



The Importance of Early Appointment of Counsel in Juvenile Court

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Judges must ensure due process in juvenile court. They must ensure that children are presumed indigent for purposes of counsel, that they are appointed counsel as early as possible, and that the right to waive counsel remains theirs and can only occur following consultation with an attorney.

Children in conflict with the law are guaranteed constitutional rights that can only be protected if they are represented at every stage of delinquency proceedings. In *Re Gault*, 387 U.S. 1 (1967), gives youth the right to counsel, which is a bulwark of the right to due process. Courts must protect and give meaning to *Gault*. At a minimum, this requires that attorneys be appointed for children as early in the proceeding as possible; that where the appointment of counsel is not automatic, courts should presume that all

children in delinquency matters are indigent; and that when a child considers waiving counsel, courts allow the waiver only after the child has consulted with qualified juvenile defense counsel and the court has determined that the child is fully aware of the vast implications of the decision to proceed without counsel.

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Counsel in delinquency court is more important than ever, as delinquency offenses no longer stay in juvenile court to be left behind when the child enters adulthood. The fact that a complaint has been brought may cause the child to be excluded from school, cause his or her family to lose housing or other public assistance, and impede the child's efforts at employment or higher education. Children charged as delinquents are far more likely to have a trauma history, a diagnosable mental illness, or undiagnosed and unmet learning needs than their uncharged peers (Ford et al., 2007), as well as prior experience in status offense or child welfare proceedings. These children especially need the guiding hand of counsel.

The Need for Early Appointment of Counsel

As in criminal court, young people in delinquency court are pitted against the government and its vast resources. The juvenile defender's job is to advocate zealously for the child, be the child's voice in the delinquency courtroom, and provide the child with the advice and counsel necessary to make good decisions. Unlike other stakeholders charged with doing what is perceived to be in the child's best interest, juvenile defenders are responsible for eliciting the youth's desired outcomes, counseling the child on the pros and cons of pursuing those objectives, and empowering the child to be engaged in the proceedings.

It takes time to build a relationship that will enable adequate and honest communication. Teenagers are often mistrusting of adults. Because many children charged as delinquents have abuse-and-neglect histories, they can be even more difficult to engage than their peers. Early appointment and a time-intensive commitment to develop the attorney-client relationship are needed to ensure that attorneys can execute their most basic duties. Attorneys who do not meet with their clients before the first hearing may not understand their clients' legal and nonlegal needs and are ill-equipped to properly advocate for them. Indeed, the failure of courts to appoint early counsel is one of the main impediments to competent, diligent, and zealous representation (National Juvenile Defender Center, 2012: 19).



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Of course, the early appointment of counsel is also required to protect the rights of young people. Counsel appointed early is better positioned to file motions, conduct investigations, obtain discovery, and encourage the client to exercise other rights (such as the right to remain silent). Without early appointment of counsel, the right to counsel is as good as nonexistent.

In general, early appointment of counsel leads to better outcomes for youth. Counsel appointed in time for the planning stages of court diversion programs (where such programs occur before any court involvement) can help ensure the selection of the programs most appropriate for the strengths and needs of the particular youth, thus increasing the likelihood the child will succeed and stay out of court. To be most effective, the attorney initially appointed as the child's defender must follow the case to disposition and be available for post-adjudication hearings, including probation violation matters and related hearings, such as school-exclusion or special-education hearings.

What Courts Can Do to Ensure Early Appointment

In jurisdictions where attorneys are calendared weeks in advance, attorneys can be assigned delinquency cases when the case is first scheduled. In those courtrooms, the attorney should meet the client before the first appearance.

Courts must convey attorney information to children and their families as soon as the attorney is identified and, when possible, using multiple methods. Courts should also ensure that appointed counsel has sufficient time to consult with a new client before the first hearing and should grant requests for short recesses when counsel needs more time. While judges have a responsibility for managing their

calendars effectively and ensuring that cases are processed judiciously, they also have a vital interest in ensuring that a child receives adequate, competent, and effective counsel.

The Problems of the Lack of Indigence Presumptions in Juvenile Court

Courts can ensure that all children have timely access to counsel by presuming indigence for all youth. Children in general are not financially independent. Therefore, in jurisdictions where an assessment of a child's indigence is required before counsel can be appointed, courts tend to use family income. This process can be fraught with delays and can create conflicts of interest between youth and their families. Many courts assess fees to conduct indigence determinations. In some jurisdictions, public-defender-eligible applicants are not even told that fee waivers are available. Parents and guardians worried about fees may tell their children that counsel is unnecessary—not because it is true, but because the initial out-of-pocket expense is burdensome to cash-strapped families. Parents who must miss work to attend each hearing may also encourage their child to do whatever possible to speed the process along—even if such advice conflicts with the child's constitutional right to counsel.

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In many jurisdictions, where parents have not filled out the entire indigence affidavit, counsel is simply not appointed (Minn. Stat. Ann. § 611.17 [b][4]). In one instance, a mother and child filled out an affidavit. The child was still found ineligible for appointed counsel because the father had not also filled out the affidavit (see *State v. D.V.S.*, 617 So.2d 1162 [Fla. Dist. Ct. App. 1993]). Even where young people and their families are willing and able to provide all requested information to prove indigence, in some jurisdictions the appointment of counsel can take days to process, thus postponing hearings for youth who try to exercise their right to counsel. This delay—or even the anticipation of

the delay—may cause young people to forgo their right to counsel to speed up the process. In the worst case, the delay can mean that a child stays in detention while awaiting appointment of counsel; even where the child is not detained, the case often needs to be postponed to a later date when the indigence determination has been resolved. These practices are inexcusable.

What Judges Should Do Regarding Indigence in Juvenile Court

Judges should advocate for court rules that presume indigence of all youth. If the jurisdiction refuses to allow for the presumption of indigence, judges should look for other ways to appoint provisional counsel until indigence can be determined. New Jersey and Washington statutorily authorize courts to appoint provisional counsel before a formal indigence assessment (N.J. Stat. Ann. § 2A:158A-14; Wash. Rev. Code § 10.101.020[4]). More jurisdictions should follow suit. Some jurisdictions have statutes or court rules that give judges the discretion to forgo the lengthy indigence-determination process and simply appoint counsel in the interests of justice. Should a formal and lengthier process later determine that a family is not indigent, the court can then recoup those costs from the family. Finally, initial indigence determinations should be made by court personnel no later than the day of the child's first appearance. In cases where a parent or another family member is the complaining witness, appointment of counsel should be automatic.

The Problem of Juveniles Waiving their Right to Counsel

Waiver of counsel before consultation is a nationwide problem in juvenile court. Courts should allow young people to waive their right to counsel only after the child has meaningfully consulted with a qualified juvenile-defense attorney. Adolescent-development research demonstrates that youth often have great difficulty understanding complex legal issues and abstract ideas and have difficulty weighing the long-term consequences of their decisions in the face of short-term desires or easy resolutions (see Brief for the American Psychiatric Association as Amici Curiae Supporting Respondent, *Roper v. Simmons*, 543 U.S. 551 [2004] [No. 03-633], 2004 WL 1636447). These cognitive challenges become more acute in high-stress environments, such as courtrooms (see Statement of Laurence Steinberg, Ph.D., United States Senate Judiciary Committee, June 11, 2007). Given the prevalence of mental illness and learning disabilities in youth charged as delinquents, these children are more likely to have great difficulty understanding the role and import of counsel than youth generally.

When given access to a lawyer who can counsel them in the way *Gault* envisions, youth are better able to make informed decisions and be active participants in their cases

(Steinberg et al., 2009). Consultation with a parent or guardian alone is rarely sufficient, given that even the most well-meaning of parents likely will not understand the myriad legal and practical consequences that can result without a qualified juvenile defender advocating for their child's rights.

What Judges Must Do Regarding Waiver of Counsel

At the very least, judges must be skeptical of any child's attempt to waive the right to counsel. Courts should not accept any waiver of counsel without prior consultation with defense counsel about the implications of that waiver and without conducting a detailed, case-specific colloquy with the child that elicits, in the child's own words, an understanding of the role of counsel generally and how counsel may be helpful in the specific case. The colloquy must ensure that the waiver is knowing, intelligent, and voluntary. Well-documented research on child and adolescent development shows that what may be "knowing and intelligent" for an adult is quite different for a youth. Even where statutes or rules do not require prior consultation with a defense attorney, judges should use their discretion to appoint attorneys for the limited purpose of such a consultation. Courts should always ask specifically whether anyone has pressured the child into giving up the right to counsel or made promises to the child in exchange for giving up that right.

Finally, by their very nature, waivers made due to financial reasons are coercive and cannot be intelligent and voluntary. Even for non-indigent, low-income families, the



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pressure to waive counsel is substantial. Allowing finances to dictate the waiver of counsel creates massive inequality between wealthy and poor children to the detriment of a fair and just juvenile delinquency court.

Conclusion

The issues of the timing of the appointment of counsel, the determination of indigence, and waiver of counsel are interrelated, and each is essential for the effective administration of justice in delinquency court. To ensure due process in delinquency court, counsel must be appointed as early as possible. Because of various coercive pressures young people face, their rights, particularly to counsel, are often at risk. Juvenile courts must facilitate each child's exercise of those rights. The earlier counsel is appointed, the less likely it is that a juvenile will waive counsel. Where indigence is presumed, juveniles will be less likely to waive counsel. Judges must do their part to ensure that every child before them, regardless of income, has early access to counsel, and that waivers occur only after discussion with counsel—not as a product of coercive, third-party pressure. Juvenile court judges and practitioners need to appreciate the role of competent, zealous counsel as an indispensable aid to the administration of justice—not as something nettlesome to be dealt with only when there is no other choice. In a country where delinquency courts have largely shed their original rehabilitative purpose in favor of a more punitive approach, all three of these reforms are necessary to ensure the protection of the rights and well-being of young people in conflict with the law. ☺

References

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