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The Juvenile at Waiver: Is Counsel Required?

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RECENT DEVELOPMENTS

THE JUVENILE AT WAIVER: IS COUNSEL REQUIRED?

The petitioner was before juvenile court on charges of committing a battery. Defendant and his mother were advised of their right to counsel, but not to appointed counsel at certification, a proceeding which determines whether the juvenile court should waive jurisdiction in favor of district court. Neither defendant nor his family was financially able to employ counsel. Counsel was appointed only after the defendant had been transferred to the district court for criminal prosecution. On motion to vacate judgment and sentence on the subsequent criminal conviction, Held: An indigent juvenile offender has no right to appointed counsel in a transfer proceeding. *State v. Acuna,* 428 P.2d 658 (N.M. 1967).

Juvenile courts were designed primarily to judge the juvenile's conduct and, when necessary, to accord him appropriate treatment. Because the goal was rehabilitation and treatment, rather than punishment, informal procedures were integrated into the juvenile court system. Adjudication was characterized as civil instead of criminal, thereby exempting it from criminal due process requirements.[1] In recent years, observers have charged the juvenile court with abuse of informal procedures[2] and failure to provide adequate rehabilitation.[3]

The court in the principal case rendered its decision prior to *In re*

[1] Mack, *The Juvenile Court,* 23 HARV. L. REV. 104, 109 (1909). *See, e.g., In re* Gault, 387 U.S. 1 (1967); Weber v. Doust, 84 Wash. 330, 146 P. 623 (1915).

[2] Handler, *The Juvenile Court and the Adversary System: Problems of Function and Form,* 1965 WIS. L. REV. 7, 12-14.

[3] REPORT OF THE PRESIDENT'S COMMISSION ON CRIME IN THE DISTRICT OF COLUMBIA 773 (1966):

> In fiscal 1966 approximately 66 percent of the 16-17 year old juveniles referred to the Court by the Youth Aid Division had been before the court previously. In 1965, 56 percent of those in the Receiving Home were repeaters. The SRI study revealed that 61 percent of the sample Juvenile Court referrals in 1965 had been previously referred at least once and that 42 percent had been referred at least twice before.

The high recidivism rates indicate that juvenile court treatment is inadequate. *See In re* Gault, 387 U.S. at 22 (1967). *But see* RESEARCH REVIEW, DEPT. OF INSTITUTIONS, STATE OF WASHINGTON 73-76 (December 1964), indicating that compared with the District of Columbia rate of 56% recidivism, the rate for Washington was only 16% in 1963. The report also indicates that the recidivism rate does not adequately reflect the success of the juvenile program because many juveniles, after a second or third referral, make a satisfactory adjustment to life. However, the report also states that the recidivism rates are perhaps the best indicia of the success of the program of rehabilitation, absent better criteria.

Gault,[4] but considered that case on rehearing. Prior to its consideration of *Gault*, the New Mexico court predicated its reasoning on the distinction between juvenile and criminal proceedings, the right to counsel being accorded only in the latter. The court reasoned that in a criminal proceeding, a defendant was guaranteed counsel only at the critical stages. The certification proceeding was not a critical stage because no constitutional rights could be waived or lost. Because a juvenile had no constitutional right to exemption from the criminal process, no relevant rights were affected by mere transfer of jurisdiction. The court therefore refused to characterize the waiver proceeding as a critical stage. *Kent v. United States*[5] was viewed as an interpretation of the District of Columbia waiver statute.[6] On rehearing, the court distinguished *In re Gault*[7] because it dealt solely with delinquency adjudication.

The court in the principal case misconstrued the critical stage analysis and failed to give adequate consideration to the *Kent-Gault* rationale. A proper analysis would have indicated that the juvenile has a right to appointed counsel if he or his parents lack the means to provide for an attorney.

To be deemed a critical stage a criminal proceeding must involve loss of substantial rights. The rights lost need not be constitutional.[8] Thus the court in the principal case erred in failing to characterize the waiver proceeding as a critical stage because the defendant was constitutionally exempt from the criminal process.[9] The proper issue was whether a juvenile is substantially interested in remaining subject to juvenile court jurisdiction.

The interest in remaining in juvenile court is substantial.[10] Trained

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[4] 387 U.S. 1 (1967).

[5] 383 U.S. 541 (1966). The Court held that under the District of Columbia statutory requirement of full investigation for transfer, counsel has the right to view social records. If jurisdiction is waived, adequate reasons for waiver must be given, in writing, by the juvenile court judge.

[6] D.C. CODE ANN. § 11-914, *as amended*, § 11-1553 (Supp. IV 1965).

[7] 387 U.S. 1 (1967).

[8] *Cf.* Mempa v. Rhay, 389 U.S. 128, 134 (1967). In holding that counsel is required at probation revocation proceedings, the Court stated:

> There was no occasion in *Gideon* to enumerate the various stages in a criminal proceeding at which counsel was required, but *Townsend*, *Moore* and *Hamilton*, when the *Betts* requirement of special circumstances is stripped away by *Gideon*, clearly stand for the proposition that appointment of counsel for an indigent is required at every stage of a criminal proceeding where substantial rights of a criminal accused may be affected.

See also Escobedo v. Illinois, 378 U.S. 478 (1964); Hamilton v. Alabama, 368 U.S. 52 (1961).

[9] 428 P.2d at 659.

[10] This is true even though *In re Gault* demonstrated the deficiencies of juvenile

personnel in juvenile houses of detention make treatment, though not always effective, at least available to the juvenile;[11] this would seem less likely to be the case in penal institutions. Moreover, even if the available treatment were ineffective, the juvenile is not mixed with hardened criminals nor does the stigma of a criminal record attach to "conviction" in juvenile court.

If the juvenile's interest in remaining subject to juvenile court jurisdiction is substantial, who is to protect that interest? Neither caseworkers nor parents can isolate and present legally relevant facts for the court's consideration. An unaided judge faced with a crowded docket is not equipped to protect the juvenile's interest. Only an attorney can insure representation of the individual juvenile's interests at waiver.

The critical stage test is satisfied by waiver proceedings.[12] In

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court procedure. The Court in *Gault* did not resolve the seeming paradox posed by the holding in *Kent* that there is a right to effective counsel at waiver and the assertion in *Gault* that juvenile proceedings are very similar to criminal proceedings. If there is so little difference between juvenile and criminal court proceedings, why should counsel be considered necessary to protect juvenile jurisdiction in *Kent*? The cases can be reconciled in two ways.

First, juvenile court could be considered sufficiently like criminal court to warrant the application of criminal due process requirements, but not so similar as to obviate *all* differences in treatment between juvenile and criminal court.

Second, *Kent* recognized that effective counsel is necessary to protect the possibility of benefit to the child from juvenile court treatment. *Gault* was concerned with juvenile court *adjudication*, which necessarily arises after the issue of waiver has been determined. Although adjudication was considered criminal for the application of due process requirements, this does not obliterate the distinction between the proceedings at other stages. Thus, juvenile court detention or probation, though very similar to criminal court disposition of cases, may well provide more and better caseworkers per child detained, etc.

[11] Kent v. United States, 383 U.S. at 554 (1966).

[12] *See generally* Douglas v. California, 372 U.S. 353 (1963); Gideon v. Wainwright, 372 U.S. 335 (1963); White v. Maryland, 373 U.S. 59 (1963); Griffin v. Illinois, 351 U.S. 12 (1956).

No analogy is required if the *Kent* rationale is viewed as controlling in the principal case, even accepting the premise that *Kent* interpreted only the District of Columbia statute. The waiver statute in the principal case closely parallels the statute construed in *Kent*. D.C. CODE ANN. § 11-914 (1961), *as amended* § 11-1553 (Supp. IV 1965) reads:

> If a child sixteen years of age or older is charged with an offense which would amount to a felony in the case of an adult, or any child charged with an offense which if committed by an adult is punishable by death or life imprisonment, the judge may, *after full investigation*, waive jurisdiction and order such child held for trial under the regular procedures of the court which would have jurisdiction of such offence if committed by an adult.

(Emphasis added).

N.M. STAT. ANN. § 13-8-27 (Supp. 1966) reads:

> [If] any child fourteen (14) years of age or older is charged in juvenile court with an offense which would be a felony if committed by an adult, and if the court *after full investigation* deems it contrary to the best interest of such child or of the public to retain jurisdiction, the court may in its discretion certify such child for proper criminal proceedings to any court which would have trial jurisdiction

White v. Maryland[13] the court held that because defendant could enter a plea, the preliminary hearing was a critical stage requiring appointment of counsel. Like the defendant in *White* and other cases[14] the juvenile is faced with a dilemma at waiver. If he stands mute, he might be considered hostile to the court's authority and not a fit subject for rehabilitation.[15] If he responds to the case against him, his attempts at exculpation may not only incriminate him, but

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of such offense if committed by an adult; but no child under fourteen (14) years of age shall be so certified.

(Emphasis added). Both require full investigation prior to waiver. If full investigation requires that the accused have effective right to counsel, as *Gault* interpreted *Kent* to hold, then it may be said that the Supreme Court recognized that substantial interests are involved in the waiver proceeding. If substantial interests were not involved, there would be little need for effective counsel in order to comply with the investigation requirement.

For Washington, see WASH. REV. CODE § 13.04.120 (1962):

If, upon *investigation,* it shall appear that a child has been arrested upon the charge of having committed a crime, the court, in its discretion, may order such child to be turned over to the proper officers for trial under the provisions of the criminal code.

(Emphasis added). Unlike the District of Columbia and New Mexico waiver statutes, the Washington statute establishes no criteria upon which the decision to transfer is determined. Washington cases construing the statute have held that a hearing is required prior to waiver, Dillenburg v. Maxwell, 68 Wash. Dec. 2d 481, 413 P.2d 940 (1966). It is unclear whether counsel is required at waiver. In the second *Dillenburg* case, 70 Wash. Dec. 2d 325, 422 P.2d 783 (1967), the court held that on rehearing to determine whether transfer was properly effected, defendant was entitled to counsel. If counsel is required at rehearing, it may also be required at the original transfer hearing. 70 Wash. Dec. 2d at 333a, 422 P.2d at 789.

A recent Washington decision, Lesperance v. Superior Court, 72 Wash. Dec. 2d 567, 434 P.2d 602 (1967), held that counsel is required in the adjudication of delinquency. Since the court relied solely on *In re Gault* it may be argued that such a decision should apply equally to waiver proceedings. *See* discussion accompanying note 19 *infra.*

In view of the court's reliance on *Gault,* an argument that provision of counsel at waiver is not feasible will no longer be persuasive. Because counsel will be accorded in the subsequent proceeding, whether juvenile or criminal, there is little additional administrative burden in providing counsel at waiver.

Moreover, the court's reliance on *Gault* indicates that in Washington *Gault* will be applied retroactively. The *Lesperance* trial began after the *Gault* decision. Hence, there was no need to cite *Gault* as controlling unless it were viewed as having retroactive application.

[13] 373 U.S. 59 (1963).

[14] *See also* Hamilton v. Alabama, 368 U.S. 52 (1961). There, defendant had not been assigned counsel at arraignment, the stage at which, according to Alabama law, certain defenses must be asserted or lost. A showing of actual loss was not required. It was the possibility which called for appointment of counsel. *Id.* Waiver raises similar problems. *See* note 18 *infra.*

[15] *See* 67 COLUM. L. REV. 281, 316 (1967). For analogy to the criminal court procedure see Mempa v. Rhay, *supra* note 8. It should be noted that in *Mempa* the court cited as crucial the fact that a plea of guilty on the original charge may be prompted by promise of probation. When defendant is without counsel at revocation, he cannot effectively withdraw his previous guilty plea. Thus, the Court found that counsel was required at revocation.

A similar situation exists at the certification proceeding. The juvenile is expected to cooperate with the court in order to indicate an attitude conducive to rehabilitation. Yet, the result of his cooperation may prejudice his case in a subsequent delinquency proceeding. Certainly, then, counsel is needed as much at a certification proceeding as at probation revocation proceedings.

may also overstate the degree of his criminality. Beyond silence may lie exposure to the criminal process; and error in setting forth his case may lead to confinement for the remainder of his minority, or exposure to criminal prosecution.[16]

The juvenile has rights to be lost at waiver whether he is deprived of the benefits of the juvenile correction system[17] or remains subject to it after having muddled his case. The waiver hearing is therefore a critical stage of a subsequent proceeding, regardless of its outcome.[18]

The New Mexico court's advice that defendant could retain counsel may be viewed as recognition that the procedure could result in the loss of substantial rights. Given this recognition, the court's failure to appoint counsel may be regarded as a denial of equal protection.[19]

Analysis of the reasoning in *Kent* and *Gault* shows that counsel is required at a waiver hearing independent of its status as a critical stage in the subsequent proceedings. Dicta in *Gault* indicate that the Court now considers the *Kent* case to have been decided on constitutional grounds.[20]

Kent alone, without the *Gault* interpretation, may be viewed as controlling the determination of right to counsel at waiver in the principal case. The statutes involved are similar.[21] Given the Court's

[16] With recognition in *Gault* that the juvenile court proceeding has criminal phases which invoke due process safeguards, the waiver hearing is no longer characterizable as a civil precursor to criminal arraignment. Regardless of its outcome, the juvenile may be exposed to criminal sanctions.

[17] *See* text accompanying note 10 *supra*. *Kent* and *Gault* apparently, however, disagree as to the value of the juvenile court system.

[18] Clearly, the transfer proceeding is a critical stage of the criminal process if jurisdiction is waived to adult court. *See* text accompanying notes 10-18 *supra*. Moreover, *In re* Gault, 387 U.S. 1 (1967) indicates that the Supreme Court views juvenile detention as sufficiently like criminal detention to warrant application of the right to counsel at the adjudication stage. If the juvenile muddles his case at certification because he lacks counsel, the right to counsel guaranteed by *Gault* may become meaningless. What the juvenile admits or denies at certification without counsel may well set the bounds within which counsel must operate during the adjudication procedure.

For similar situations in adult court proceedings, see *White* and *Hamilton* at notes 12 & 14 *supra*, where the Supreme Court indicates that outcome or actual loss of rights is not determinative of the existence of a critical stage.

[19] *Cf.* Griffin v. Illinois, 351 U.S. 12 (1956).

[20] *Gault* cited *Kent* as holding that the right to counsel at waiver was a necessary part of a hearing which must measure up to the essentials of due process and fair treatment. It spoke of itself as reiterating that view when it held that counsel was required at the adjudication proceeding:

> Just as in Kent v. United States... we indicated our agreement with the United States Court of Appeals for the District of Columbia Circuit that the assistance of counsel is essential for purposes of waiver proceedings, so we hold now that it is equally essential for the determination of delinquency, carrying with it the awesome prospect of incarceration in a state institution until the juvenile reaches the age of 21.

387 U.S. at 36-37.

[21] *See* note 12 *supra*.

requirement in *Kent* that the statute be read in the light of constitutional principles of due process and the assistance of counsel,[22] the *Kent* result should have been adopted.

Gault established that the loss of liberty attendant upon a juvenile court determination of guilt is analogous to criminal incarceration.[23] If counsel is required at the adjudication stage, counsel should also by implication be required at the waiver proceeding where access to juvenile court is determined.[24]

Adequate consideration of either the critical stage of *Kent-Gault* rationale should have led the court to the conclusion that counsel was required for defendant in the principal case. It is to be hoped that other courts, guided by the *Gault* decision and its interpretation of *Kent*, would require appointment of counsel at waiver. Decisions such as the principal case bode ill for state court reception of Supreme Court cases relating to juvenile court due process.

SURVEY OF ABORTION REFORM LEGISLATION*

During the past year governments have felt increasing pressure for reform of their abortion statutes. California, Colorado, North Carolina, and Great Britain[1] recently enacted new abortion statutes.

Abortion statutes[2] seek two ends: 1) a definition of the crime of

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[22] 383 U.S. at 551 (1966).

[23] *See* note 18 *supra*.

[24] For further discussion on the distinction between juvenile proceedings and criminal proceedings, see note 10 *supra*.

*"Abortion" elicits numerous moral and philosophical responses. This note does not attempt to review the general discussions which surround these responses. This posture was adopted for two reasons: 1) the extent to which the new abortion statutes evidence a shift of moral or philosophical stance is at best conjectural and 2) the doctrinal approach has received generous space in other works. *See generally* ABORTION AND THE LAW (D. Smith ed. 1967), first published in 17 W. RES. L. REV. 369 (1965). *See also*, Lorensen, *Abortion and the Crime-Sin Spectrum*, 70 WEST. VA. L. REV. 20 (1967).

[1] The official text of the British statute is not available at the time of this writing. Reference in this note to that statute is based on the reproduction of the crucial sections of the Abortion Bill as of its second reading in the House of Commons found at Samuels, *Termination of Pregnancy—A Lawyer Considers the Arguments*, 7 MED. SCI. & LAW 10, 11 (1967).

[2] Under the common law, induced abortion prior to "quickening" was not criminal. Comment, *The Legal Status of Therapeutic Abortion*, 27 U. PITT. L. REV. 669, 672 (1965-66). "Quickening" was taken as that stage of gestation—usually sixteen to twenty weeks following conception—when the mother first feels fetal movements. The rule is perhaps best stated by Blackstone: "Life... begins in contemplation of law as soon as the infant is able to stir in the mother's womb." I COMMENTARIES 129 (14th ed. 1803). It was believed that life or soul entered the fetus at this time. This view is often attributed to St. Thomas Aquinas. G. WILLIAMS, THE SANCTITY