he did not understand what the Judge was saying, and his admission was not made knowingly (87:23-8). The hearing was recessed and set for further hearing. (88:12-89:2).

On May 6, 2010, Austin Grant testified that he was with Appellant on June 13, 2009 at the abandoned gas station in Hickman. (91:20-92:10). Mr. Grant further testified that Appellant did not throw a rock, and Andrew Kerry threw a rock which broke the gas station window. (92:11-17). Moreover, Mr. Grant testified that Appellant was "the most innocent of [them] all" in that he did not pick up a rock. (96:10-15).

Kerry Dean, a Juvenile Probation Officer, was questioned generally about whether the State would be prejudiced if Appellant is allowed to withdraw his admission. (100:24-101:9). The State argued that it has invested resources in Appellant as a result of his admission. (101:9-12). The Court sustained Appellant's objection as to relevance and the State withdrew Mr. Dean as a witness. (101:20-102:4). The Court then overruled Appellant's Motion to Withdraw the admission and, after hearing further testimony from Appellant's mother regarding Appellant's

disabilities and his successful completion of intensive outpatient treatment, the Court committed Appellant to the Office of Juvenile Services at the highest level of care, the Y.R.T.C. in Kearney until his is discharged or paroled. (110:4-5; 113:8-119:5).

ARGUMENT

I. THE SEPEARATE JUVENILE COURT OF LANCASTER COUNTY, NEBRASKA, ERRED IN DENYING THE JUVENILE APPELLANT'S MOTION TO WITHDRAW HIS ADMISSION, WHERE THAT ADMISSION RESULTED FROM AN UNKNOWING AND UNCOUNCELED WAIVER OF HIS RIGHT TO COUNSEL.

The Appellant urges that his Motion to Withdraw his admission was improperly overruled by the Juvenile Court and a disposition of confinement was improperly imposed. An appellate court is to review a final order or judgment entered by a juvenile court in the same manner as an appeal from district court. NEB. REV. STAT. § 43-2,106.01; see also *State v. M.H.*, 227 Neb. 446, 447, 418 N.W.2d 226, 227 (1988). An appeal from juvenile court is heard *de novo* upon the record and the appellate court must its conclusions independently of the juvenile court's findings. *In re Interest of Dakota M.*, 279 Neb. 802, 781 N.W.2d 612 (2010); see also *State v. Jennifer W.*, 3 Neb. App. 274, 278, 526 N.W.2d 233, 237 (1994).

When a juvenile is brought before a juvenile court, the court shall advise the juvenile of their right to retain counsel and shall inquire as to whether they desire to retain counsel. NEB. REV. STAT. § 43-272. Additionally, the court shall inform such juvenile of their right to appointed counsel at county expense if their family cannot afford an attorney. *Id.* Whether a juvenile has knowingly, voluntarily, and intelligently waived the right to counsel is to be determined from the totality of the circumstances. *In re Dalton S.*, 273 Neb. 504, 510, 730

N.W.2d 816, 822(2007). The circumstances to be considered include the age, intelligence, and education of the juvenile; the juvenile's background and experience generally, and more specifically, in the court system; the presence of the juvenile's parents; the language used by the court in describing the juvenile's rights; the juvenile's conduct; the juvenile's emotional stability; and the intricacy of the offense. *Id.* The juvenile court's determination as to whether a juvenile's waiver of counsel was voluntary, knowing, and intelligent is reviewed *de novo* on the record for an abuse of discretion. *In re Dalton S.*, 273 Neb. at 509, 730 N.W.2d at 822.

In addition to advising the juvenile of their right to counsel, the juvenile court must also inform the parties of the nature of the proceeding and possible dispositions and the juvenile's rights against self-incrimination, to confront witnesses, to testify and to compel other witnesses to testify, to a speedy adjudication, and to appeal. NEB. REV. STAT. § 43-279. After giving such warnings and admonitions, the court may accept an in-court admission by the juvenile of all or any part of the allegations in the Petition if the court has determined from the examination of the juvenile that such admission is intelligently, voluntarily, and understandably made with an affirmative waiver of rights. *Id.*; *see also United States v. Johnson*, 978 F.Supp. 1305 (D. Neb 1997)(suggesting that if the juvenile waived his right to counsel and admitted the allegations based solely on his mother and stepfather's advice without really knowing what he was doing, it may have qualified as an invalid waiver of counsel which could lead to his plea being set aside). More recently, the Nebraska Supreme Court cautioned, "[c]ourts should take special care in scrutinizing a purported confession or waiver by a child." *In re Dalton S.*, 273 Neb. at 515, 730 N.W.2d at 826-27. The Court emphasized that courts should take care to employ language that the juvenile can understand and take the time necessary to conduct a sufficient inquiry into the juvenile's understanding of the right to counsel and the waiver thereof. *Id.*

In criminal court, after the entry of a plea of guilty or no contest, but before sentencing, the court, in its discretion, may allow an adult defendant to withdraw his or her plea for *any* fair and just reason, provided that the prosecution has not been or would not be substantially prejudiced by its reliance on the plea entered. *State v. Williams*, 276 Neb. 716, 721, 257 N.W.2d 187, 192 (2008)(emphasis added); *see also State v. Hunter*, 138 N.M. 96, 104, 117 P.3d 254, 262-63 (2005)(finding a number of states allow for pre-sentence plea withdrawal if adult defendant can show a fair and just reasoning). In these cases, the burden is on the defendant to establish by clear and convincing evidence the grounds for withdrawal of a plea. *State v. Carlson*, 260 Neb. 815, 826, 619 N.W.2d 832, 839 (2000). However, regarding children, Juvenile Courts must employ “special care” in the initial acceptance of a child’s initial admission as well any subsequent attempts to withdraw such admissions. *See In re Dalton S.*, 273 Neb. at 515, 730 N.W.2d at 826-27.

The admissions of juveniles and their subsequent requests for withdrawals touch on a number of bedrock dilemmas that confront a society founded on the rule of law when the State is called upon to bring the power of that law to bear on persons who, because of their youth, cognitive deficits, or other disabilities, are incapable of comprehending how or why they are being held to account for their behavior. *State ex rel. K.M.*, 592 Utah Adv. Rep. 33, 8, 173 P.3d 1279, 1282 (2007); *see also* Lacy Cole Singleton, Say “Pleas”: Juveniles’ Competence to Enter Plea Agreements, 9 J.L.FAM.STUD. 439 (2007)(suggesting that Juvenile Courts must: 1) recognize the effect of a learning disability, 2) avoid acquiescence to authority by using open-ended questions when determining whether or not an admission was made freely and voluntarily, and 3) that courts should treat a juvenile plea withdrawal as a parallel to contractual avoidance). An example of this dilemma in real world terms is the scenario where a juvenile is too young to

enter into a legally binding contract to purchase goods and, if entered, the contract can be voided; but, that same juvenile can validly waive constitutional rights and enter into a legally binding plea agreement. *State ex rel. K.M.*, 546 Utah Adv. Rep. 3, 22, 136 P.3d 1230, 1237 (Orme, J., dissenting).

In *K.M.*, a juvenile court accepted a 15 year-old, girl's admission to child abuse homicide. The juvenile subsequently moved to withdraw her admission, which was denied by the juvenile court and the denial was affirmed by the court of appeals. *Ex rel K.M.*, 592 Utah Adv. Rep. at 6, 173 P.3d at 1281. The Supreme Court of Utah reversed because it was determined that the juvenile court failed to afford due process of the law to the juvenile because she did not understand the nature and the elements of the offense and accepted a plea unknowingly. *Ex rel K.M.*, 592 Utah Adv. Rep. at 36, 173 P.3d at 1289. In particular, the juvenile asserted that even though she was represented by counsel, she "understood little or none" of the admission colloquy and that she was pressured into admitting the allegation. *Ex rel K.M.*, 592 Utah Adv. Rep. at 7, 173 P.3d at 1281. The court affirmed that a juvenile's decisions about legal affairs may be influenced in varying degrees by the demands and expectations of family and peers. Moreover, there are a countless array of other forces that may diminish a child's ability to exercise the independent decision-making judgment we assume to be available to adults. *Ex rel K.M.*, 592 Utah Adv. Rep. at 9, 173 P.3d at 1282. The court clarified that juveniles are guaranteed Constitutional protection against arbitrary infliction of the coercive power of the State "even in those instances where there is little doubt that the juvenile would also benefit from lessons imparted by taking responsibility for one's conduct." *Ex rel K.M.*, 592 Utah Adv. Rep. at 10, 173 P.3d at 1282.

Here, like the juvenile in *K.M.*, Appellant maintains his innocence and testified that his admission was not made knowingly. In fact, the initial hearing where Appellant admitted the charge in the Petition was his first experience in court and he “didn’t really understand what [the Judge] was saying.” (88:2-4). Both Appellant and his Mother were not familiar with the protections that Appellant was waiving by entering an admission, and neither of them were presented with police reports or any other documentation that were used as a basis for the charge in the Petition. The Court’s language that “hopefully [placement at the Juvenile Detention Center] is not going to occur” and “we’d prefer to be able to [allow Appellant to remain in his family home]” was appealing to Appellant and his Mother. (8:9-11; 9:24-10:1). In addition to his youth, inexperience with the courtroom setting and his desire to avoid being removed from his home, Appellant had the additional “dilemmas” of his disabilities and expectations of his Mother that diminished his ability to exercise the independent decision-making judgment needed for his admission to be voluntary and knowing. (12:11-17; 113:19). While it is apparent the Court felt as if Appellant would benefit from taking responsibility for his alleged conduct by being committed, that is not sufficient to arbitrarily deny him his Constitutional protections and prevent him from withdrawing his uncounseled, unknowing, and arguably coerced initial admission.

Due to the possibility of these type of “dilemmas” in juvenile court, juvenile judges are called upon to a much greater degree than their adult counterparts to discern between applications of the law that are arbitrary and those that are apropos. *Ex rel K.M.*, 592 Utah Adv. Rep. at 10, 173 P.3d at 1282. (“Colloquies in juvenile courts require the use of ‘kid gloves’ to assure that minors, because of their tender years and lack of knowledge and experience, have been properly informed of their legal rights before being allowed to waive those rights and enter an admission to an alleged offense”)(citations omitted); *see also State v. Kielt*, 121 N.J. 483, 582 A.2d 630

(1990)(allowing a juvenile who pleaded guilty to withdraw guilty plea and thereby avoid exposure to an inapplicable death penalty); *In re Joseph G.*, 196 Misc. 2d 904, 912,76 N.Y.S.2d. 455 (2003)(allowed a juvenile to withdraw his admission to a designated felony and stated a militating factor was the significant impact that such a finding may have on his future).

In particular, juveniles' waivers of their right to counsel has been a cause for concern at both the state and federal level, and is a pivotal issue in whether or not a juvenile's admission was made knowing and voluntary. While the current state of the United States law is that every state must provide counsel to juveniles accused of a crime, at least at the adjudicatory phase, this does not mean that juveniles must accept legal representation, but only that they have the right to accept legal representation. *In re Gault*, 387 U.S. 1 (1967). Despite the ruling in *Gault*, studies report that more than one-half of children accused of criminal acts appear in juvenile court without counsel and enter pleas to crimes they may or may not have committed. Mary Berkheiser, *The Fiction of Juvenile Right to Counsel: Waiver in the Juvenile Courts*, 54 FLA. L. REV. 577 (2002). In order to better protect children, many have suggested there is a need to guarantee that every child is provided counsel. *Id.* (Automatic appointment of counsel in juvenile proceedings has been called for by the National Report of the President's Crime Commission and the Institute for Judicial Administration and the American Bar Association have even adopted standard that declares a juvenile's right to counsel may not be waived). In fact, several states require, or implement in practice, that juveniles be at least provided counsel before permitting a waiver of their right to counsel. *Id.* (citing IOWA CODE ANN. §232.11(2) and TEX. FAM. CODE ANN. § 51.10(b)).

Here, the fact that Appellant or his mother initially had no independent knowledge of the importance of counsel should not cost him his Constitutional rights and his loss of freedom.

Although Nebraska does not require attorney representation of juveniles or prevent in any way the waiver of counsel, it is clear that a juvenile's waiver of counsel followed by an uncounseled admission is questionable as to whether the juvenile's decisions can be found to have been made intelligently and voluntarily. As previously discussed, Appellant was faced with many of the dilemmas that juveniles often face when representing themselves in Court. In particular, he did not understand what his rights were or fully appreciate the possible consequences of his admission. If Appellant had been represented by an attorney, he would have understood the significance of the lack of evidence supporting the allegation in the Petition. Ultimately, he would have had the confidence to deny the allegation to the Court, instead of only being able to address his innocence to others involved in the case and not to the Court.

Nebraska criminal law provides that the a court may allow a defendant to withdraw his or her plea for any fair and just reason provided the prosecution would not be substantially prejudiced by its reliance on the plea entered. Not only is Appellant's innocence, as testified to by witness Andrew Grant, a "fair and just reason" to withdraw his admission, but the fact that he made an unintelligent and uncounseled admission provides more "fair and just reason" that his admission should be withdrawn. The case law and scholarly literature indicate that Juvenile Courts have a great responsibility to apply the law appropriately to the children before them. The Nebraska Supreme Court has even alluded that Juvenile Courts should treat a child's initial admission as well any subsequent attempts to withdraw such admissions with "special care." More importantly, Juvenile judges need to be aware that when children appear in juvenile court without counsel, they will almost always plea to a crime that they may or may not have committed. Accordingly, protections must be afforded to juveniles that allow them to disaffirm their initial admissions, especially when it was uncounseled. Here, the Court abused its

discretion by not finding a fair and just reason for Appellant to withdraw his initial admission and overruling his Motion to Withdraw.

Although there is legitimacy in the Court's concern for Appellant, he has provided fair and just reasoning as to why he should be allowed to withdraw his previous admission. Most notably, Appellant maintains his innocence which is supported by testimony on the record. The withdrawal of Appellant's admission would not prejudice the prosecution and, furthermore, clear and convincing evidence has established fair and just grounds such withdrawal.

CONCLUSION

Based upon the foregoing discussion, Appellant respectfully requests this Court to reverse the Separate Juvenile Court of Lancaster County's overruling of Appellant's Motion to Withdraw his admission filed on April 5, 2010 and hearing on April 2, 2010, April 12, 2010 and May 6, 2010; and reverse and/or vacate the Order of Disposition sentencing the Appellant to confinement at the Highest Level of Care and Custody of the Nebraska Department of Health and Human Services, for placement at the Youth Rehabilitation and Treatment Center in Kearney, Nebraska.

DATED this ____ day of September 2010.