

IN THE SUPREME COURT OF THE STATE OF MONTANA  
Supreme Court No. DA 09-0249

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IN RE THE MATTER OF:            )  
  )  
G.M.,                                 )  
  )  
                          Appellant.    )  
  ) TRANSCRIPT ON APPEAL  
  )  
  )

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APPEARANCES:

Mary Ann Ries, Esq.,  
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Attorneys for Appellant.

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Before Honorable Laurie McKinnon,  
Ninth Judicial District Judge.

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TRANSCRIPT ON APPEAL FROM THE  
NINTH JUDICIAL DISTRICT COURT, PONDERA COUNTY

VOLUME I

Pages 1 through 140

IN RE THE MATTER OF: G.M.

Pondera County Cause No. DJ-07-005

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## MONTANA NINTH JUDICIAL DISTRICT COURT-PONDERA COUNTY

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IN RE THE MATTER OF:	)	INITIAL APPEARANCE
	)	
GAVIN THOMAS MERCADO,	)	Cause No. DJ-07-05
	)	
A Youth.	)	October 1, 2007

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BE IT REMEMBERED that the above-entitled matter came on regularly for hearing before the Honorable Laurie McKinnon, Ninth Judicial District Judge for the State of Montana, in the Courtroom of the Pondera County Courthouse, Conrad, Montana, on the 1<sup>st</sup> day of October, 2007, at the hour of 11:00 a.m.

---

## APPEARANCES:

Mary Ann Ries, Esq.,  
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Attorney for State of Montana;

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Attorney for Gavin Mercado.

---

THE COURT: Alright, this would be In The Matter Of: Gavin Mercado, DJ-07-05; and Mr. Lee, are we proceeding with an Answer?

MR. LEE: Yes, Your Honor, we will answer the allegations today.

THE COURT: Gavin, my name is Judge

McKinnon, and we're here today because a petition, because a piece of paper has been filed by the County Attorney, Mary Ann Ries, bringing this to my attention; that on or about September 13<sup>th</sup>, 2007, you an another youth in Conrad committed an offense, did something wrong, which would constitute, or make up, the crime of Arson if an adult had done it; do you understand so far what I'm saying?

GAVIN MERCADO: Not really.

THE COURT: Alright. The State has filed a document, a piece of paper, called a Petition. In the Petition they're saying you did something wrong, and what you did wrong is you attempted to set fire to - or did he actually set the fire Ms. Ries?

MS. RIES: The information I received says the two of them were involved and both of them have identified the other one as the one who lit the wall on fire.

THE COURT: So there was actually a fire on a wall in a house that you weren't supposed to be in; do you understand that?

GAVIN MERCADO: Yeah.

THE COURT: You an another child were in that house and you set fire to the wall, and because the State has said you did that, that's why you're

here today; do you understand that so far?

GAVIN MERCADO: Ah-huh.

THE COURT: Now Mr. Lee, how do we take an Answer in this?

MR. LEE: Your Honor, I have talked to Gavin, I have talked to his mother, I would like to enter a denial for him at this time.

THE COURT: That sounds good. Alright, so Gavin, let me see if I can explain to you some of the rights that you have. It's going to be a good civics lesson for you here, alright.

GAVIN MERCADO: Okay.

THE COURT: Because the State filed this paper, this Petition, they're asking for me to handle this case, your case, and in this case you have certain rights; do you know what I mean by rights?

GAVIN MERCADO: No.

THE COURT: You have certain protections under the law that I will make sure you get.

GAVIN MERCADO: Okay.

THE COURT: One is that you don't have to say anything at all in this case, alright, you can remain silent, okay?

GAVIN MERCADO: Okay.

THE COURT: You can say that I didn't do this and Ms. Ries, the County Attorney, will have to present a case, or have to prove that you did do it. Alright, do you understand that so far?

GAVIN MERCADO: Yes.

THE COURT: An in proving their case, in proving it she'll have to bring people into this courtroom who will say certain things about what happened, an you will have a right to ask those people questions. Your attorney will have the right to ask those people questions and to say, Basically, what I'm listening to here isn't true; do you understand that?

GAVIN MERCADO: Ah-huh.

THE COURT: You will also have the right to tell me, in your own words, what happened or what didn't happen, or you have the right not to say anything; do you understand that?

GAVIN MERCADO: Ah-huh.

THE COURT: And you have what's know as a presumption of innocence, which means you don't have to say anything and the State has the burden of proving that you did this Arson by proof beyond a reasonable doubt. It's a very high standard that they're held to in saying that you did this; do you

understand that?

GAVIN MERCADO: Ah-huh.

THE COURT: Okay, an anything that I might decide, Gavin, you would have, through your attorney, the right to ask another judge, or a panel of judges, or group of judges to review or decide whether I made a mistake; do you understand that?

GAVIN MERCADO: Yes.

THE COURT: That's called your appeal right, alright?

GAVIN MERCADO: Yeah.

THE COURT: Okay, and you know what you're here for, regarding the Arson; is that right? You understand the nature of the offense, that's the reason you're here, that you set fire to -

GAVIN MERCADO: Yeah.

THE COURT: Okay. Mr. Lee will talk to you regarding the maximum penalty.

MR. LEE: Sure.

THE COURT: And Mr. Lee has indicated, your attorney has indicated he will be entering a denial for you; is that right Mr. Lee?

MR. LEE: That's right, Your Honor.

THE COURT: The other reason you're here is also they say you did not have a right to be on the

property; do you understand that?

GAVIN MERCADO: Yes.

THE COURT: An I'll accept the denial on that Count as well.

MR. LEE: Thank you, Your Honor.

THE COURT: Alright, any questions, Gavin -

GAVIN MERCADO: No -

THE COURT: So far?

GAVIN MERCADO: No.

THE COURT: What do you suggest in terms of a time frame, Mr. Lee?

MR. LEE: If we could have six weeks, Your Honor, that's fine.

MS. RIES: The second Law and Motion Day in November, Your Honor, would be fine.

THE COURT: Alright, we don't want to take any longer than we need on a juvenile.

MS. RIES: I understand that, Your Honor, we're in conversation with the Juvenile Probation Officer regarding the most appropriate way to dispose of this, but we're going to need some time to fashion something in this thing, because the victim in this matter needs to have an opportunity to access the damage to the house and come up with a restitution figure.

THE COURT: I'm looking at November 19<sup>th</sup>.

MS. RIES: For a status hearing?

THE COURT: Why don't we have a Youth Omnibus Hearing; any reason we can't do that on the next Law and Motion Day?

MR. LEE: No, Your Honor.

MS. RIES: No.

THE COURT: Alright, we'll set the Youth Omnibus for October 15<sup>th</sup> at 9:00. At that time you can advise me - at that point you can advise me where we need to go with the next hearing, alright. So Gavin, what's happening is your attorney will be here next time and we'll just be working on the case. An I see you're here with your mom, and you need to listen to her and do everything that she says. I don't know if Ms. Swanson is involved, okay she is, but you have to make sure you stay out of trouble.

GAVIN MERCADO: Okay.

THE COURT: And that also means doing well in school, okay.

MS. RIES: Your Honor, I believe that the Juvenile Probation Officer would like to schedule regular meetings with him while he's released, pending disposition of the case, if that's agreeable

to the Court?

THE COURT: Okay, I don't have a problem with that. How often does she want to meet, once a week?

JUVENILE PROBATION: That would be fine.

THE COURT: Alright, so Ms. Swanson will have to work that out with Ms. Lechowski, but you will also have to meet with Ms. Swanson once a week; but you listen to your mom and she will set that up so she'll know what to do, okay?

GAVIN MERCADO: Okay.

THE COURT: Alright, nice to meet you Gavin.

WHEREUPON the Initial Appearance was completed.

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## MONTANA NINTH JUDICIAL DISTRICT COURT-PONDERA COUNTY

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IN RE THE MATTER OF:	)	OMNIBUS HEARING
	)	
GAVIN THOMAS MERCADO,	)	Cause No. DJ-07-05
	)	
A Youth.	)	October 15, 2007

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BE IT REMEMBERED that the above-entitled matter came on regularly for hearing before the Honorable Laurie McKinnon, Ninth Judicial District Judge for the State of Montana, in the Courtroom of the Pondera County Courthouse, Conrad, Montana, on the 15th day of October, 2007, at the hour of 11:00 a.m.

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## APPEARANCES:

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Attorney for State of Montana;

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Attorney for Gavin Mercado.

---

MS. RIES: That just leaves us with the Omnibus Hearing in In Re The Matter Of: Gavin Mercado, DJ-2007-05.

THE COURT: Alright, we're here on Gavin Mercado. Has the State made its disclosures under 322?

MS. RIES: We have, Your Honor.

THE COURT: Has the Defense under 323?

MR. LEE: We haven't had anything, Your Honor, to disclose but we will do so 30 days before the trial.

THE COURT: Any issue as to the Youth's fitness to proceed?

MR. LEE: Yes.

THE COURT: And do you want the same time frame, I'm thinking, as for Colby?

MS. RIES: That would work for the State, Your Honor.

THE COURT: On Colby we set a psychiatric exam and report deadline for November 21<sup>st</sup>, and the State's discovery by December 20<sup>th</sup> - or the State's expert disclosure by December 20<sup>th</sup>, with a report.

There was no informant in this case?

MS. RIES: No.

THE COURT: No electronic surveillance?

MS. RIES: No.

THE COURT: Does the Youth have any suppression motions?

MR. LEE: No.

THE COURT: Does the Youth intend to introduce evidence of other crimes, wrongs or acts?

MS. RIES: No, the State doesn't, Your Honor.

THE COURT: I'm sorry, the State. And you're asserting an affirmative defense?

MR. LEE: Yes.

THE COURT: What, lack of capacity?

MR. LEE: Lack of capacity, yeah, thank you Your Honor.

THE COURT: An if you would have your witnesses, including your expert on that affirmative defense, filed by December 20<sup>th</sup>; and the State as well on that date. I'll indicate a general denial Mr. Lee.

MR. LEE: Yes, please.

THE COURT: Any pretrial motions by the State?

MS. RIES: None known at this time, Your Honor.

THE COURT: By the Youth?

MR. LEE: Not at this time, Your Honor.

THE COURT: Trial will be two days?

MS. RIES: Yes.

THE COURT: The Court will draw a panel consisting of 48 prospective jurors. Does the State waive its right to be present during the drawing?

MS. RIES: Yes.

THE COURT: Does the Defense?

MR. LEE: As does the Defense, Your Honor.

THE COURT: I'll set it for trial on January 24<sup>th</sup>, an a status on January 14<sup>th</sup>. Lets set this for December 17<sup>th</sup> on a status for both kids. An I'm going to look into - I don't know why I don't have a Law and Motion Day before that. Alright.

WHEREUPON the Omnibus Hearing was completed.

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MONTANA NINTH JUDICIAL DISTRICT COURT-PONDERA COUNTY

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IN RE THE MATTER OF:	)	STATUS HEARING
	)	
GAVIN THOMAS MERCADO,	)	Cause No. DJ-07-05
	)	
A Youth.	)	December 17, 2007

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BE IT REMEMBERED that the above-entitled matter came on regularly for hearing before the Honorable Laurie McKinnon, Ninth Judicial District Judge for the State of Montana, in the Courtroom of the Pondera County Courthouse, Conrad, Montana, on the 17th day of December, 2007, at the hour of 11:00 a.m.

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APPEARANCES:

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Attorney for Gavin Mercado.

---

THE COURT: Ms. Ries.

MS. RIES: Yes, Your Honor, if we can take up In Re The Matter Of: Gavin Mercado, DJ-07-005.

THE COURT: Good morning, Mr. Lee.

MR. LEE: Good morning, Your Honor. I believe the Court ordered a mental evaluation of Mr.

Mercado, which we're now in possession of, which I just delivered to the County Attorney. We intend to brief the issue of competency. I know we're behind the Court's schedule on this matter, but like I say, it took a while to get the evaluation done, and I believe that issue is probably going to be dispositive of whether or not this matter goes to trial.

THE COURT: Okay, is the State going to be conducting its own evaluation?

MS. RIES: Your Honor, I was just handed the eval as court started this morning. I have not had the opportunity to look at it. I would like to reserve the right to have another evaluation done, if necessary.

THE COURT: Is 30 days enough time, or do you need longer Ms. Ries?

MS. RIES: Thirty days should be sufficient, Your Honor.

THE COURT: Alright, do - I have a trial date for January 24<sup>th</sup>, so we'll have to vacate that; and it's your position, Mr. Lee, that the affirmative defense of lack of capacity is still on the table?

MR. LEE: Yes, Your Honor.

THE COURT: Alright, so -

MR. LEE: I believe within no longer than two weeks it will take me to get a brief done.

THE COURT: Alright, well I'm sure that Ms. Ries will need her psychiatric exam in order to respond to the brief, so why don't we give the State until January 18<sup>th</sup> to have a psychiatric exam conducted. If you need more time let me know.

MS. RIES: Yes, Your Honor.

THE COURT: Briefs will be due, Mr. Lee, yours will be due on January 25<sup>th</sup>. The response will be due on February 9<sup>th</sup>. We'll have a hearing on it, an, actually, I'm cutting it close. I was going to try to set it in for trial on the week of the 19<sup>th</sup>. How long is trial going to take, do you think?

MS. RIES: A couple of days.

THE COURT: I really don't want to carry this over until April. Alright, why don't we set it in for a hearing, I'm going to set it for trial as well, that week of February 19<sup>th</sup>. We'll have a hearing and status on February 11<sup>th</sup>. When did I give you until, your brief time Ms. Ries?

MS. RIES: You said it was due February 8<sup>th</sup>.

MR. LEE: Judge, I don't think you mentioned a specific date by which my brief was due.

THE COURT: Yeah, I think I said January 25<sup>th</sup>.

MR. LEE: Okay.

THE COURT: And this is with a jury, right?

MR. LEE: Yes, Your Honor.

THE COURT: Okay, well we'll have to deal with drawing a jury and those issues. That's a Pondera County jury week, and I don't have one the next month, mostly because of the Court's schedule, so let's keep it on that time frame. If counsel keeps me posted, I may be making a call to see where we are with things, but let's keep it for status and a hearing on lack of capacity for the 11<sup>th</sup>, and jury trial on the 19<sup>th</sup>.

MR. LEE: Very well, Your Honor, thank you.

WHEREUPON the Status Hearing was completed.

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MONTANA NINTH JUDICIAL DISTRICT COURT-PONDERA COUNTY

IN RE THE MATTER OF:            ) STATUS HEARING  
   )  
 GAVIN THOMAS MERCADO,        ) Cause No. DJ-07-05  
   )  
                   A Youth.                ) February 11, 2008

BE IT REMEMBERED that the above-entitled matter came on regularly for hearing before the Honorable Laurie McKinnon, Ninth Judicial District Judge for the State of Montana, in the Courtroom of the Pondera County Courthouse, Conrad, Montana, on the 11th day of February, 2008, at the hour of 11:00 a.m.

APPEARANCES:

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Attorney for Gavin Mercado.

MS. RIES: Your Honor, State of Montana, vs. - In Re The Matter Of: Gavin Mercado, DJ-07-005. Mr. Mercado has asked to be present, the father of Gavin, he wanted to be present with his son.

THE COURT: I thought I had sent Mr. Mercado to Judge McKittrick. Good morning Mr.

Mercado, you may step up with counsel; is that alright Mr. Lee?

MR. LEE: Sure.

THE COURT: And you don't represent Mr. Mercado?

MR. LEE: Right.

THE COURT: But he's -

MR. LEE: The parent of the Youth.

THE COURT: Alright, what are we doing here today?

MS. RIES: Your Honor, Defense counsel has filed a Motion To Dismiss on the basis that the Youth was incapable of forming the necessary intent. The State has reviewed that and has concerns because of the nature of the offense and the situation it now places the Youth. The State is in the process of and will file an Amended Petition, hopefully before the end of today Your Honor, changing the allegation from that of being a Delinquent Youth, to that of being a Youth In Need Of Intervention. I believe the situation that's set forth in the evaluation that he underwent supports a Youth In Need Of Intervention. The State is reluctant, Your Honor, given the nature of the circumstances of this offense and the harm that was caused to the victim

to not intervene at this point. I think we have a chance with this young man at this point in his life to get him on probation with the probation officer and to avail him of, and his family of, some of the services that we have available to use so you won't ever see him again. I believe if this court dismisses this Petition that he will be back, and he will be back with equally severe charges in the future, and by then that we'll have lost any chance we had to turn his life around and get him headed in the direction that society needs to have him headed in, so I believe the Youth In Need Of Intervention Petition would be appropriate in this matter. As far as this court is aware, generally that's reserved for status offenses, however the Court can treat any offense as a Youth In Need Of Intervention, as opposed to just being a Delinquent Youth.

THE COURT: Right, and if I recall the statute is very general, in terms of what a Youth In Need Of Intervention is, and I think it's listed under the definitional section of the Code.

MS. RIES: Yes, it is.

THE COURT: So I don't know what type of intent would be required for that. I don't think it's purposefully or knowingly committing the

offense, it's more of a - I don't know. Mr. Lee, I guess where I'm headed is, regarding your Motion To Dismiss, which I have not read because it was my understanding that the State was not going to be responding to it and was going to file an amended petition, and this matter was to be set in today to kind of be re-evaluated; what's your thought on the State's amendment?

MR. LEE: Your Honor, having reviewed the situation and having written this motion and having spoken with the young man and his mother, I respectfully do not disagree with the County Attorney nor does the mother. I believe that this is a normal young kid. I believe that he did something that's normal for young boys to do. Now maybe we can talk about this as being a supervision problem, but -

THE COURT: Well that's the nature of the Youth In Need Of Intervention petition.

MR. LEE: I think that needs to come to the Court in a DN situation, that's the best way to handle it, that's the type of situation that it contemplates.

THE COURT: Well, I don't have the amendment in front of me.

MR. LEE: I'm concerned though that this kid is fragile. He's a good kid but he's fragile, and what happens to him if he gets paraded in front of the courts and probation officers? An although I think Ms. Swanson works very well with him, I'm worried about that, in an of itself, has its own damaging effects. The reality of the situation is we're kind of stuck here in no-man's land.

THE COURT: Are you saying that I'm intimidating to children, Mr. Lee?

MR. LEE: You're intimidating to me, Your Honor. We have a child here who the psychiatrist said that he couldn't form the intent to do what he did, and that he probably can't remember it, and probably can't assist me at trial. And its - under the statutory scheme in Montana, unbelievably we don't have a remedy for that type of situation. If he were an adult and he suffered from some organic brain disease, we would say that he's insane and we would not be able to take him to trial, and wouldn't be able to punish him but we might be able to take him to Warm Springs. In this case we have a Youth, an if you read my motion Your Honor, Youths in Montana enjoy greater or equal rights than adults do, but we have no remedy for a Youth, who by reason

of the fact that he's a Youth, can't appreciate the charges against him. He can't assist his counsel, he can't testify, so we can't enter into a Consent Decree with this kid, and we can't take him to trial, and so the reason for that is that he's too young. There's a long line of American Jurisprudence of kids being too young to go to trial. In Common Law it's presumptive that between the ages of 8 and 13 that a kid's not old enough to commit a crime, and that's come a long, long way, right from the Greek and Roman times to English an American Common Law, and continues right up to the present time. For some crimes, I mean, some kids when they're just too young cannot commit crimes.

Now I'm sorry for the victims in this case but they have civil remedies to pursue to get restitution.

THE COURT: Well I think your Motion To Dismiss, with the report of the psychiatrist or psychologist, if it's substantiated that he was not able to form intent, that that's a defense to the crime and that's what's available to the Youth to present at trial -

MR. LEE: No, I think that's not something to be decided by a jury, that's just something to be

decided by a judge before trial.

THE COURT: Right, right. Well I think -

MR. LEE: Let me add one thing: He's a good kid, he's doing well in school, I just truly believe, in my heart, that this is something that just needs to be dismissed and he will be fine. Dragging him through the legal system for a while I think has the chance of being harmful to him. I disagree with the County Attorney on that part of it.

THE COURT: Alright, well I guess, first of all, the County Attorney has indicated that they wish to amend the pleadings. I'm not going to rule on the Motion To Dismiss at this point. I will consider, if you want me to, the Memorandum and Motion To Dismiss in the context of the amendment, if it's filed, because basically I don't have the same charges in front of me, or the County Attorney has indicated I would not have the same charges in front of me, as to what your motion initially was responding to.

MR. LEE: I'm not so sure what the remedy is. The remedy of having him declared a Youth In Need Of Intervention, I'm not sure what the remedy is going to be; is it that he gets some sort of

treatment or -

THE COURT: Well I'll tell you what the remedy is going to be Mr. Lee, it's going to be supervision by Ms. Swanson, and Youth Enhancement Services providing MRT classes to him so he can have some input in his life, and having available some support system for him to access. An I don't know, I share your view that coming into court is such a negative experience for the Youth but, at any rate, that's what I'm sure the disposition in this case would be, its to provide those services to him, and, you know, I mean, they're available to him now. He would have to pay for those services if the case is dismissed. The County Attorney is indicating that she thinks he could use some help, an I frankly think that also because of the offense that was committed. With dad incarcerated and a single mom trying to raise him, I couldn't imagine that he couldn't use some help from some outside people who are interested in his well-being. So that's what I see is going to happen as a result of the amendment and the Consent Decree developed to that amendment.

MR. LEE: But I think those things still put us in a situation where he has to sign some kind of Consent Decree. Given the status of this case I

just don't think that's a reality.

THE COURT: Well - an like I said, there is a distinction between a witness who is qualified to testify, and they can go as young as four years old and five years old and comprehend what's right and what's wrong. What's telling the truth and what isn't. And that, apparently, is a distinction between that and forming the specific intent necessary for Arson. I don't know that there is going to be that much difficulty, or whether those same arguments relate to the amendment that Ms. Ries is proposing.

MS. RIES: Your Honor, as to the Consent Decree, a Consent Decree would be contemplated by the State in this matter, as it's a document which suspends the proceedings, and then the Court can clearly go to disposition on the Youth In Need Of Intervention Petition. I realize that Consent Decrees have been used as a matter of course with juveniles but it's certainly not the only means of disposing of these cases.

THE COURT: Alright.

MR. LEE: My understanding of that, an I don't claim to have great knowledge of the Youth Court Act, but there is two ways of doing it, in my

knowledge, which is limited; he can either go to trial with a judge or jury and then if he gets found guilty, then if the judge declares it's not punishment -

THE COURT: No, then it goes to disposition.

MR. LEE: What's your disposition going to be if we enter into a Consent Decree, it's still going to be punishment; isn't it?

MS. RIES: No, that's not true Your Honor. Upon an entry of a true answer the Court can go to disposition and choose the most appropriate disposition for the Youth, which are any of the dispositions set forth in the statute, and it does not necessarily have to be a Consent Decree. A Consent Decree just gives the Youth an opportunity, just like a deferred imposition of sentence, to come back to court and withdraw a true answer and then having it taken off of his record prior to the age of 18.

MR. LEE: I can have him come in and say true, Your Honor, but the reality is he's not going to understand what he's saying true to.

THE COURT: What would be true would be that he exhibits behavior that's beyond - he hasn't

followed the direction of his parents; that he's beyond the control of his parents. I mean, maybe that's true, and it would be an admission to that, a true to that, or I would hear testimony on that, an I'm assuming there is a jury trial right on that as well, which would be kind of interesting, but -

MR. LEE: A jury trial right on whether or not he committed the alleged act?

THE COURT: No, the jury trial right would be under the Youth In Need Of Intervention statute, an I'm assuming that, an I haven't canvassed the Youth Court Act, but if the allegation is Youth In Need Of Intervention, that means a Youth who is adjudicated as a Youth who continues to exhibit behaviors like, running away from home, or habitual truancy, a Youth that's beyond the control of the Youth's parents, despite the attempts of the Youth's parents to exert all reasonable efforts to resolve the Youth's behavior. I mean, that would be what the State would have to meet, the burden the State would have to meet, then I would do the disposition.

MS. RIES: I believe the Youth is entitled to, the Youth can also choose not to have a jury trial in that matter, but the Youth is entitled to a jury trial if he wants.

THE COURT: I do think that a jury trial would be somewhat intimidating to a nine-year-old, but that would be your call Mr. Lee. An I guess what we'll do is, Ms Ries has indicated she is not proceeding on the current Information, so we'll vacate the trial date set for Mr. Mercado; is that correct?

MS. RIES: Yes.

THE COURT: And my thought was this would have been a bench trial but that's your call, and that would take maybe an hour at the most. It would be testimony from the mother, or whoever the State would present as witnesses, and based on what was presented possibly there would be a disposition, and certainly that would include some kind of supervision from Juvenile Probation and Youth Enhancement Services, as I indicated. There is not a lot of case law to guide the Court on that Youth In Need Of Intervention section, it's just what, an interpretation of the statute?

MR. LEE: When you think about it in terms of going to trial with someone who can't effectively assist their own counsel, assist in their own defense, with someone who can't appreciate the charges against him, or assist in the defense to the

charges against him, or couldn't have formed the intent to commit the underlying offenses, it seems to me the case should be dismissed.

THE COURT: Alright. I think what needs to be done is, when we receive the amendment we will consider - or the Court will consider your Motion To Dismiss, unless you want to change that motion in the context of the amendment?

MR. LEE: I do.

THE COURT: Alright, so Ms. Ries, when will you have that amendment filed?

MS. RIES: It will be filed today, Your Honor.

THE COURT: Alright, so how long are you going to need to file an additional Motion To Dismiss on the amendment?

MR. LEE: The soonest would be a week.

THE COURT: Alright, why don't we set a deadline of February 29<sup>th</sup>, and if the State can respond by March 14<sup>th</sup>, and we'll set a hearing on the motion and a status as well, on April 7<sup>th</sup>. And just so we don't lose track of things, we'll put it in for trial on the 28<sup>th</sup>. And I'm assuming we're proceeding with a jury, you can let me know if we change that request, alright?

MS. RIES: Alright.

THE COURT: I think those are some interesting concepts Mr. Lee. I don't know that there is any clear answer in the case law to that issue you've raised.

MR. LEE: There is no case law on it.

THE COURT: Right.

MS. RIES: Thank you, Your Honor. If we can take up the Antonio Rodriguez matters.

WHEREUPON the Status Hearing was completed.

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## MONTANA NINTH JUDICIAL DISTRICT COURT-PONDERA COUNTY

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IN RE THE MATTER OF:	)	HEARING ON MOTION
	)	
GAVIN THOMAS MERCADO,	)	Cause No. DJ-07-05
	)	
A Youth.	)	April 7, 2008

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BE IT REMEMBERED that the above-entitled matter came on regularly for hearing before the Honorable Laurie McKinnon, Ninth Judicial District Judge for the State of Montana, in the Courtroom of the Pondera County Courthouse, Conrad, Montana, on the 7th day of April, 2008, at the hour of 11:00 a.m.

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## APPEARANCES:

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Attorney for State of Montana;

Justin B. Lee, Esq.,  
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Choteau, Montana 59422

Attorney for Gavin Thomas Mercado.

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THE COURT: Alright, we're here on Gavin Mercado, DJ-07-05, and do we have a trial date set on this?

MS. RIES: We do, Your Honor, it's set for the 28<sup>th</sup> of April.

THE COURT: Alright, and today was the

time set for hearing on the Defendant's Motion To Dismiss; and I imagine, as well as a status hearing?

MS. RIES: Yes, Your Honor.

THE COURT: Okay, Mr. Lee.

MR. LEE: Your Honor, where should I begin? When I first interviewed this young man I knew that he didn't have any idea, other than being scared, he was scared, but he didn't have idea what this process was, who the players were, who I was. He had a vague notion that there was a fire that was started, but he didn't possess - I knew he didn't possess the requisite mental ability to either appreciate the underlying offense or to effectively assist me in defending him, he was too young.

There is no provision in Montana Law, black letter Montana Law, that provides for what you do when the youth is incompetent by reason of youth, there just isn't any guidance there.

THE COURT: We have to prove the incompetency.

MR. LEE: Well, there's nothing in Youth Court that draws any kind of an analysis to 46-18, or whatever the adult competency, mental disease or defect in that statute, that's the place I looked. I thought to myself, there has got to be instances

when a person is too young to have formed the mens rea to commit a crime, and I thought I would just go to it quickly, and I didn't find it, it's just not there. So what I did was, I searched nationally, and this is an issue that is out there nationally, and I found this Law Review article that I've provided for the Court, and it alluded to a case where there was an infancy defense, that under the Common Law, American, English and Roman, it was recognized by society that a person could be too young to commit offenses, and that's been used in the United States. Its never been done away with, never specifically, never specifically by the Supreme Court, but its been over-shadowed by the Youth Court Act, which has taken place in many states; but that doesn't address that issue, and nothing in Montana addresses that issue, so if you look at Montana, and Montana's unique, in that in its constitution it specifically provides for the rights of minor children, and it says that those rights, the right of a minor child, is equal to or greater than those of adults; so taking that into consideration, if we turn to the Mental Disease and Defect Statute in Section 46, we ought to be able to conclude that a person can be found to be

incompetent by reason of age, so if we look at that, I think the Court has to make that construction. This is not - there is no law that the Court can turn to to say, This is what we should do. This is equitable construction in the absence of law, which you have the power to do.

I don't know where we can go from here. We have at least one psychological, we have a in depth psychological review of this boy, and this wasn't something that was just an overnight deal. My understanding is that Dr. Johnson took eight hours with this kid. His report seems a little bit small for that amount of time, but I've talked to him and he is serious about his recommendations that this kid doesn't have the competency to understand or to stand trial.

THE COURT: I think that - first of all, I don't even know if I'm supposed to be considering the report at this time. I mean, its been attached with the motion, but it hasn't been moved into evidence during this proceeding. I don't have the doctor here to testify, Dr. Johnson, so that it could be admitted.

MR. LEE: Under 46, the mental incompetency statute, determining the mental incompetence of the

youth, judge, you're entitled to take notice of that report.

THE COURT: Okay, what statute are you looking at?

MR. LEE: 46-14-221, my reply brief brings that out, and notes in a footnote that this particular section is not completely on point, because they're talking about a different type of incompetence. Although, I think the Court can use it, and that says, "If neither the prosecutor or defense counsel contest the findings of the report, the Court may make the determination on the basis of that report." In the first clause -

THE COURT: Which section are you under, 206?

MR. LEE: No, 46-14-221, and so if it's moving the admission, I do move the admission of that report; an also the report of Ms. McInnis.

THE COURT: Alright, what's your position on the admission of those reports; do you have an objection to that?

MS. RIES: Well -

THE COURT: I'm not sure whether it's admissible or not.

MS. RIES: Well, Your Honor, I guess I

don't have an objection, however it would be nice to ask Dr. Johnson about the mental state required for Negligent Arson. In the report it indicates that he intentionally set a fire, and that is the mental state that's required of Negligent Arson, which is what he was charged with.

THE COURT: Alright, I don't want to interrupt Mr. Lee with his argument. If there is no objection, I'm going to reserve on my ruling regarding its admission. At this point I don't know that it's appropriate, but go ahead Mr. Lee.

MR. LEE: So we have uncontested medical evidence from two medical professionals that say: One, that he can't form the intent or assist in trial; and two, that he's not a fire setting danger or that -

THE COURT: Well, let me interrupt you Mr. Lee. It says, "He can tell his attorney about his view of the incident, and thereby assist in his own defense."

MR. LEE: Yeah, but read farther Your Honor.

THE COURT: Well, that's the problem I have. If you read further regarding understanding the process of a trial, which I wasn't allowed to

ask him about at the Entry Of Plea because you entered his plea for him, I didn't ask him about any of these, I didn't advise him of his rights.

MR. LEE: Right.

THE COURT: And there was no colloquy established. We don't have a bit of testimony from Gavin.

MR. LEE: No, I wouldn't have allowed him to do that. I knew he didn't understand what he was saying. If you asked him question that was yes or no, he would try to find out what you wanted.

THE COURT: But I think that has to be made in the record, we don't have a record here.

MR. LEE: It doesn't have to be made in the record, Your Honor, you can take the psychologists reports and make the finding.

THE COURT: But I see some inconsistencies in the report and I'm not sure what she's telling me. She says that he can assist in his defense, and then she says "He vaguely understands the role of what the trial is" and, frankly, I don't know that he's ever been explained the role. I mean, I'm certain if a nine-year-old child wasn't explained what a jury trial was about and you started asking them that they wouldn't understand what that's about. I

have gone through that colloquy with nine-year-olds before, and explained what a jury trial was, and they were able to respond. I think there needs to be a record made as to his mens rea and competency.

MR. LEE: I think that there has been.

THE COURT: You're asking me to find an infancy defense in Montana based on a nine-year-old, based on his age, when there is no statutory provision for that. However, I certainly would entertain an infancy defense if the evidence presented - if there was evidence presented that was sufficient to make that finding, but - an I don't think Montana forecloses saying that this particular nine-year-old could not have formed the mens rea to commit Negligent Arson, or that he's not capable of assisting his counsel in his defense. I don't think that Montana says no to that, but what they haven't said is, I will draw the line at a nine-year-old an anything younger. I think it's for a good reason.

MR. LEE: No, that's not what I'm saying, an I'm not articulating a rule by which no nine-year-old can be prosecuted. I represent nine-year-olds in other contexts that I think can be prosecuted, correct. I'm saying this nine-year-old can't be prosecuted, and that's what the common law

rule is, you take it case by case, and the court looks at the evidence.

THE COURT: And the evidence that you're presenting is a report from Dr. Johnson, and that's the extent of the evidence?

MR. LEE: Correct.

THE COURT: Okay.

MR. LEE: A report that says, He has a vague understanding of the role of attorneys, witnesses, the judge and a jury. He has difficulty testifying because he's shy, and he has a 1.3 score out of five for competency.

THE COURT: Which I'm not sure how she gets at that, where does -

MR. LEE: He, Dr. Johnson is a male. Through extensive testing he did on the boy, he opines that he did not act knowingly or intentionally, and due to his age he was unaware of the potential consequences of his negligence, which is an element of the offense. Further, it's doubtful that Gavin understood the reading of Miranda rights and could have ever knowingly given consent.

THE COURT: Well, you know, that goes to - I don't know anything about the facts of the case,

other than vaguely. I mean, what's contained in the affidavit, but I don't know if the Miranda consent was signed in the absence of a parent, and normally, they wouldn't have been able to talk to the youth without a parent's signature. I don't know if that was obtained here or not, but that's a separate issue from fitness to proceed or mens rea, or -

MR. LEE: There has been no other evidence presented to the Court, there has been no other evidence, so we're entitled to ask this court to rule on the evidence that's been presented to the Court.

THE COURT: I know, Mr. Lee, and that's my problem. I'm not arguing that Gavin may not have had the competency, I just don't know that I can find it on what's been presented. I have a report that I think is questionable, in terms of what it's saying. There is a sentence right in here where it says, "He can tell his attorney about his view of the incident and thereby assist in his own defense."

MR. LEE: Yeah, that's an unfortunate line, but it goes on to say that he can't assist me.

THE COURT: And those are with respect to the elements that I would explain to him on entry of plea, and I was never allowed to do that. I would

have allowed you to do it, but there has been no record established that indicates that this particular youth cannot understand what's going on, other than what - and I don't know if Dr. Johnson explained it to him and he still didn't understand it, but I don't know that he did, because he's not here to testify.

MR. LEE: He doesn't need to be because the statute says if the report is uncontested its deemed admitted.

THE COURT: Alright, I'll look at that statute, and that may be determinative. I'm saying the report is ambiguous, in terms of the issues that I have to decide, and I don't know that I can decide them in your favor, based on this report. If I had Dr. Johnson to ask questions about it, or if I were able to establish with Gavin, that I could, in no way, have him articulate back to me what a jury trial was or what was taking place. I can't make a ruling on this based just on your representations. If the report didn't have any ambiguities in it, that might be a different story.

MR. LEE: I wasn't aware that the report did. It was my reading of the report I thought the report was clear. I'll have to go back and read it

for ambiguities.

THE COURT: Well it says, "Gavin is a normal nine-year-old boy. No indications of mental illness, pathological personality or delinquent disposition." Alright, anything else Mr. Lee?

MR. LEE: No, Your Honor.

THE COURT: Okay.

MR. LEE: I mean, if the Court wants to, I can have Dr. Johnson here to testify. Like I said, I don't think I needed that because the State hasn't rebutted his report; the report's in the record, and now moved to be admitted, which I didn't know that I should have needed to do that, but it's now -

THE COURT: Well, I don't know, I guess you're referring to a Section of the Code that you said wasn't completely applicable, but you were making reference to it so, but there doesn't seem to be a problem, and the record is protected, in terms of there not being an objection. Alright, Ms. Ries.

MS. RIES: Your Honor, it is the State's position that this report is very ambiguous, and one of my primary concerns is that the charge has been amended, following this evaluation, and I believe that the report itself, on page 3 and the upper part of page 4, it shows that indeed the young man

intentionally started a fire, and Negligent Arson requires just that; that he purposefully or knowingly starts a fire which then negligently causes damage. And Dr. Johnson, at the top of page 4, indicates that they had lighters with them, they set a fire with some cotton-like material, they became alarmed and tried to put the fire out. He had no intention of burning the building down, and the State is not alleging that he did. It also goes on to say that they were experimenting with fire, they negligently started a fire, which negligently caused property damage, and in his summary he likewise says that.

It's the State's position that that meets the mental state that's required for the Negligent Arson charge, and that we should go forward. As to the competency to proceed, the State would submit that dismissal of the case would not be appropriate, as with an adult, the proceedings are suspended until they are able to be competent. And I submit that Gavin, if indeed he's able to assist his attorney in preparing for trial, that age would rectify that and he could be able to, even now as we speak, I mean, he's nearly 10, and would be able to assist his attorney.

And I would also note for this court that the Law Review article that defense counsel relied upon is a Law Review article which opposes treating very young children as adults and prosecuting them for criminal offenses in District Court, treating them as adults; and the State has addressed that in this matter, by not even alleging that he's a Delinquent Youth, rather a Youth In Need Of Supervision, and he needs to be put on supervision so that these matters can be addressed and the victims can receive some compensation for the damage which was caused by this young person's act, intentional act of starting a fire. But perhaps having Dr. Johnson here so those questions about his report and the difference in the charges could be addressed, because we're only guessing what he means throughout his report.

THE COURT: Right. Mr. Lee, anything else?

MR. LEE: Yeah, just quickly. The State's amending the Negligent Homicide actually makes it a more difficult case - Negligent Arson. There are three mental states, and negligence is also a mental state, and I've provided the Court with the definition of that, the jury instruction says you've got to read the jury instruction for negligence, which is replete with references to a person's state

of mind.

THE COURT: Well those are used in any criminal offense, and those are used for citations issued to youth and requires a mens rea, there is no question about that. The problem I have with the report is that it appears that the mens rea was there, he knew what he was doing, he said, I was playing with the matches - or lighter, and then his behavior afterwards, and the issues that Dr. Johnson has brought up regarding his jury trial - understanding what a jury trial is, and I never had any testimony regarding that. I was not allowed to ask him whether he understood his rights, and it also confuses what would be appropriate for him, what appropriate actions should be taken, in terms of him not being a delinquent youth or being a delinquent youth, and whether, you know, he's going to do this again or not. Those really aren't the considerations that are before the Court right now -

MR. LEE: I agree.

THE COURT: And then you also have that sentence right in the middle of the recommendation that says, he understands, "he can tell his attorney about the view of the incident and assist in his defense", and he has explained that he knew what he

was doing was wrong, so -

MR. LEE: That can't be read by the sentence its got to be read by the context of the report, and the context of the report to me indicates clearly that he doesn't have the mental state.

Just a couple of points, Your Honor, so we covered the negligence thing, which is a high standard, but I agree with the court that that's something that comes later if he, in fact, is asked to go before a jury.

Consistently though, I also want to point out to the Court, I hear restitution over and over again from the prosecution, and while restitution is something that's provided for, these people are not left without a remedy, they can sue. There is home-owners insurance, they can be put whole, and its far more just to ask the insurance company to pay for this.

THE COURT: Mr. Lee, I am only concerned at this point with whether Gavin has the ability to assist you in his defense, and whether he has the ability to form the requisite mens rea, those are the concerns right now in front of the Court; an I will go back through the evaluation and the statutes

and get a finding, an order out, as soon as possible. I'll keep the trial date that's set, at this point, for April 28<sup>th</sup>. I would hope to have a decision out this week. It's going to have to be well thought out and well written so I don't want to do it from the bench, at this point, I would like to consider the argument and go back through the briefs.

MR. LEE: Okay, and if the Court wants to we can bring Dr. Johnson in to testify.

THE COURT: Well, that was what today's hearing was for, so -

MR. LEE: Well, in my defense, since my report is un-rebutted, professionally, the statute says the Court can take notice of that and rule on that, and so I don't think it's enough for the State just to say, I don't think it's enough, that's not professional.

THE COURT: Do you want an opportunity to present Dr. Johnson?

MR. LEE: If the Court's going to rule against me, but the statute says -

THE COURT: Ms. Ries, any position on that?

MS. RIES: I think it would be good for the Court to have an opportunity to hear from Dr.

Johnson so we can ask the questions we need to have answered about his report.

THE COURT: Alright, we'll vacate the April 28<sup>th</sup> trial date. Mr. Lee, why don't you get the - I don't know how difficult it is, I don't know Dr. Johnson, particularly, I know several of the ones -

MR. LEE: Monday afternoons he told me seem to be a fairly good time for him, and it seems to be a good time for us.

THE COURT: Alright, and that would be very helpful if we could get some testimony from him. Why don't we set it for - and it is a man right, Lynn?

MR. LEE: Lynn, yes.

THE COURT: Alright, we'll set it for April 21<sup>st</sup> at 1:00 in the afternoon; and let me know if that's not a good date, I'll accommodate Dr. Johnson as best as possible.

MR. LEE: Okay, thank you.

THE COURT: And that's because Will Kelly isn't going to be on the docket for the 28<sup>th</sup>, so we don't have any trials?

MS. RIES: That's my understanding.

THE COURT: Alright, and it might be helpful, Mr. Lee, if Gavin were here. I don't know,

I mean, that's your call. I would allow you to go through the colloquy. I mean, I don't have to do it, but -

MR. LEE: Okay.

THE COURT: Alright.

MS. RIES: Your Honor, we just have the one remaining matter, but I don't see Mr. Albers, I'm anticipating he's not here yet, so -

WHEREUPON the above-entitled hearing was completed.

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MONTANA NINTH JUDICIAL DISTRICT COURT-PONDERA COUNTY

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IN RE THE MATTER OF:            ) HEARING ON MOTION  
   )  
 GAVIN THOMAS MERCADO,        ) Cause No. DJ-07-05  
   )  
                   A Youth.                ) May 8, 2008

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BE IT REMEMBERED that the above-entitled matter came on regularly for hearing before the Honorable Laurie McKinnon, Ninth Judicial District Judge for the State of Montana, in the Courtroom of the Toole County Courthouse, Shelby, Montana, on the 8th day of May, 2008, at the hour of 1:00 p.m.

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APPEARANCES:

Mary Ann Ries, Esq.,  
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Attorney for State of Montana;

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 Choteau, Montana 59422

Attorney for Gavin Thomas Mercado.

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THE COURT: Alright, this is, DJ-07-005;  
 and is it Gavin, Gavin Mercado?

GAVIN MERCADO: Yes.

THE COURT: Alright, can you stand up  
 with Mr. Lee, Gavin, and how old are you?

GAVIN MERCADO: Nine.

THE COURT: Nine. Alright, and I don't

remember Gavin if we went through this before. First of all, I'm Judge McKinnon, and I am going to go through some things with you and I want to make sure that you understand. If, at any time you don't know what's going on, you need to stop me. You can ask Mr. Lee a question or you can ask me a question, okay?

GAVIN MERCADO: Okay.

THE COURT: Alright. There has been filed a document or paper which brings you here today. Okay. And, first of all, let me ask you, you understand the questions so far that I'm asking you? You have to say yes or no -

GAVIN MERCADO: Yes.

THE COURT: Because everything you say and I say is being recorded by this gentleman right here (Court indicating).

GAVIN MERCADO: Okay.

THE COURT: Alright. There has been filed a paper called a Petition, and I need to make sure that you understand certain rights that you have in this case; alright?

GAVIN MERCADO: Ah-huh.

THE COURT: First of all, you have the right, other than to answer my questions, you don't

have to say anything, and my questions will relate - my questions are only to make sure that you know what's going on in this case. You don't have to say anything about the case itself to me. Do you understand that?

GAVIN MERCADO: Yes.

THE COURT: That's your right to remain silent. And you have the right to stand there and not say anything in this hearing and all other hearings that may happen and remain quiet and require that the County Attorney, who is the woman to your left in the brown suit, Ms. Ries, require that she present her case or tell her side of the story as to what happened, alright.

GAVIN MERCADO: Okay.

THE COURT: And before this case - before I could decide or a jury could decide that you committed this act, she must present her story so well that people are convinced beyond a reasonable doubt, that I'm convinced beyond a reasonable doubt or that anyone on a jury that's listening to the case is convinced, and that's a very high level of proof. Do you understand that?

GAVIN MERCADO: Yes.

THE COURT: Alright. And when she presents

her case, she will call witnesses who will sit - actually it won't be in this courtroom, but they would sit in a chair next to me. Can you see this chair here?

GAVIN MERCADO: Yeah.

THE COURT: They would sit in that chair and they would tell what they knew about this fire; okay?

GAVIN MERCADO: Okay.

THE COURT: And she may also bring in something like a lighter or evidence. Do you understand that?

GAVIN MERCADO: (Youth nodding affirmatively).

THE COURT: And you would have the right, through your attorney, to ask the person telling the story questions and to confront them with questions, and to say, Judge, the evidence that has been presented is not enough. Do you understand that?

GAVIN MERCADO: Ah-huh.

THE COURT: You would also have the right to tell your own story, and that means that you'd talk to Mr. Lee and you tell him what happened, and Mr. Lee would figure out who to bring in to court to talk about the case. And those people, as well,

would talk from this chair, those are witnesses, and Mr. Lee might also bring in evidence. I don't know what it would be, but something, I don't know, from the house, or that he thought was useful for me to see or a jury to see. Do you understand that?

GAVIN MERCADO: Yes.

THE COURT: And you have to make sure if you don't understand, you say that you don't and you ask a question. Alright?

GAVIN MERCADO: Okay.

THE COURT: Okay. Now, you have the right to -

MR. LEE: I'm sorry. Your Honor, at that point, I think I should object, because the whole issue, the whole reason why we're here at this hearing is the issue of competence, and one of the central issues is whether or not Gavin is mature enough to understand his rights. And so, while he may be answering in the affirmative, our - we allege that he, in fact, is not mature enough to understand his rights.

THE COURT: Alright. So, Gavin, you have to the help of your Attorney, Mr. Lee, throughout that whole trial and I would make sure that trial would be public, which is what's going on right now,

you have your mom here and there's other people here that can watch the trial, and that trial, I also would make sure would be set as quickly as possible, in other words, you have a speedy right to a trial, and that trial could take place in front of myself, in other words, I would be the one making the decisions, or you have a right to a jury, and a jury would be 12 people seated in this jury box. Do you see the jury box, and there's 12 chairs, and they would listen to all the evidence and what the witnesses had to say, and those 12 jurors would come from Pondera County, or the people that vote in Pondera County. And before I could find or before anyone could say that you had done this, each one of those people must be convinced with that proof beyond a reasonable doubt. It's that high standard that I told you about. In other words, they have to listen to the evidence and be pretty darned sure that you did what Ms. Ries is saying you did regarding the fire. Do you understand that?

GAVIN MERCADO: Yes.

THE COURT: Every single one of those jurors must believe that, not just two, all twelve of them. Do you understand that?

GAVIN MERCADO: Yes.

THE COURT: And, lastly, Gavin, you may appeal or ask another court, a court that tells me I'm wrong or maybe sometimes that I'm right, but will listen to the case and review whether I've done my job right and whether the jury's been right. Those are your appellate rights.

GAVIN MERCADO: Okay.

THE COURT: Appellate's kind of a big word, but basically that's who you would go - you would have another court that you could go to to decide whether I had done my job or the jury had done theirs'; alright?

GAVIN MERCADO: Ah-huh.

THE COURT: Okay. Now, the amended petition that's been filed, do you - you've talked to Mr. Lee about this case?

MR. LEE: Your Honor, we have talked enough for me to appreciate that Gavin is too young to understand the charges against him.

THE COURT: I understand, Mr. Lee.

MR. LEE: So, for him, I would like to enter a denial to the admissions - or a denial to the allegations, I'm sorry.

THE COURT: Can you show me where I have to accept the attorney's entry of that plea?

MR. LEE: No, but I've - I've done it many times and I believe that it's proper for me to do that, at this time, in the context of my belief that Gavin is not competent.

THE COURT: Ms. Ries, any problems with that?

MS. RIES: Your Honor, I believe that Montana law requires you to give him an advisement of the contents of the Petition.

THE COURT: I have -

MS. RIES: Of what the allegations are in the Petition.

MR. LEE: And that's fine, Your Honor, but I want to enter a denial for him.

THE COURT: Alright, okay. I thought you were asking me to completely not - alright.

MR. LEE: Oh, I'm sorry, no.

THE COURT: I don't have a problem with you entering a denial. Alright. Gavin, let me explain to you what Ms. Ries has filed or said that you've done. And it happened in the fall, September 13<sup>th</sup> of 2007, that would be last fall, alright, in Conrad, and it's alleged that you did something which, if done by an adult, would be a crime, and that crime would be Negligent Arson. The Section of the law is

45-6-102, and the allegation or what they're saying you did was that you knowingly, or that you knew that you were setting a fire, and that that fire damaged a residence or structure at 4 - 504 Second Avenue Southeast and that you did not have permission to be in that residence, or that house or structure, and the value of the damage from the fire exceeded \$1,000.00. Do you understand what I'm saying? Do you understand what Ms. Ries has said you've done wrong?

GAVIN MERCADO: Yes.

THE COURT: Alright. The maximum penalty is a commitment to a secure youth facility until your 18<sup>th</sup> birthday. Mr. Lee, do you have an entry as to Count I?

MR. LEE: Yes, a denial.

THE COURT: Count II, Gavin, alleges on - that on that same date, September 13<sup>th</sup>, of 2007, in Conrad, that you were on somebody's property without permission, and this would be a crime if done by an adult, and it would be known as Criminal Trespass to Property, in violation of 45-6-202, but basically, it's that you were on somebody's property without their permission, alright, and again, the maximum penalty, the worse thing that could happen, is

commitment to a secure youth detention facility until your 18<sup>th</sup> birthday.

MS. RIES: Your Honor, as a Youth In Need Of Intervention, I do not have the ability to commit him to a detention facility.

THE COURT: Alright, so what's the maximum penalty, he needs to be advised of that?

MS. RIES: They're under 41-5-1512.

THE COURT: We learn something all the time, don't we? What section are we going -

MS. RIES: Under - under -

THE COURT: "Place the youth in a residence that" -

MS. RIES: On probation, potentially put him in a residence for rehabilitation.

THE COURT: Alright. Well, I don't know what the maximum under this could be characterized as, I guess. I guess the max that - the maximum penalty would be to place the youth in a youth group home or youth shelter home.

MR. LEE: And that - I'm not even sure that that is possible because of the defendant's age. I think there's a statutory prohibition if they're under 10.

MS. RIES: There is to a secure facility,

such as Pine Hills, but Pine Hills or a secure facility is not available to him, but an out-of-home placement for rehabilitation such as KBH, if there was determined there was a mental need for treatment of that type, or - that's not what the State is anticipating, at this point. It's attempting rehabilitation and offering services to the family to enable him to be able to get past this and move on productively.

THE COURT: Alright. I think that's sufficient advisement as to the maximum penalty, Mr. Lee, on that; do you have an entry on Count II?

MR. LEE: Yes, denial.

THE COURT: Alright. Okay. So that takes care, Gavin, of this Amended Petition that's been filed, and, I think, Mr. Lee, you've made your record as to it, but is there anything else you want to add to that?

MR. LEE: No, Your Honor.

THE COURT: Alright. So today we are here on a Motion to Dismiss filed by Mr. Lee, and I think we're ready.

MR. LEE: Sure. I think, at this time, I'll ask that my client leaves the courtroom.

THE COURT: Thank you, Gavin.

MR. LEE: I'll call Dr. Lynn Johnson to the stand.

DR. LYNN JOHNSON, called as a witness by the Youth, being first duly sworn, testified as follows:

THE COURT: Good afternoon, Dr. Johnson.

DR. JOHNSON: Good afternoon, Your Honor.

DIRECT EXAMINATION

By Mr. Lee:

Q Good afternoon, Dr. Johnson.

A Good afternoon, Mr. Lee.

Q Will you state your name and address for the record, please?

A My name is Lynn Johnson, 401 15<sup>th</sup> Avenue South, in Great Falls, Suite, 206, that's my professional office.

Q Okay. And what is your profession?

A I'm a Licensed Psychologist.

Q Okay. And, let me ask you some questions about that.

A Yes.

Q How long have you been a psychologist?

A 1976, I was licensed in North Dakota, and came to Montana in 1979.

Q Okay. And you've been a psychologist

since then?

A Yes.

Q Okay.

A Continuously.

Q Alright, and where were you trained?

A I was trained at Brigham Young University in Provo, Utah; had undergraduate training at Stanford University, at Palo Alto, California. I went there also for my clinical psychology internship at a mental hospital there.

Q Okay.

MR. LEE: At this time, Your Honor, I'd ask that Dr. Johnson be qualified as an expert.

THE COURT: I don't think there will be - is there any objection, Ms. Ries?

MS. RIES: No.

MR. LEE: Okay.

Q Dr. Johnson, we're here discussing the case of Gavin Mercado. Did you have opportunity to meet Gavin Mercado?

A Yes, I did.

Q Okay. In what context was that?

A That was in the context of the psychological evaluation in my office, referred by yourself.

Q Okay. And what was the purpose of that examination?

A The purpose to determine his competency to proceed in trial and to assist in his own defense and to determine something about his mental capacity at the time of the alleged incidents.

Q Okay. And how - roughly, do you remember how long did you interview him for?

A The examination took about four to five hours.

Q Okay. So it was a pretty extensive examination?

A Yes, all afternoon.

Q Do you remember how old Mr. - or Gavin is?

A At the time, I have that he was nine years old, I believe nine years, three months.

Q Okay. Let me first ask you generally does Gavin, in your opinion, does Gavin suffer from any mental disease or defect?

A No, none that's going to be diagnosable in in a traditional way.

Q Okay, okay. Does he have any brain abnormality or organic brain abnormality?

A I do not believe so.

Q Okay. So, your evaluation of him,

generally, his mental state, his cognitive state, was that he was normal?

A Yes.

Q For his age?

A Yes.

Q And part of your examination is that you conduct tests; is that right?

A Right, we conduct mental tests of an interview type nature and we conduct some interactive type tests and we also conduct more standardized answer things of questions and tests, and paper and pencil tests, we call them, related to personality, intelligence, things like that.

Q Sure. And I note in your report that you examined - or had comments on his intelligence, and what was your determination in terms of his intelligence?

A Well, we indicated that he basically had intelligence in the normal range of a nine year old boy and was estimated by our testing to be about 87 on the scale we used, which is the lower end of the average range, but nonetheless within the average range, about the 21<sup>st</sup> percentile, meaning that 79% of the people would probably score higher than he, but that's considered within the average range.

Q Okay. Alright, so he has average to lower intelligence?

A Lower end of average, I would say.

Q Lower end of average, okay. Also, your report stated that you did a test called a CPS test?

A Right, Carlson Psychological Survey.

Q And what does that measure?

A That's a multiple choice type of personality test. It leads to ratings in different areas, such as substance abuse, disordered thinking, anti-sociality in the sense of criminal tendencies, self-esteem, things of that nature.

Q Okay. And what were the results of that test, per Gavin?

A They were normal. He did not show any abnormalities on that test.

Q Okay. So he didn't have any psychotic nature or -

A No -

Q That you could measure?

A No.

Q So he did not have -

A Did not have a psychotic nature, which would be the thought disorder area, or antisocial significant tendencies.

Q Okay. So again, a normal nine year old boy?

A I believe so.

Q Okay. You testified before that the purpose of your evaluation was two things, was to assess Gavin's ability to have formed the mental intent to commit the crimes that are alleged here; right?

A Yes.

Q And, secondly, his ability to effectively assist his counsel in the process?

A Ah-huh.

Q I'd like to dive into the first issue first, whether or not Gavin had the, in the law, they call it the mens rea or the mental ability to form the intent to commit the crime. Gavin's charged with trespassing, and in your opinion, based on your evaluation, did he - was Gavin able to - first of all, what materials did you use? Did you review any materials before you evaluated Gavin?

A Yes, we did review police reports and that was the main external information that we used.

Q Okay. So at least from the police perspective, you had a sense of what the facts were of the case?

A Yes.

Q And you understand that they - that Gavin and a friend of his went into a house that was not theirs that was under construction -

A Ah-huh.

Q And were playing with lighters, allegedly, and started a fire; is that what you understand?

A Yes, that the fire resulted from their doing that, yes.

Q Okay. So one of the charges that's been filed against him is trespassing, and I would like to ask you, Doctor, if you were able to form an opinion on whether Gavin could appreciate the criminality of that charge?

A I do not believe that he did appreciate the criminality of that charge.

Q What makes you say that?

A Well, in the first place, he was taken to this residence, as I understood it, by the other boy and in that boy's neighborhood there was an unoccupied house, and that apparently the other boy thought of as their clubhouse and Gavin appeared to accept that idea, as well, such as boys often do, or children do, that unless a person is forbidden from playing in a particular area, that that area is

acceptable to play in, unless otherwise told, and I do not think that he understood that that was clearly a trespass, and therefore, a illegal act.

Q     Alright.  Gavin is also charged with Negligent Arson, as a result of the fire which happened in the house.  Do you think that Gavin has the ability to appreciate that charge against him - or to have committed - formed the mens rea, with the intent to have committed that crime?

A     No, I do not.

Q     And why is that?

A     Well, I don't believe that he was under the impression that, whereas they did have lighters and could have, an apparently, at least between the two boys, did light a fire; that it was something with intent to cause a fire that would be a criminal act.  They appeared to have been experimenting with fire, as is fairly typical of children, and in the absence of someone directing them differently, did their experimentation and felt that they realized that they needed to put out whatever fire they started, and thought they had put out a fire, and taken normal precautions for a child.

Q     Okay.  Alright, let me stop you on that point.  The statutes, an I understand, Doctor, that

you won't stoop so low as to consider yourself a lawyer, but the statute defines negligence for us and one of the ways that defines negligence is that it's a conscious disregard, where the defendant consciously disregards a risk that a result would occur. Now, do you believe in your expert opinion, that Gavin consciously disregarded the risk of a fire?

A I don't believe he consciously disregarded a risk that a house would be set on fire. He was probably not aware that that was a likely outcome from what they were doing.

Q And you - and that would be because of his age and immaturity?

A Because of his age, his immaturity, his cognitive level, which we could explain in terms of mental operations and abilities for children his age.

Q Okay. Alright, the statute defining negligence goes on to say that to be criminally negligent a person disregards a risk of which the person should be aware that a result will occur. In your opinion, did Gavin have the ability to disregard that risk?

A I don't think he had the ability to

disregard a risk because he was not aware of that as a significant risk.

Q Okay. Alright. Further the statute says, "that the risk must be of a nature and degree that to disregard it involves a gross deviation from the standard of conduct that a reasonable person - reasonable person would" observe in this situation. So the question is, Doctor, did Gavin have the ability to act in a manner that a reasonable person would act?

A Not a reasonable adult person, not a person of a mature understanding, and he just, by not being able to appreciate the risk of what he was doing, I would say he did not have the capacity to grossly deviate then from conduct of a reasonable person.

Q Okay. Lastly, I wanted to ask you on this subject, the statute says, it defines gross deviation for us, and it says that it means a deviation that's considerably greater than a lack of ordinary care. So with that definition as the context, did Gavin have the ability, at that time, to grossly deviate from ordinary care?

A Not likely, no. To do that, I think he would to appreciate the risk first and then

disregard it.

Q Right, he would have to understand what ordinary care was in that situation?

A Yes.

Q Okay. So I'd like to ask you now, Doctor, about the second general issue that you evaluated Gavin for and that is his ability to effectively assist his - assist me at trial in the proceedings here and to understand the process against him. You state in your report that "he can tell his attorney about his view of the incident and thereby assist in his own defense". What did you mean by that?

A Well, I meant by that that competency is not all or nothing. People are competent in some areas and not others. He probably could not, you know, he didn't really understand that - well, basically, he could be cooperative, he could be obedient, enough to tell what he thinks happened but not necessarily understand the proceedings and what's going on and be able to, with knowledge of the natures of the crime, the different penalties and what those consequences mean directly to him, should be able to provide good, relevant information to - with his attorney, and/or to know how to make decisions about whatever counsel has to advise him

on.

Q You were in the courtroom a few minutes ago, were you not, when Gavin was read his rights?

A Yes.

Q Did you note that Gavin answered affirmatively to those questions?

A Yes.

Q And he even answered affirmatively to the question if he understood his rights.

A Ah-huh.

Q And understood the questions that were being asked him.

A Right.

Q Merely because he answers affirmatively, does that mean that he actually, in fact, understands those concepts?

A Well, no, it means only that he saw that - he saw that as the proper thing to do under the circumstances, to answer affirmatively -

Q Okay -

A It would take more than that to know that he understood those rights.

Q Alright. In your opinion, does Gavin understand that he's in the Youth Court system and is able to distinguish between Youth Court and adult

court?

A I do not believe that he really understands the difference there.

Q Okay. Does - did he understand - do you believe that he has the ability to understand the nature of the penalties that could be imposed against him as a consequence of the charges?

A Well, I don't think he understands the nature of the penalties. He might understand, partially understand, some of the consequences of penalties, but as for what - what their nature is, what that all really means, I think he would be hard pressed to understand that. He would have trouble knowing what to do, in thinking about those penalties, whether the penalty means, you know, he is to be taken away from his mother versus have to pay a large fine, how to - what that would mean for him.

Q Okay. And that - again, that's because, not because he has some sort of brain defect but because he's mentally immature?

A Yes, I think that that's the case.

Q Okay. And then how about, one of the penalties is that he would be under court supervision, could be under court supervision until

he's 21, if there's restitution involved in this case. Does he have the ability to understand, truly, as rationally what that would mean?

A I don't believe that he can represent that to himself very well, would not understand it as an absolute requirement. For example, that is you have to report to someone or there will be extra consequences. If you were afraid of that person, you might avoid them, even though there were extra penalties associated with dodging that parole officer or whatever, and I don't think he would understand that well.

Q How about if Gavin were to be convicted or to plead or admit to these charges, he could be found to - he could be given restitution in the sums of thousands of dollars; do you think he understands that concept?

A Well, I'm sure he knows what money is. I don't think he would have the ability to comprehend thousands of dollars and what that would mean for him now, the implication of having to pay thousands of dollars might seem more palatable than to be detained from his mother for a day, for example.

Q Okay.

A But some of this has to do with his

cognitive level and children of his age, he's at a sort of a boundary area right now for children. There is what we call a pre-operational level, children develop somewhere between ages two and seven, where they're able to use words to communicate but they have more of an intuitive feel for those words rather than a real comprehension. Their perceptions are more important than judgment, that is what's right in front of him right now is dominant over judgment. They can't really show that they understand principals very well. They go by dos and don'ts, as to what they've been told. They focus on one aspect of a situation more than anything else that's relevant. As they get between seven and 11, they get into a concrete operational stage but that's still less than adult cognitive development, and in the concrete operational stage they are beginning to put some logical thought together, they're concrete problem solvers. They can make categorical judgments but their classic logic is really not there yet. They can start to consider more than one thing than another, you know, what would mom want me to do, versus what does a situation demand, but still, the rules and authority is more important than any kind of consequential

thinking where they can consider different possible consequences that can happen from things.

Q Okay.

A So that's the cognitive development. As a child who is in the low average range of general intelligence, I would say he's probably somewhere between that pre-operational level to the beginning stages of that concrete operational level. That's what I mean by immature cognitively.

Q Okay. One of the - there is, as I understand it, two different ways this case can go, either Gavin exercises his right to take this case to trial and be found guilty or not guilty, or responsible or not responsible, by a jury, which you've explained you don't believe he has the ability to assist me in that already, and the second thing that could happen is we could enter into what's called a Consent Decree, which is basically the juvenile court or youth court plea agreement. Now, one of the elements or one of the things we have to verify, or the Court has to verify, in order to enter into this Consent Decree, is that it's voluntary and knowing. Do you believe that if I were to enter into a Consent De - or advise Gavin to enter into a Consent Decree, that that would be

voluntary and knowing on his part?

A I think that would be doubtful. He could say yes or no. Children can be coached or pick up the hints, you know, of what people would want for them. I don't know that he would know what he's - what he's giving up by doing that.

Q I'm absolutely certain, given my interaction with Gavin, that if I asked him to enter into a Consent Decree he would do that. But you're telling the Court that that probably would not be voluntary; is that your testimony?

A It wouldn't be voluntary in the sense of coming from a position of knowledge and understanding.

Q Okay. Under the Youth Court Act - well, no, let me pull back. Does he have the independent ability, I'm talking about effectively assisting me in trial, does he have the independent ability to make decisions or to exercise his - or waive his rights?

A Now, we're talking about the trial question or the waive his rights question?

Q Well, either one, you pick.

A Well, let's talk about the waive his rights question. I think the other one has probably

been addressed already. No, I didn't think he has the independent ability to waive his rights, for some of the same reasons we've talked about -

Q Ah-huh -

A In terms of understanding the ultimate consequences of these different lines of choice. Perhaps the same reason why children can't give consent to have surgery, or waive their rights to go to school, or something like that, they wouldn't understand the consequences that would involve.

Q Okay. Finally, Doctor, let me ask you, does he have the rational, as well as, factual understanding of these proceedings against him?

A Well, I don't think so. I would say not.

Q Okay. So your conclusion, by way of Gavin, is that he does not have the mental capacity to stand trial; is that right?

A I believe that's the best summary of it, he has a quite limited capacity to stand trial.

Q Okay. Nor did he have the mental capacity to commit the crimes as charged?

A That's correct.

MR. LEE: Okay. I have no further questions. Thank you, Doctor.

THE COURT: Ms. Ries.

MS. RIES: Thank you, Your Honor.

CROSS-EXAMINATION

By Ms. Ries.

Q Good afternoon, Doctor.

A Hello.

Q I want to get into your - develop your - what you have done since you were licensed in Montana back in 1979. What type of a practice do you have and how long have you been practicing in that manner?

A At present or historically?

Q What are you doing presently?

A Presently I have a private practice in Great Falls, I've been doing that since 1993. I also consult and I'm working at the Prison, here in Shelby, and do a lot of work with the correctional system and the inmates there.

Q In the consulting work that you do with CCA here in Shelby, that focuses on adults, an adult behavior -

A Yes -

Q Correct?

A Yes.

Q What about juveniles, what is your experience with juveniles?

A My practice, since 1979, in Montana, well I should - in 1975 to '79, I was a Professor of Clinical Psychology at the University of North Dakota. Then when I moved to Montana I started working in the community level health system, in Great Falls. It's now called the Center For Mental Health, Golden Triangle, and in that system I had the full range of clinical services to adults, children and families, and so I did psychological evaluations and psychotherapy on children and youth and their families. Not just children and youth, but I had a mix of experiences, and I have continued in that mix of general practice, including a lot of evaluations of youth, both for court or for treatment recommendations; except for between '87 and '93, and then I was more exclusively working with the adults in the Montana Deaconess Medical Center, at that time, now Benefis Healthcare, in their rehabilitation programs.

Q I'm hearing, and correct me if I'm wrong, that the focus of your practice has been therapeutic, as opposed to forensic; or a mixture?

A A mixture, it's been a mixture.

Q Can you estimate for me how many forensic evaluations you've done on juveniles in the last

year?

A In the past year, I would, I think about, about six.

Q About six?

A Last year, that's about it.

Q And two of those for Pondera County?

A Yes.

Q I want to talk specifically now about this evaluation that was conducted on Gavin, back in November. Your report indicates four different days, and when you were testifying you indicated that the exam lasted approximately four to five hours, so can you explain that to me what the process is?

A Okay, well, yes I can. One day was an interview with Gavin's mother, another day was the main interview, and then the other days have to do with the times in which the reports were written.

Q Okay.

A So they're not all clinical appointments.

Q And did you personally conduct both of those interviews?

A I did, I conducted both of those interviews on both of those days. I had an associate who did part of one of them.

Q Okay, would that be Roger Hughes?

A Yes.

Q Okay, and he's listed in your report?

A Yes.

Q Okay, when was the testing that was completed on Gavin done?

A Well, lets see, I'll see if I have a note. I did not bring the file with actual testing data. I believe it was the 27<sup>th</sup>, and that the 28<sup>th</sup> and the 30<sup>th</sup> were write-up days.

Q Okay.

A I may need to have my memory clarified on that but I believe that's the date. It would have been either the 27<sup>th</sup> or 28<sup>th</sup> when we were both doing the testing, and the afternoon's work with Gavin.

Q And that would have been a long day for him, given his age, four to five hours?

A Half a day, yeah, ah-huh.

Q Okay. You indicated that you had done several tests?

A Ah-huh.

Q I'm assuming that the Child Adolescent Psychologic - or psycho/social, excuse me, Child/Adolescent Psycho/Social History; is that the interview - was that completed when you were

interviewing mom, or how was that done?

A Yes, that would have been with mom, input from mom.

Q Okay.

A His history, yes, she would be the one who had that information.

Q And the history for the child, you primarily took that directly from the mom; is that correct?

A I interviewed - certainly his early history was obtained that way, and then I got some from Gavin himself, as he could remember.

Q Did you review any medical records or any school records?

A I did not review any medical records or school records. I did review reports from Licensed Professional Counselor, Maureen McInnis, regarding her test of his fire-setting indicators I guess, or potential for fire-setting.

Q Okay. Now you indicate the Slosson Intelligence Test?

A Yes.

Q Is that pretty standard when you're doing an eval on a nine-year-old, or someone around that age?

A Yes. It's not an extensive, comprehensive intelligence test, it's a shorter test than some of the ones that are in use, but usually sufficient before deciding whether to do an in-depth intelligence test.

Q And the results of that indicated that an in depth test wasn't necessary?

A Right.

Q Your report, as I'm finding it on page 2, talks about results of testing. It indicates that the S.I.T., which I'm assuming is the Slosson -

A Slosson -

Q Intelligence Test, indicates normal intelligence?

A Yes.

Q And then during your testimony you gave a number to that of 87?

A Right, correct.

Q An I'm unable to find that anywhere in the report?

A Oh, okay. Yes, you're correct, that number is not cited here. The focus is on him in the normal range of intelligence, and that is within the normal verbal range.

Q Okay, so although you're testifying today

that he is at the low end of average, he fell within normal -

A Within average -

Q An anywhere within that normal would have not - wouldn't have made any difference in what your ultimate report and conclusions were?

A I don't believe so.

Q You also indicate that you did a Wide Range Achievement Test III; can you explain for us what that is?

A Yes, that's a test of ability, that is, I should say, more of a test of achievement; that is, what has a child been able to achieve in those areas due to his exposure to the educational system.

Q Okay.

A And so he's in the third grade and the scores are indicated - the grade levels are indicated there.

Q Okay, so a little low on math, a little higher on spelling -

A Ah-huh -

Q Not average on reading level?

A Not average on the other things.

Q Nothing out of the norm?

A No.

Q You also administered the Conners Test; could you tell us what that test is for?

A The Conners Test is basically a rating scale by a third-party. It's a rating scale, in this case by his mother, about the possibility - the potential I should say, for Attention Deficit/Hyperactivity Disorder, or attentional problems. A mother or a teacher or a third-party rates the child and then it's scored. There is a score that's obtained, they're rated on about 35 different child behavior items, as to whether that behavior is rare, occasional, frequent or - basically a one to four scale, happens predominantly, and he did not score in the range that would tend to suggest Hyperactivity Disorder, or Attention Deficit Disorder.

Q The next test that you have listed is the Children's Problems Checklist?

A (witness nodding affirmatively)

Q And what type of test is that?

A Well, this is also rated by mother, checking problems of the child in the present, and to indicate his current adjustment to life's situations.

Q Okay, Child Personality Questionnaire/

Profile, and then you refer to that as C.P.Q.?

A Yeah.

Q What does that - what is the nature of that test?

A Well, that is a test that the child fills out and rates himself, it's a true and false instrument about personality traits that are considered to be normal range kind of personality traits. We're not looking here for clinical problems or diagnoses, it just gives some of Gavin's more typical personality traits. It has him between two poles. As it says here, "Cool to reserved - I mean, "Cool and reserved" as opposed to a warm and outgoing kind of thing. And then I tried to indicate the ones where he is somewhat more in one direction than another, and the ones that are said that are balanced are pretty much right in the middle between the two poles.

Q And that gives you an idea of what he's like as a person or, how do you -

A What he is like as a normal boy, the range of normal personality traits of a child.

Q Does that help you with determining whether there's any mental illness or potential for that?

A Not towards the diagnosis of mental illness, but towards influences based on personality, on his behavior or his adjustment or reactions to other things.

Q Okay. Your next test was the Carlson Psychological Survey; is that correct?

A Right.

Q An I'm assuming that that's the one you referred to as the CPS?

A Yes.

Q And he was normal on that instrument; correct?

A Yes, he was.

Q And that instrument measures dimensions of substance abuse, thought disorder, antisocial and self-esteem?

A Yes, ma'am.

Q Okay. Your next test instrument was a Jesness Inventory?

A Yes.

Q Can you explain for us what that is?

A That's also a number of questions and statements about one's self, that the child has to respond to, and that's more of a clinical instrument. Trying to see if there are clinical

problems there, and so then there's various ranges of dimension. It's targeted really, mostly at whether the child has strongly delinquent tendencies.

Q The results were that he was "moderately high on denial"?

A Right, that's the only one that was outside the range of normal. Denial was, he was just above the average range, moderately into the significantly above average range in denial. Denial in the psychological sense of the word, as a defense mechanism; that is a person who is defending against anxiety in some way, is against fear an anxiety.

Q Okay. Your next tool was the Piers-Harris Self-Concept Scale?

A Yes. In that sense, I think I have to owe you and the Court an apology. I think that is a test that we actually did not complete, but was on the list to be done and did not get administered, so that needs to be deleted from the report, I have no data on that test.

Q So that takes care of my next question, what the results were on that test. And then the last test it indicates is the Family Fire Risk Evaluation?

A Yes.

Q Was that completed by Maureen McInnis or did you -

A Yes, we did not re-administer that test, that was her test, and we've cited her conclusions on that.

Q Okay. Doctor, these are all standard tools that you generally use when evaluating a young person; is that right?

A Typically they are, yes.

Q Did you use any evaluations that are designed especially for juveniles, such as the Juvenile Adjudication Competence Interview Evaluation?

A No, we used the Jesness to get closer to the delinquency idea. We did with respect to the competency, we used the McGary questions regarding competency, and those are more general, they're not necessarily targeted at juveniles, specifically.

Q They're -

A They're more general -

Q More general.

A General questions about competency to proceed.

Q Are you familiar with the Juvenile

Adjudication - Adjudicative Competence Interview  
Evaluation Form that's been developed?

A I've heard of it, but no, I've not specifically used it.

Q It's fair to say that is a rather developing area of psychology; is that correct?

A Yes, I believe that it is developing. There's a lot of things that are not nailed down yet.

THE COURT: What is the area that's developing?

MS. RIES: The area of determining whether a young person is competent for proceedings in either Youth Court or a criminal court, and different tools have been developed in an attempt to more accurately address competency.

THE COURT: Is that accurate Dr. Johnson?

THE WITNESS: I think she has paraphrased it well.

THE COURT: Okay.

THE WITNESS: Well enough for me.

Q We as a society kind of swing back and forth?

A Yes, we do. There was a time when children were thought of as just little adults, and

then gradually, when society began to realize that they didn't think just like adults, and then more tendency to try to prosecute children, again, as if they're adults; yeah, we swing back and forth.

Q Dr. Johnson, you didn't find any mental disease or defect with this young man; correct?

A That's correct. I did make some observations that Gavin is somewhat threat sensitive but I didn't find any mental disease or defect in Gavin.

Q What do you mean by threat sensitive?

A Well, that he's somewhat shy, he's easily frightened, intimidated, I think within normal range. For example, when I did interview him, he was frightened about some of the interaction, and at one point pulled his coat over his head and cried and he couldn't go on to answer questions. But eventually he was able to do so, but it took a long time for him to come out of that.

Q When you said he was frightened about some of the interactions, that's interactions at you during the time of the evaluation?

A I think he was, at some points, and I infer that he may be in other contexts, as well.

Q Is it fair to say that a lot of people

that you do evaluations on are threat sensitive and fearful of what's happening.

A Well, yes, some are, not very many to that extent.

Q But that doesn't - how do you use that in determining competency to proceed?

A Well, I have to be aware that he may be fearful, and based on lack of comprehension, you know, of what he's supposed to do, what is permissible to do, and what the implications are of being in trouble, as opposed to, you know, whether he just doesn't understand what's going on.

Q Doctor, Mr. Lee asked you some questions about criminal trespass, that particular offense. You didn't address the criminal trespass offense, as such, in your evaluation, did you?

A I will have to be reminded whether we did or did not. Let's see, I don't know that I clearly distinguished the offenses. I did, at the top of page of, I believe it's Page 4, although my pages may not be numbered here, where it says, Inferred and implied that he was thinking or stated that he was thinking of the structure as unoccupied and as a clubhouse. I think that's relevant to the state of mind about whether his intentions were to trespass

or not.

Q Doctor, I understood your testimony to be that given his age, he would think any area was available for him to go onto unless he was specifically told he could not; is that fair?

A Or had been told, you know, at some point, you know, at some point in the past. I don't know that - I don't know how far I would take that, but I believe that that's, in general, that he would not worry very much about playing somewhere unless he had been given some kind of instructions or historic reasons to avoid a certain area.

Q So unless the person that lived a block away from him told him specifically, Don't come to my house, he would come into my house; he wouldn't have any comprehension that that's not acceptable?

A Do you mean into their own occupied house?

Q Into someone else's occupied house, yes.

A Would you state the question again?

Q Well, what I'm hearing you say is that he needed to be told specifically he couldn't go into that area. Is there a difference here because it was an unoccupied structure as opposed to an occupied structure?

A I think there's probably a reasonable

difference there in his mind about that.

Q So if he'd gone into an occupied structure, would that still be excusable?

A Probably less so because he would have likely understood better that that was not normal and not put in the realm of what's usually free to a child to explore.

Q Okay. You also indicated that he wouldn't have the mind-set for the arson. Are you aware that the original charges in this matter were amended to a Negligent Arson, as opposed to an Arson which was originally charged?

A Yes.

Q And Negligent Arson indicates - what the State's required to prove is that the youth knowingly or purposely started a fire, which then negligently caused the structure to burn to the ground. When I'm reading your report, it indicates to me that Gavin was starting a fire, was playing with a lighter, knowingly started something on fire; is that fair to say?

A I believe I stated that he knew he was starting a fire of some type using a lighter, yes.

Q And then in your evaluation, and your testimony indicates that Gavin did have some

appreciation of the danger that that fire posed;  
correct?

A I believe he had some awareness that fire is a somewhat dangerous curiosity; that one should put out fires, if they start fires, and so I think that's correct.

Q So you testified that he knew he needed to get that fire put out; correct?

A Yes.

Q So he appreciated what had gone on to the extent that he knew the fire needed to go out?

A Yes, and he thought that he put the fire out, the one that he and/or the other boy made, that's my testimony.

Q Your report also says that Gavin quickly became alarmed about the fire?

A Ah-huh.

Q And that, likewise, shows that he appreciated the risk that that fire could pose?

A He appreciated some - some risk that it could pose, and as far as how much projection or consequence, you know, he understood, I doubt that it was to the extent that it could burn this house down, but he appreciated some risk of not putting a fire out, yes.

Q And then, Doctor, you indicated that you had reviewed the police reports?

A Ah-huh.

Q We have a person who viewed these two young boys running from the house prior to the fire being noticed?

A Ah-huh.

Q Wouldn't you agree with me that them running from the house after the fire was started indicated that they knew that there was a problem?

A I don't know, really, what that means or which of the boys was the most worried, if there was a difference. I assume that it implies that they realized that they could be in trouble, if there was more consequences.

Q Doctor, you testified that Gavin was nine years, three months old, when you completed the evaluation?

A I believe that was true. If I've erred in his birthday, then I apologize.

Q We believe his birthday is in June, in the month of June.

A In June, and we saw him in August.

Q November, I believe.

A Oh, excuse me, let's see.

Q The fire was in September.

A The fire was in August and we saw him in November, so he would have been, what, two months older than that?

Q Then when the incident occurred?

A Yes.

Q Mr. Lee indicated that we had two things that we needed to determine, based with the use of your testimony, one was whether he had a particular state of mind at the time the event occurred, but then also his fitness to proceed. It's fair to say that young people, like Gavin, they make a lot of strides in competency, maturity, much more quickly than, say, adults would; is that fair to say?

A Yes, they're growing, they're developing, their brains are maturing, you know, as the months go by. They're not mature at this age, but time is on their side, compared to some of us.

Q And so, you know, potentially, six months ago, he couldn't assist, but provided that he's developing normally, he would be better able to assist today than he would have six months ago; correct?

A I cannot say how much better he would be. Of course, I haven't examined him recently. I would

presume that he would be gradually growing in that direction.

Q But absent any mental defect or physical abnormality, age should give him the ability to assist in his defense; correct?

A Eventually, yes.

Q And then, Doctor, when you were talking about unable to appreciate the results or consequences or what it might mean, is there an age when young people are more able to appreciate the consequences of their action?

A Well, yes, those typically between the age of 11 and 15, they develop what we call formal logic and they're more able to reason from abstract principals, consider different lines of consequences from different courses of action. Those are the years in which that usually occurs and so I don't know exactly, but I think that that's one reason why, typically, people that are less than that higher end of that range, less than 15, for example, are often regarded as not yet fully able to appreciate the consequences of their actions and such.

Q But, Doctor, then wouldn't they have free reign to go out and create havoc and we can't hold

them accountable because they can't appreciate the consequences?

A Society must have various ways to hold people accountable, and it's a case-by-case basis.

MS. RIES: Nothing further, Your Honor.

REDIRECT EXAMINATION

By Mr. Lee:

Q Doctor, just quickly on a case-by-case basis and your review of this case -

A Yes -

Q Again, do you believe that Gavin had the competence, at the time, to commit these crimes?

A No.

Q And do you believe that he has the competency to stand trial?

A No.

MR. LEE: Okay, thank you. I have no further questions.

EXAMINATION

By The Court:

THE COURT: Doctor Johnson, you can take a seat but I have a few questions. I just don't want you to have to strain your neck.

THE WITNESS: Well, okay, I can just turn and visit with you.

THE COURT: Alright, and this is on the line of kind of what Ms. Ries was asking you. I guess, would it be your position that - I mean, every test that you administered to Gavin indicated that he was within a normal functioning range of a nine year old; is that correct?

THE WITNESS: Yes.

THE COURT: Except for the one test where he showed he was threat sensitive, but even that was within the normal range; is that correct?

THE WITNESS: I think that that - I think that that's probably - I think that's reasonable.

THE COURT: Alright, so would it be your position that any nine year old is not competent to stand trial because they either; One, couldn't appreciate the criminality of what they did, or; Two, they're not able to assist counsel?

THE WITNESS: I believe that they're in that - I would think it would be the rare nine year old that could do that, ma'am, and so I would say that that's my opinion, that most could not, and I would like to help the Court a little bit better, if I can, but I think that this child is too young for that and that's my opinion.

THE COURT: Alright. And, your interview

with Gavin was, I think you call it, Day 2, and that was the main interview?

THE WITNESS: Yes.

THE COURT: Okay. So then certain tests that were to be completed by him were given; right?

THE WITNESS: Ah-huh -

THE COURT: And there were several. What part of that interview did you talk to Gavin about the particular offense?

THE WITNESS: That would have been that main interview day, we talked about that offense.

THE COURT: How much time was spent on that?

THE WITNESS: I would say probably about an hour, between myself and my associate, and Mr. Hewitt spent about half of that time and I spent about the other half of that time talking to him about the offense, and whereas my test didn't show him to be specifically above and beyond the normal range for threat sensitive, I did find my interaction with him clinically made me feel that he was probably more threat sensitive, if I may be forgiven for adding a bit to what I had said earlier, by his emotional reaction to my attempts to talk to him about that indicated.

THE COURT: Alright. And when you talked to him about the incident, I guess I want to know kind of how that went; did he tell you about what happened or did you ask him questions? I mean, when I had this colloquy with him, I couldn't have an interchange. I was advising him of certain things.

THE WITNESS: Yes.

THE COURT: And I could only accept his answers, as to whether he understood, but if I had some free reign, I would have tried, and as a witness he would be asked questions that weren't yes or no answers, and that's what I'm wondering is, were you able to talk to him in that manner about the incident, whether he explained what happened or -

THE WITNESS: Yes, he did not find it easy. He was shy and had some trouble explaining it but he did. He did explain what happened, eventually, with some difficulty, but he did explain it consistent with what had been said previously; and then as I tried to get him to draw pictures to elaborate, you know, since I knew he was interested in art an a good artist, and I thought maybe he would be more able to express himself with that, so I had him draw pictures of various things and one of them was draw

a picture of a fire, and he drew a nice picture of a fire. I tried to get him to draw a picture of the actions of the children, you know, in that connection, and that's when he became unable.

THE COURT: Alright. And in your competency to proceed, the last paragraph, you talk about, He does not understand the role of his attorney or of a prosecuting attorney, basically the elements that I went through some of them today: how was that handled in terms of did you ask him questions first or did you explain? Do you know whether he has ever had that process explained to him?

THE WITNESS: No, I don't know if he'd had that explained to him before. I don't know the nature of Mr. Lee's discussions of that with him.

THE COURT: But you didn't explain it to him?

THE WITNESS: I asked him, in as close to children's language as I could, if he understood them and the difference, and his responses were vague. I did not try to coach him very much about that. No, I did not try to coach him, to educate him about that.

THE COURT: Alright. Any questions, in

light of the Court's?

MS. RIES: No.

MR. LEE: One question.

REDIRECT EXAMINATION

By Mr. Lee:

Q Doctor, the Court asked you about whether or not all nine year olds, you know, are able to stand trial. You deal with cases on a case-by-case basis; is that right?

A Yes, I do.

Q You're not in the business of making broad generalizations about all nine year olds; are you?

A No, it's not my study.

Q Okay. Also, when you analyze someone, especially a minor, isn't it true that you are not interested in educating them on the subject, you're interested in discovering what their competency is on a subject?

A Right.

Q Okay. So you wouldn't have tried to educate him as to the process here?

A No, I wouldn't have tried to do that. I wouldn't know how, in which context that would be appropriate, considering the on-going legal proceedings.

MR. LEE: Okay, no further questions.

Thank you.

THE COURT: Actually, I forgot one. I had another one that keeps coming up, Dr. Johnson, with me, and that is, that a witness can testify from the stand, which is a different proceeding as a witness and not a youth charged or an adult, and sometimes we could have a witness that's as young as six years old, and the basis for that competency is whether they understand the difference between a truth and a lie, and based on that witness being qualified, they're then able to answer questions. Do you see a distinction between this scenario and, in other words, I guess, would Gavin be able to distinguish between the truth and a lie and testify as a witness?

THE WITNESS: I think he could probably distinguish between a truth and a lie and testify as a witness. How much, you know, emotional overlay, you know, he might bring to that, I'm sure what the effect would be, but as far as being able to tell the truth from a lie and give an opinion of that, relate those facts, I believe he could do that.

THE COURT: Alright. Okay, thank you.

THE WITNESS: You're welcome, Your Honor.

I'll collect my things here.

THE COURT: Mr. Lee, do you have any other evidence to present?

MR. LEE: I have no other witnesses, Your Honor.

THE COURT: Ms. Ries, anything to present?

MS. RIES: Your Honor we stand, and have no evidentiary items to present, we stand by our Response. What I am hearing today is that Mr. Lee is trying to get this Court to supercede the trier of facts' responsibility of determining whether or not there was a state of mind, which is the State's burden to prove at an adjudicatory hearing, given all of the evidence that would be available, including the youth's actions which were discussed with the Doctor today, as well as if he wants to present expert testimony regarding the inability to have the state of mind. I believe that the youth is fit to proceed in a Youth Court hearing, to be found to be a Youth In Need of Intervention, and I would ask that you hold him accountable.

THE COURT: Mr. Lee.

MR. LEE: Your Honor, we're basically or virtually in the same condition as we were the last time that we met and discussed this issue. We had a

hearing on it, except for now I had Dr. Johnson come to the stand and testify, and testified consistently with what his report had to say. The issue before this Court is whether or not the youth is - just like it would be in an adult context, just like if we were having this in an adult context, the issue is whether or not he's competent to stand trial, or whether he had the particular mental state to commit the crime. That would be what we would be deciding in an adult context. The problem here, Your Honor, the overwhelming problem in this case is that there's a void in Montana law.

THE COURT: Is the adult competency based on mental disease or defect, or developmental disability?

MR. LEE: Right, and that's the distinction. That's the distinction here and that's what I was getting to, Your Honor, is that there's a void in Montana law for having a developmental delay that's because of youth, or not being able to effectively assist counsel or appreciate counsel because of youth, and we all know instinctively and naturally that some kids are too immature to understand those things, and accidents happen, and we don't charge every kid that commits what could be

charged or defined as a crime; and my assertion in this case is that that's what we have done. We've taken a kid who is not mentally competent, not old enough to be mentally competent, and we've charged him with crimes, or he's come into the Youth Court process and that we have no mechanism, even though minors under the Constitution of Montana have the same rights as adults, and even super rights, whatever rights the legislature wants to give them beyond adult rights, even though they have those rights of adults, we have no mechanism in the State of Montana to verify whether, by reason of youth, he is too immature to charge with a crime, and I suggest that he is. And I would say that the only evidence that we have before the Court is the testimony of Dr. Johnson. He's been the only expert in this case, and the expert, the doctor, testified that in his expert opinion that he's not competent to effectively assist counsel, or understand the process against him, nor would he be competent, nor was he competent at the time to have formed the particular mental state to have committed the crime, so that's the crux of the case. I believe that the Court should dismiss this case because the only evidence before the Court is what the doctor put in,

and he's the only psychologist, he's the only expert here, so I believe that the Court should dismiss this case and needs to dismiss this case; and I understand and I empathize with the Court that, if this were at the Supreme Court, I believe it would be a case of first impression because I cannot find any law in Montana, but this has to have occurred, this did occur here, and so I believe that justice requires that the Court dismiss this case now.

MS. RIES: Just briefly, Your Honor. If he were an adult, what happens, if you find he's unable to - he's unfit to proceed, then we set this aside until he's able to proceed, either through treatment. In this case I would argue that maturity, ageing, would give him a better ability to assist; but I think the Youth Court, in an of its very nature, and the fact that this is charged as a Youth In Need Of Intervention, addresses some of those concerns. What the youth's counsel has failed to point out is that not only is the issue whether he had a particular state of mind and he's fit to proceed at this point, then the Court also has to take that into consideration at sentencing, or in this case at disposition; and the State has been very careful to amend its filings so that we are

addressing his young age, while holding him accountable and weighing the interest of the victims, Your Honor.

MR. LEE: Your Honor, I believe that's a misrepresentation. In adult court, if the defendant doesn't have the ability to regain competency, the court has to consider, I believe within 90 days, about whether or not he should be released and the charges dismissed. So first of all -

THE COURT: But we're not under Section 46-

MR. LEE: We're not under 46, I agree -

THE COURT: 14 -

MR. LEE: Right, but you understand why we use it, Your Honor, because it's the only procedural context that we can really talk about this in, which it has been my problem from the beginning.

THE COURT: Well I guess my problem is that we have a nine year old who is normal, by your own expert witness; and your witness indicated that he does not believe most nine year olds would have the ability and appreciate what they were doing was wrong. And also that Gavin was, when he was observed in the home, in the house, he ran when he saw the witness, which indicates he knew what he was doing was wrong. Now granted Dr. Johnson said that

it may have been because he was with Colby Clark, but at some point we've got to stop, I mean, there has to be some accountability.

I understand the points you have raised. I think probably the infancy defense can be presented in Montana, and has been presented in just the fashion that you are doing, and I'll have to make a decision as to whether Gavin Mercado had the ability to appreciate what he was doing was wrong, could form the mens rea, and also whether he could assist you in your defense. And so I will - are we having any dates that I have to - I don't think we have any dates - I'll issue a - it needs to be in a written finding.

MS. RIES: Your Honor, we vacated the last trial date and nothing has been reset.

THE COURT: Alright, I'll get an order out and that's about it.

MR. LEE: Okay, thank you.

MS. RIES: Thank you, Your Honor.

WHEREUPON the Hearing On Motion was completed.

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MONTANA NINTH JUDICIAL DISTRICT COURT-PONDERA COUNTY

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IN RE THE MATTER OF:            ) STATUS HEARING  
   )  
 GAVIN THOMAS MERCADO,        ) Cause No. DJ-07-05  
   )  
                   A Youth.                ) January 20, 2009

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BE IT REMEMBERED that the above-entitled matter came on regularly for hearing before the Honorable Laurie McKinnon, Ninth Judicial District Judge for the State of Montana, in the Courtroom of the Pondera County Courthouse, Conrad, Montana, on the 20th day of January, 2009, at the hour of 11:00 a.m.

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APPEARANCES:

Mary Ann Ries, Esq.,  
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 20 4<sup>th</sup> Ave. S.W.,  
 Conrad, Montana 59425

Attorney for State of Montana;

Justin B. Lee, Esq.,  
 BURK, LEE & BIELER, P.L.L.P.,  
 216 Main Avenue North,  
 Choteau, Montana 59422

Attorney for Gavin Mercado.

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THE COURT: While we're up here, are we going to do Gavin?

MS. RIES: Certainly, Your Honor.

MR. LEE: Well, Ms. Gianarelli has been appointed Guardian Ad Litem, and she an I have set 11:00 o'clock this Friday, at the Town Pump in

Missoula at 11:00 o'clock, to meet with Gavin and his mother.

THE COURT: Do you think Gavin will remember the offense?

MR. LEE: I don't know.

THE COURT: Well what do you want me to do, just continue this?

MR. LEE: Set it for status, please.

THE COURT: Alright, I'll set it in for February 2<sup>nd</sup>. Hopefully we're going to have it done by the end of the week, that's what we want to do here.

MR. LEE: I would add for the record, that the issues in this case are remarkably complex. I'm not even sure what to do, neither is anyone I talked to around the state, so I think we're treading through some new territory and I appreciate the Court's patience in letting us present something that seems legal.

THE COURT: You know, there isn't anything wrong with presenting the case and having a bench trial or jury trial. I understand what you're saying, that the Youth - actually I'm having trouble remembering the offense at this point, but I made a finding that I kind of have to keep.

MR. LEE: Right, and I appreciate that. The problem I have, I continue to have, it's hard to have a trial when the allegation is that the Youth is incompetent. I don't understand that, I don't understand the law if that's the case, that's why Shari has come on board too. I feel an obligation to do what's in the best interest of the child, and I'm not sure, and I need her to evaluate whether or not having a trial, what the effect of that would be on him personally. So that's one of the things I'm having Shari take a look into, Ms. Gianarelli, Your Honor.

THE COURT: I've already found, it's not an allegation that he's incompetent, he's competent, okay, I made that finding. So the next step is, we either have a Consent Decree or we have a trial. And I understand where you're coming from, in terms of representing a Youth, but it isn't the first time that a defense attorney has had to do that so, but I certainly will continue it again. There isn't an objection from Ms. Ries?

MS. RIES: No.

THE COURT: But those are my thoughts, okay. Alright.

WHEREUPON the Status Hearing was completed.

MONTANA NINTH JUDICIAL DISTRICT COURT-PONDERA COUNTY

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IN RE THE MATTER OF:	)	STATUS HEARING
	)	
GAVIN THOMAS MERCADO,	)	Cause No. DJ-07-05
	)	
A Youth.	)	February 17, 2009

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BE IT REMEMBERED that the above-entitled matter came on regularly for hearing before the Honorable Laurie McKinnon, Ninth Judicial District Judge for the State of Montana, in the Courtroom of the Pondera County Courthouse, Conrad, Montana, on the 17th day of February, 2009, at the hour of 11:00 a.m.

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APPEARANCES:

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Attorney for State of Montana;

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Attorney for Gavin Mercado;

Shari Gianarelli, Esq.,  
GIANARELLI LAW OFFICE, PLLC,  
310 South Main, Suite B,  
Conrad, Montana 59425

Guardian Ad Litem.

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MS. RIES: Judge, if we could take up the juvenile matter.

THE COURT: Alright, Mr. Mercado.

MS. RIES: Your Honor, it's my understanding that the Guardian Ad Litem met with this youth and has a recommendation as to how to proceed in this matter.

MS. GIANARELLI: Your Honor, my only question is: Would you like me to reduce that into writing? I did send an email correspondence to both counsel, telling them what my recommendation is, but I have not reduced it to a Report To The Court.

THE COURT: Why don't you just make your record.

MS. GIANARELLI: Okay. Your Honor, if the Consent Decree called for him to admit accountability to Negligent Arson I would recommend that he admit to that offense, with my agreement. It's my opinion, after meeting with him, that this offense arose, it's highly likely, out of poor supervision. He was with another child who I think was the leader. He was really hard for me to speak with. He's very terrified of this process. He remembers the event, and going through a trial, even though he might prevail, would traumatize him further, which wouldn't be in his best interest.

I have a recommendation as to the potential disposition, would the Court like me to tell you

now, or -

THE COURT: Well, are all parties in agreement with the Consent Decree?

MS. RIES: Your Honor, I don't believe a Consent Decree is appropriate in a two year disposition as a Youth In Need Of Intervention, which I believe, given Ms. Gianarelli's statement, that the poor supervision led to this offense, which clearly meets the criteria for a Youth In Need Of Intervention. She indicated two years, I think we have previously had done four, but I won't object to two years. I don't know what type of restitution we're talking about. I'm assuming there is a community service program in the Missoula County area which could be used to go towards whatever restitution would be appropriate.

MS. GIANARELLI: Your Honor, just for the Court's information, Gavin's in the fourth grade. He does attend school regularly, he's participating in the Science Program, and I saw his report card and wrote a letter to the teacher, and he said he doesn't seem to be any problem down there in the Bonner area, and that he's very amenable to supervision. I spoke to mom who said he is very amenable to supervision, and she understands that

community service will be a requirement. And just so the Court understands, that poor supervision only goes back to the day of the fire, which the mother's direct thought on that day was that he was being supervised by another parent, whom she did not have adequate familiarity with.

THE COURT: Alright, for a Youth In Need Of Intervention, an I didn't bring my Code Book out to the bench, for a Youth In Need Of Intervention, I still need to have an admission to the Petition from the Youth; correct?

MR. LEE: Yes.

THE COURT: Where is the Youth?

MS. GIANARELLI: Your Honor, Mr. Lee an I spoke about this and have discussed it with the County Attorney, and what's happening right now, before we had him arranged to be present, I believe it would be in Gavin's best interest that he not be required to come all the way here, and that he could appear by Vision Net, but if the Court requires him, certainly he will be here.

THE COURT: No, I don't care.

MS. GIANARELLI: My impression was that they could set him up at any time to appear.

MR. LEE: That's my impression, Your Honor.

THE COURT: Alright, we'll set this in for a Change Of Answer on March 2<sup>nd</sup> at 9:00 a.m. Ms. Ries, if you make the call or coordinate that Vision Net connection with Elda, I think that's probably the best way to do it. That would be through the Missoula County Courthouse; is that correct?

MR. LEE: That's true.

THE COURT: That's Judge Larson, who also has Youth Treatment Court, and does very well with that, but I think if you're satisfied with the two years and restitution or community service, and transfer of supervision, I'm certainly in agreement with that. I just want to get this case over with, so we'll see Gavin on camera at 9:00 o'clock on March 2<sup>nd</sup>.

MS. RIES: Thank you, Your Honor.

MS. GIANARELLI: Thank you, Judge.

WHEREUPON the Status Hearing was completed.

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MONTANA NINTH JUDICIAL DISTRICT COURT-PONDERA COUNTY

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IN RE THE MATTER OF:	)	CHANGE OF ANSWER HEARING
	)	
GAVIN THOMAS MERCADO,	)	Cause No. DJ-07-05
	)	
A Youth.	)	March 6, 2009

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BE IT REMEMBERED that the above-entitled matter came on regularly for hearing before the Honorable Laurie McKinnon, Ninth Judicial District Judge for the State of Montana, in the Courtroom of the Pondera County Courthouse, Conrad, Montana, on the 6th day of March, 2009, at the hour of 1:15 p.m.

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APPEARANCES:

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Attorney for Gavin Mercado;

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Conrad, Montana 59425

Guardian Ad Litem.

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MS. RIES: Judge, this is - do you want me to call it?

THE COURT: Go ahead.

MS. RIES: In Re The Matter Of: Gavin Mercado, DJ-07-05. We have entered into a verbal plea agreement as to how we're going to resolve this case, and Defense counsel want to retain the right to appeal on some issues that we talked about, and also the State has no objection to the first item. He's currently being charged as a Youth In Need Of Intervention, which will remain, but the underlying offense, which is Negligent Arson, and I will, at this point, ask to amend that to Accountability To Negligent Arson under Section 45-2-301 Montana Code Annotated, which needs to be added, in addition to the section on Negligent Arson.

THE COURT: What section is that?

MS. RIES: 45-2-301, the accountability section. I'll be recommending, as set forth in the Report To The Court prepared by the Juvenile Probation Officer, two years supervised probation. And I know that's somewhat lengthy to what the co-defendant received, however in this matter, and I just saw it today in the file, it was last set for trial a year ago, so ultimately he's not been supervised during that time while the co-defendant has been on probation and he's been held accountable to us for his behavior. The State's going to be

asking for restitution in the amount of \$500.00, with the recommendation for community service. I'm aware that the co-defendant also was ordered to pay \$500.00. I'm asking for the same here so that ultimately the victim will receive a total of \$1,000.00. If you will remember their claim was that they were out-of-pocket \$13,000.00. I know from the discussion we had with the other juvenile, was that the \$500.00, given his age, was going to be almost an insurmountable task, but I would recommend the same here; an also recommend that he be required to perform community service to address that restitution because we know that financially it is - I mean, he is unable to go to work because of his young age but that gives him an opportunity to put forth physical effort in order to help make amends for what happened. We're also recommending the conditions set forth in the Report To The Court, which are standard conditions of probation. And Ms. Swanson has got a recommendation that he enroll in some type of program where he has a male mentor, such as Big Brothers/Big Sisters, an it's my understanding, according to what Justin told me this morning, that he's already on a waiting list for that.

THE COURT: They have a waiting list?

MS. RIES: Yes, and particularly with boys. I think the Great Falls - the Cascade County program has lots of volunteers available and still there is a lengthy waiting list for that kind of mentor. It's hard, and it's hard to get good volunteers to do it but I was pleased to hear that he was on the list because I think it's something that's available for lots of children to benefit from. Ultimately, that's our agreement.

THE COURT: Alright, do you have the Amended Information that I can use, I just have the last file? Alright, and the record should reflect that Shari Gianarelli is here as Guardian; Laura Swanson is here, Gavin's mother is here as well. So, Gavin, I'll try to get through this without choking, but - so did you listen to what Ms. Ries, the County Attorney, just said as to the amended petition or the case that's been brought here in front of me? There is an allegation that you're a Youth In Need Of Intervention, and the basis of that allegation is that there needs to be supervision because of the incident that happened where you were involved in - the State has alleged that you're accountable for negligently setting the fire, or

Negligent Arson; do you understand that?

GAVIN MERCADO: Yes.

THE COURT: Alright, so you stop me, Gavin, anytime you want to ask a question, or you can ask Mr. Lee a question, or your mom a question alright? Really what I want to do is make sure you understand what we're doing, and what has brought you here. An as I indicated, the State has said that you need supervision because of this incident that happened back on September 13 of 2007, which is about a year an a half ago, and the State has alleged that supervision is needed because on September 13 of 2007, you were involved with another youth in setting a fire to 504 Second Avenue Southeast, here in Conrad; and that you didn't have permission to do that from the owner, and there was a good amount of damage. In fact, the damage exceeded \$1,000.00. The State has alleged that if you were an adult that this would be the offense of Negligent Arson, and the section of the Code, or the law that would have been violated, is 45-6-102, okay. So I'm sure that Mr. Lee has gone over this, but do you understand what I've just said?

GAVIN MERCADO: Yes.

THE COURT: Alright. Now I need to advise

you of what the maximum penalty is for a Youth In Need Of Intervention; that's just placing him in Shelter Care, isn't it?

MS. RIES: That's the most it could be, yes Judge.

THE COURT: Alright, so Gavin, we know how we're going to handle this case, but I have to advise you of what the worst thing is that could happen; do you understand that?

GAVIN MERCADO: Yes.

THE COURT: The worst thing that could happen is I could find you need to be in a group home or Shelter Care facility, or some place other than your own home but I'm not going to be making that determination, but I need to advise you that that could happen; do you understand that?

GAVIN MERCADO: Yeah.

THE COURT: So let me tell you some other things about this case, an you have to stop me if you don't understand, alright. I think that you're going to admit to the Negligent Arson, that you were involved in that, but if you didn't admit to it, then you would have a right to a trial; and during that trial you would have the right to not make any statements, to remain silent, and require that Ms.

Ries, the County Attorney who has filed this charge, prove her case and meet - produce enough evidence to prove beyond a reasonable doubt that you were involved in this Negligent Arson; do you understand that?

GAVIN MERCADO: Yes.

THE COURT: And in proving her case, Gavin, she would bring in witnesses to testify from the witness stand there (court indicating) and she might bring in evidence, you know, such as what was found maybe at the house, an other evidence, and you would, through Mr. Lee, be able to ask those witnesses questions and confront them face to face about what they were saying; do you understand that?

GAVIN MERCADO: Yes.

THE COURT: And you could also say to me, Judge, there just isn't enough evidence here, the State hasn't met their burden in the case, which means you would say you're challenging that they haven't proven the case beyond a reasonable doubt; do you understand that?

GAVIN MERCADO: Yeah.

THE COURT: Alright. And then Gavin you would also have the right to present your own case, and that means that you could call - Mr. Lee could

call, Mr. Lee could call people into court and they would take the witness stand and testify for you on your behalf; and also you would have the right to present other evidence through Mr. Lee, okay, and you could testify if you wished and tell me your side of the story, or the jury, or you could remain silent; do you know what that means?

GAVIN MERCADO: Yes.

THE COURT: And do you understand what I've just said?

GAVIN MERCADO: Yes.

THE COURT: You wouldn't have to tell me your side of the story, you could just be quiet and rely on the State having to prove their case against you; okay?

GAVIN MERCADO: Yes.

THE COURT: Now although we're kind of late in the ball game here by about a year and a half, I would still try to make sure that this was set in for trial in a speedy manner if we weren't able to resolve this today, I would be setting it in pretty quickly for trial, and you also have the right to have people present in the courtroom to make sure that it's a public trial; do you understand that?

GAVIN MERCADO: Yes.

THE COURT: And you have the right to the help of Mr. Lee for effective assistance of counsel throughout the whole trial; okay?

GAVIN MERCADO: Yes.

THE COURT: Alright, now the trial could be in front of myself, a judge, and I would have to listen to the evidence and decide if the State had proven their case beyond a reasonable doubt, or it could be in front of a jury, an a jury are 12 individuals selected from the community. Do you see those chairs over there? There are 12 chairs and they would be in those chairs and listen to what was presented in the case, and before you could be found to have done anything wrong, each one of those jurors must be convinced beyond a reasonable doubt that the State has proven their case. That means that the jury decision must be unanimous. All 12 of them must be convinced beyond a reasonable doubt or the State hasn't proven their case; do you understand that?

GAVIN MERCADO: Yeah.

THE COURT: You really do?

GAVIN MERCADO: Yeah.

THE COURT: Alright, and Gavin lastly, I think I already covered this, but if you elected to

be tried by me I would have to be convinced, too, beyond a reasonable doubt, alright, before I could say you did this; alright. And lastly, I'll just tell you that you have the right to appeal any finding I make, and I think that that's going to happen here anyway, but appeal any finding I make during the trial, or if you had a jury trial that the jury makes; do you understand that an appeal means that you're taking - you're asking another court to review or look at what I have done and tell me if I have been right or wrong. It's somebody who watches what I do. Do you understand that?

GAVIN MERCADO: Yes.

THE COURT: That's the Montana Supreme Court, seven judges that would listen to what I did. That's why this gentleman here is taking down everything I say and you say because if there is a review of this case the Supreme Court knows exactly what's happened; do you understand that?

GAVIN MERCADO: Yes.

THE COURT: Okay. Alright, any questions?

GAVIN MERCADO: No.

THE COURT: Now by coming in here today and saying, Judge, I'm accountable for, responsible for having participated in that fire, setting that fire

negligently, you're giving up those rights I just mentioned. Do you understand that we're not having a trial by saying that you did this, you're making a statement that's saying, Judge, I did it. Do you understand that?

GAVIN MERCADO: Yes.

THE COURT: So you're waiving all of those rights that I just told you about?

GAVIN MERCADO: Yes.

THE COURT: Okay. Alright, so the Amended Petition alleges that on September 13<sup>th</sup>, of 2007, you participated and are accountable for having set a fire at 504 Second Avenue Southeast, in Conrad, Montana; an, as I said, the damage from that fire exceeded \$1,000.00, an it says, negligently, and I'll try to explain what that means. It doesn't mean that you intentionally started the fire. It means that your behavior was - that you didn't consider what the risks were that were at stake when you went in and used the matches, played with the matches, that you disregarded the risk; do you understand that?

GAVIN MERCADO: Yes.

THE COURT: Alright. And so - okay, as I indicated, the maximum penalty would be that you

would have to go to Shelter Care, and - do you need a Kleenex? Alright, any questions about that?

GAVIN MERCADO: No.

THE COURT: Okay, so as to the allegation of being a Youth In Need Of Intervention and/or Supervision, do you admit or deny that's the case?

GAVIN MERCADO: I admit.

THE COURT: Alright. And has anyone threatened you or forced you to come in here and admit?

GAVIN MERCADO: No.

THE COURT: Did you talk to your mom about this?

GAVIN MERCADO: Yes.

THE COURT: I'm sure you did. Did you talk to Mr. Lee about it?

GAVIN MERCADO: Yes.

THE COURT: Do you have any questions for Mr. Lee?

GAVIN MERCADO: No.

THE COURT: Has he been a pretty good help for you?

GAVIN MERCADO: Yes.

THE COURT: And you don't have any other questions?

GAVIN MERCADO: No.

THE COURT: Okay, alright, I guess, Ms. Ries, if you could provide me - or Mr. Lee, you can take your pick, I just need a factual basis for the admission.

MR. LEE: Gavin, do you remember the day that the fire started?

GAVIN MERCADO: Yes.

MR. LEE: Do you remember that you and your friend had some lighters?

GAVIN MERCADO: Yeah.

MR. LEE: And that happened here in Conrad, right?

GAVIN MERCADO: Ah-huh.

MR. LEE: In Conrad you went into a house that wasn't yours, right?

GAVIN MERCADO: Yes.

MR. LEE: And you didn't have permission to be there?

GAVIN MERCADO: No.

MR. LEE: Then you were playing with lighters inside the house, right?

GAVIN MERCADO: Yes.

MR. LEE: And you found out later that the house, in fact, started on fire; right?

GAVIN MERCADO: Yes.

MR. LEE: I think that's sufficient.

MS. RIES: I think that's sufficient,  
Judge.

THE COURT: Alright, the Court finds there is a factual basis underlying the admission; that Gavin understands his rights and he's received the advice of Counsel. Gavin, let me ask you one more question. Have you had any prescription medication or anything like that before you came in here today?

GAVIN MERCADO: No.

THE COURT: Alright, so you understand everything that's going on, there is no reason you can't understand what's going on; is that right?

GAVIN MERCADO: Yes.

THE COURT: You understand?

GAVIN MERCADO: (Witness nodding affirmatively).

THE COURT: The Court finds that he understands his rights and that he's not under the influence of any alcohol, drugs, or prescription medication; that he's discussed his answers here today with his Counsel and his mom, and that his answers are freely, voluntarily, and intelligently made.

I find that Gavin is a Youth In Need Of Intervention. And has there been a Consent Decree entered into?

MS. RIES: No, just disposition, Judge.

THE COURT: Okay, just disposition, an I think the recommendation is - and, Ms. Gianarelli, will you let me know if you're on board with it, it asks for two years of probation, supervised probation, and restitution in the amount of \$500.00. Is there a program in Missoula like we have here for working off the restitution?

MS. SWANSON: They have a community service program in Missoula. If it's too difficult for them to go into Missoula to do that, I'm willing to allow him to go to the school in Bonner or somewhere else that's local to serve that, and as long as the hours are turned into us we can get that amount put to restitution and get a grant to pay for that.

THE COURT: Alright, that sounds good. An I suspect Gavin, with all the things you're going to be doing good in the community that there won't be any trouble finding jobs for you to do. You might be able to get credit for some things that you like doing and you'll be helping the community as well; do you understand that?

GAVIN MERCADO: Yes.

THE COURT: I'm going to ask that, an it looks like it's already been done, but Big Brothers or Big Sisters, that you get connected up with that program, and there are other materials to help you, and probation, I think, has them, those that have been set out in the Report To The Court. Have you gone over these with Gavin, Mr. Lee?

MR. LEE: I believe so.

THE COURT: Well Gavin, just so that you understand, you must remain law abiding, which means, you know, you don't get into trouble again. You're not to use any illegal substances or drugs or anything that your mom hasn't given you or that you don't have a prescription for. Do you understand that? Don't take any pills in school unless your mom has given them to you. You will have a probation officer down there, and you're to follow those recommendations of the probation officer. There will be a curfew established - or I'm sure your mom has a curfew for you already. You just need to make you follow what your mom says, alright?

GAVIN MERCADO: Okay.

THE COURT: I think that's it. Any questions? How are you with the recommendation, Ms.

Gianarelli?

MS. GIANARELLI: I agree with the recommendation, Your Honor. Thank you.

THE COURT: Okay Gavin it's done. It really doesn't change too many things, does it?

GAVIN MERCADO: No.

THE COURT: You're going to go back home now. What grade are you in?

GAVIN MERCADO: Fourth.

THE COURT: Are you a pretty good student?

GAVIN MERCADO: Yes.

MS. RIES: Judge, I think there is a copy of a report card in there. If you read it, the teacher has a glowing recommendation of him.

THE COURT: Well Gavin I'm not too worried about you, I bet you'll do fine. Do you like being in Missoula?

GAVIN MERCADO: Yes.

THE COURT: Do you live right in town?

GAVIN MERCADO: No, we live in Bonner.

THE COURT: Bonner, okay, that's a pretty spot right along the river. Which class do you like more or like the best, I guess it depends on the teacher, huh?

GAVIN MERCADO: Yes.

THE COURT: Okay, Gavin, thanks for coming up here today.

WHEREUPON the Change of Answer Hearing was completed.

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CERTIFICATE OF REPORTER

I, R. R. GRESCZYK, do hereby certify that I am a Notary Public for the State of Montana, and that I am the duly appointed and qualified and acting Official Court Reporter for the Ninth Judicial District of the State of Montana, in and for the Counties of Teton, Toole, Pondera and Glacier, and as such reported the proceedings had and taken in the foregoing transcript of testimony and thereafter accurately and correctly transcribed the same, as hereinbefore set out in the above-entitled transcript consisting of pages 1 through 140.

IN WITNESS WHEREOF, I have hereunto set my hand this 5th day of May, 2009.

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R. R. Gresczyk,  
Ninth Judicial District Court Reporter

