Juvenile Justice System and Sixth Amendment Provisions: Right to Counsel

Morgan S. Varn

Arizona State University

CRJ 537: Criminal Procedure for Social & Forensic Scientists

Jayn von Delden, J.D., Ph.D.

February 25, 2022

Abstract

The Juvenile Justice system has evolved since the first case was heard in 1899. Through the work of many, juvenile offenders now have basic rights and privileges granted by the Sixth Amendment. However, some gaps threaten the juvenile offenders in the system. Juveniles are frequently left without effective counsel or waive their rights without understanding the consequences. Without counsel, even the most intelligent laypersons may not know the state laws and the statutes that provide a defense worthy of the adversarial challenge of the prosecution. States should adjust their juvenile codes to allow for representation by counsel, regardless of waiver. More research is needed to create a system that reduces recidivism rates and increases options for rehabilitation.

This paper reviews the history of the juvenile justice system and the Supreme Court cases that made the Sixth Amendment right to counsel available to juveniles. It concludes with viable options to broaden the availability of counsel of juvenile offenders.

Keywords: Juvenile due process rights, Status offenders, Juvenile Court, Sixth Amendment

Juvenile Justice System and Sixth Amendment Provisions: Right to Counsel

The Inception of the Juvenile Justice System

During the Renaissance Period, a transition of thought emerged about children's unique mental and physical needs. In the Progressive Era, which spanned from the 1890s to the 1920s, a social reform movement began, led by women from middle- and upper-class backgrounds who exerted their political influence to change the way vagrant, poor, or delinquent children were handled in the judicial system. Thus far, children under the age of seven who had been apprehended for an offense could utilize the common law defense of infancy. The "infancy" defense was the understanding that a child of that age could not concoct the required *mens rea*, or intent, to commit a crime. However, older children between the ages of seven and sixteen were tried and housed with adults (Landess, 2016, pp. 19-21).

In 1899, Judge Richard Tuthill, in Chicago, Illinois, heard the first juvenile case (Landess, 2016; Butts, 1997). This new style of justice for young offenders was the product of social reformers in the Chicago Women's Club, the Chicago Bar Association, and the Illinois Conference of Charities. The focus was four-fold: rehabilitation, confidentiality, separate housing for juvenile offenders, and informal court procedures (Landess, 2016). This initial judicial process was molded around the idea that there should exist an entirely separate system for juveniles that could care for their needs under the doctrine of *parens patriae*, the belief that the state held the responsibility to care for those who could not care for themselves (Butts, 1997). The surrogate parent model of the Juvenile Court relaxed the formalities required in an adult court to better focus on the best interests of the indigent child. This doctrine is best illustrated with the words of Judge Julian Mack's article, The Juvenile Court (1909):

> Why is it not just and proper to treat these juvenile offenders, as we deal with the neglected children, as a wise and merciful father handles his own child whose errors are not discovered by the authorities? Why is it not the duty of the state, instead of asking merely whether a [child] has committed a specific offense, to find out what he is, … and then if it learns that he is treading the path that leads to criminality, … not so much to punish as to reform, … not to make him a criminal but a worthy citizen. (p. 107)

This contemporary Juvenile Court adjusted the legal verbiage to fit the informal nature of juvenile proceedings. The word “verdict” was replaced by “adjudication,” and the word “guilty” became “delinquent” (Landess, 2016). Other informalities included less rigorous fact-finding procedures to reflect the problem-solving focus and move away from guilt or innocence determinations. The lack of procedural requirements, such as due process, is attributed to the belief that expedient sanctions will boost the rehabilitative effect and lessen the opportunity for recidivism (Butts, 1997). Other procedural leniencies negated most of the assurances to the accused afforded by the Sixth Amendment: the right to a speedy trial, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against and to obtain witnesses in favor of the accused, and the right to have the assistance of counsel for defense (Butts, 1997; Harvard Law Review, 2016; Feld & Schaefer, 2010; U.S. Const. amend. VI).

Although the system had laudable roots, opponents felt the Juvenile Court system still trended towards punitive engagements rather than rehabilitative and that the results were often unpredictable and inconsistent. Due to the informality of the proceedings, Juvenile Courts were not obligated to notify the parents of the charges brought against the children, provide the indigent accused with counsel, make way for an expedient trial, or to utilize the evidentiary standard of "beyond a reasonable doubt." In addition, the variability between districts or counties

and the complexity of the base of cases in a jurisdiction might mean that an offender could serve a harsher penalty for a status offense in one jurisdiction than would a violent offender in another (Butts, 1997; Harvard Law Review, 2016; Feld & Schaefer, 2010). A status offense is an act that would not be a crime if the perpetrator were an adult. These offenses can include running away, using or possessing alcohol or nicotine, ungovernability/incorrigibility, or truancy (Feld & Schaefer, 2010).

Juvenile Court Procedures

In most states, the Juvenile Court in a county or district has exclusive jurisdiction over children under seventeen, when they will then consider them an adult. The court may handle many different cases, including delinquency, neglect, and status offenses, but can also be tasked with adoptions, termination of parental rights, emancipation, and juvenile consent (Butts, 1997). The entrance for a juvenile accused of delinquency begins with a petition, most likely issued by state and local law enforcement, the school system, or parents and stepparents (Minor et al., 1997). In fact, in 2019, 82% of petitions were issued by state and local law enforcement (Hockenberry & Puzzanchera, 2021). The petition is then given to an intake officer, who determines whether the court will take official action for the offense; most are resolved informally with an agreement that the juvenile will accept some form of services, such as community service or counseling, or an informal sanction, such as probation. This is considered the intake phase. If the intake officer then determines legal sufficiency, a formal petition is filed, and the case is placed on the docket for an adjudication hearing, considered the pre-adjudication or petitioning phase. About half of all cases are handled formally (Butts, 1997). The finding of the hearing, either failure to adjudicate (acquittal) or finding of delinquency (conviction), will begin the adjudication phase. In a finding of delinquency, a disposition hearing will follow, and

the court will order formal sanctions such as diversion (community service or court-ordered counseling), formal probation, or detention (incarceration, out-of-home placement, referral to an outside agency). Generally, a first-time offender's adjudication outcome is diversion (91.6%) (Minor et al., 1997). This is the final phase, called disposition (Hockenberry & Puzzanchera, 2021).

Cases that Shaped the Juvenile Court System.

The 1960s

During the 1960s, there was a sense of a punitive shift in the Juvenile Court system, to which the Supreme Court responded. In the first case, *Gideon v. Wainwright* (1963), the court authored a unanimous opinion that the Sixth Amendment's guarantee of an indigent defendant in a criminal trial to have the assistance of counsel is an obligatory right, to be granted by the States, through the Fourteenth Amendment. This case overturned *Betts v. Brady (1942),* which held that indigent defendants do not have the right to a state-appointed attorney (*Gideon v. Wainwright,* 372 U.S. 335, 1963). The Fourteenth Amendment inhibits the actions of states in several ways: states cannot make laws that remove the rights granted to citizens of the United States; create legislation that deprives a citizen of life, liberty, or property without due process; and cannot deny any person within a state's jurisdiction the equal protection of the laws (Dressler et al., 2020). In truth, *Gideon* only applied to adult criminal proceedings because the opinion was rooted in the Due Process Clause of the Fourteenth Amendment. Still, it was a building block for constitutionality in juvenile justice.

Three years later, the court heard *Kent v. United States* (1966). The defendant was a sixteen-year-old who had been a ward of the state for two years. Police matched him to a string of home invasions using his fingerprints, taken two years prior. Initially, he was in Juvenile

Court, but the case was waived to the District Court for indictment. His attorney filed several unanswered motions, and the defendant was convicted on six counts of housebreaking and robbery. He argued that the court had violated his due process of law under the Fifth Amendment and effective assistance of counsel under the Sixth Amendment provisions. In the opinion, Justice Abe Fortas stated, "[t]he Juvenile Court's latitude in determining whether to waive jurisdiction is not complete. It assumes procedural regularity sufficient in the particular circumstances to satisfy the basic requirements of due process and fairness, as well as compliance with the statutory requirement of a full investigation" (pp. 552-554). He followed, "[t]he *parens patriae* philosophy of the Juvenile Court is not an invitation to procedural arbitrariness" (pp. 554-556). This case granted juveniles that would be transferred to adult courts basic due process rights, including a hearing, effective counsel, and a statement of reasons (Landess, 2016). Still, it only applied to juveniles who faced transfer, leaving those who would be adjudicated in Juvenile Courts unprotected.

The Supreme Court referenced *Kent* in the next landmark case, *In re Gault* (1967). This was the case of a fifteen-year-old on formal juvenile probation when he made lewd phone calls to a neighbor. He was arrested and charged with no notice of the petition to his parents. The victim was absent in court, and after several hearings, he was sentenced to six years in juvenile detention (*In re Gault*, 387 U.S. 1, 1967). If he had been an adult, he would have faced a maximum penalty of two months in jail and a $50.00 fine (Landess, 2016). Justice Fortas delivered the opinion in which he held that "the [waiver] hearing must measure up to the essentials of due process and fair treatment. This view is reiterated, here in connection with a Juvenile Court adjudication of "delinquency," as a requirement which is part of the Due Process Clause of the Fourteenth Amendment of our Constitution" (pp. 1-2). The opinion thoroughly

outlined the due process rights granted to a juvenile offender during the adjudicatory stage of the process, where institutionalization or incarceration are possible outcomes. Juveniles now had the right to timely notification of charges to themselves and their guardian, the right to counsel, the right against self-incrimination, and absent a confession, the right to call witnesses for confrontation and cross-examination (*In re Gault,* 387 U. S. 31-57, 1967).

The 1970s

The 1970s brought several more cases that added some clear definition to the juvenile justice system. *In re Winship* (1970) used the Due Process Clause of the Fourteenth Amendment to provide a standard of proof for the adjudicatory stage if a juvenile is charged with an offense that would constitute a crime if committed by an adult (*In re Winship,* 397 U. S. 361-368, 1970). Before this opinion, the Juvenile Court used a "preponderance of evidence" standard rather than the higher standard of "beyond a reasonable doubt." There were, however, some setbacks in *McKeiver v. Pennsylvania* (1971) and *Barker v. Wingo* (1972). The first held that there is no constitutional right to a jury trial in Juvenile Court, even if the proceedings are substantially similar to a criminal trial, because it would remove the informality of the Juvenile Court and because it would not strengthen fact-finding (*McKeiver v. Pennsylvania,* 403 U. S. 545-550, 1971). In *Barker*, the court held that the length of time that constitutes a “speedy” trial could not be definitively established and must be assessed on a case by case basis dependent upon the conduct of the prosecution and the defense (*Barker v. Wingo,* 407 U.S. 514, 1972). *Argersinger v. Hamlin* (1972) provided the right to indigent defendants in a criminal trial to the assistance of counsel but went farther than *Gideon* in providing the assistance of counsel in both felony and misdemeanor criminal prosecutions (*Argersinger v. Hamlin*, 407 U.S. 25, 1972).

It was also during this decade that the National Advisory Committee for Juvenile Justice and Delinquency Prevention (1974) made recommendations for the National Institute for Juvenile Justice and Delinquency Prevention [NIJJDP] to assist in producing a "national policy and standards for juvenile justice and delinquency prevention" (United States Department of Justice, n.d.). The organization pushed for funding, intensive research, and automated programs for collecting data on juveniles in the system. Simultaneously, the American Bar Association [ABA] and the Institute for Judicial Administration [IJA] coauthored twenty-three separate volumes of standards relating to everything from police behavior with juveniles, to housing standards, to judicial standards in the Juvenile Court. The standards were intended for legislative, judicial, and executive reform (Institute for Judicial Administration/American Bar Association [IJA/ABA] Joint Commission on Juvenile Justice Standards, 1979). These were presented to the ABA House of Delegates in 1979. Later in the year, the House approved seventeen volumes and, in 1980, adopted an additional three to create the Juvenile Justice Delinquency Prevention Act [JJDPA]. Three of these collections of standards included separation from adults during incarceration, the deinstitutionalization of status offenders, and recommendations for addressing disproportionate minority confinement (Landess, 2016).

The 1980s

In the next decade, defense attorneys began to transition their relationships with juvenile defendants from the paternal stance to a focus on the defendant's legal interests in their case (Landess, 2016). Still, judges complained about the JJDPA, mainly that deinstitutionalization did not reduce recidivism rates and that the standards left little room for rehabilitation. Because of this, the Valid Court Order (VCO) amendment was added to the JJDPA, which would essentially allow judges to place status offenders in out-of-home detention for violating a court order (e.g.,

not attending counseling, breaking curfew) (Butts, 1997). This modification of status offenders is called “bootstrapping” (Landess, 2016). Not all states permitted the VCO, but this had an adverse effect because it had disproportionate ramifications on females and minorities and allowed incarceration for status offenders who had very few constitutional rights due to the lack of severity of their charges (Landess, 2016).

The Supreme Court answered two more cases during this time, which served to redefine what, exactly, "effectiveness" is as it relates to counsel. In *United States v. Cronic* (1984), the Court of Appeals found that the defendant’s right to the effective assistance of counsel under the Sixth Amendment had been violated and outlined how it measured the effectiveness of counsel. However, the Supreme Court reversed this ruling, stating, “The Court of Appeals erred in utilizing an inferential approach in determining whether respondent's right to the effective assistance of counsel had been violated.” (*United States v. Chronic,* 466 U. S. 653-667, 1984). Of note, the higher court felt that to find the respondent's Sixth Amendment rights had been violated, it mattered not that the attorney he was granted was a specialized in real estate and not criminal law, or that he had only a month to prepare the case, but rather the standard of adversarial testing of the prosecution's case that the defense counsel can supply. In *Strickland v. Washington* (1984), the court held that in the case of measuring the efficiency of counsel, the determination should lie in whether having counsel was objectively deficient, and whether a competent attorney would have led to a different outcome (*Strickland v. Washington,* 466 U.S. 668, 1984).

The *Argersinger* case had granted the Sixth Amendment rights for juveniles charged with a misdemeanor to have effective counsel, and *Cronic* and *Strickland* illuminated the standards for this, but they also created an obsession for a speedy outcome. However, as busy the Juvenile

Court may have been, the fact remains that juveniles are more likely to waive Miranda rights due to a feeling of disempowerment or mistrust in the legal system, general inexperience or misunderstanding, and perceived or actual coercion (Butts, 1997). Juveniles still found their defense representation lacking or completely absent in their hearings. Factors that tend to exacerbate appropriate counsel representation are the juvenile population in a jurisdiction, the number of formal cases processed through the year, the proportion of cases resulting in adjudication, the complexity of the cases, the counsel's level of experience, and the prosecutorial and judicial resources available (Minor et al., 1997; Feld & Schaefer, 2010; Butts, 1997; Landess, 2016). In a Grisso study cited by Butts (1997), only 20.9% of juveniles in the court system adequately understand the four components of the Miranda warning, which is less than half of the adults in the study (42.3%).

The 1990s

The 1990s brought a political scientist, John DiLulio, who published an article touting his "super-predator" theory, in which he described the "ever-growing numbers of hardened, remorseless juveniles who were showing up in the system." He continued his article with a solution: "[i]n deference to public safety, we will have little choice but to pursue genuine get-tough law-enforcement strategies against the super-predators" (DiLulio, 1995). The massive media coverage of his theory caused widespread panic. It led to the modification of state juvenile codes that called for harsher sentencing and made waivers to adult criminal court more accessible, which, in turn, heightened the need for competent juvenile counsel (Landess, 2016).

A Current Assessment of Juvenile Rights to Counsel

As evidenced by the two following cases, the struggle to retain counsel for juveniles continued. On January 7, 2014, a claim in Georgia's Cordele Judicial Circuit, *NP ex rel Darden v. State*,

was filed by indigent children and adults. The class-action lawsuit stated that the right to counsel is consistently violated or becomes a caricature of the requirements of counsel. Children were frequently absent counsel throughout the most critical moments of the process, even when they had expressed a desire for it. The public defender's office was so incredibly understaffed and underfunded that public defenders could not provide adequate assistance to the client. In addition, the detainees would remain incarcerated for extended periods without the opportunity to conference with counsel. The plaintiffs invoked the Supreme Court's decisions in *Gideon* and *Gault*, and sought injunctive relief to "require Georgia to provide meaningful and timely counsel to all indigent children and adults facing loss of liberty in the Circuit" *(N.P. ex rel. Darden v. State*, No. 2014-CV-241025, Ga. Super. Ct. Mar. 2015). Shortly after, the Department of Justice filed a statement of interest supporting the juvenile right to counsel (Harvard Law Review, 2015). The statement made clear the ability of the federal government to investigate the complaints and enforce meaningful counsel to juveniles, pursuant to the Violent Crime Control and Law Enforcement Act of 1994 (United States Department of Justice, 2015). This case ended in a settlement that outlined procedural, fiscal, and judicial changes that would benefit the juvenile justice system in Georgia.

The court also heard *Joseph Jerome Wilbur et al. v. City of Mt. Vernon et al.* (2013) just two years prior. The opinion stated that the plaintiffs had produced a preponderance of the evidence demonstrating that the assistance of counsel for indigent defendants was deficient, and that the "prosecution and that municipal policymakers have made deliberate choices regarding the funding, contracting, and monitoring of the public defense system that directly and predictably caused the deprivation" (p.2, 10-12). The plaintiffs revealed that any opportunities to confer with counsel happened only in the courtroom and without confidentiality. The defense

attorneys did not conduct investigations, did not provide for meaningful adversarial testing of the state's case, did not initiate contact with incarcerated clients, and negotiated plea bargains that were not equivalent to the charge. The city overloaded the contracted attorneys, and they were paid the equivalent of $16.00 per case. The plaintiffs did not argue the ultimate disposition, which would have fallen under *Strickland* or *Gideon.* The Court did find that there was a Sixth Amendment violation in this case.

Conclusion

The Juvenile Court delinquency caseload is nearly double (78%) that of the 1960 caseload. The number of cases decreased for all offense categories between 2005 and 2019, but in each year, the proportion of delinquency cases that were handled formally (with a petition for adjudication) rose. Historically, the number of cases judicially waived declined after 1994, but this may be attributable to many states excluding serious offenses from Juvenile Court, allowing prosecutors to file directly in adult criminal court. In essence, the proportion of formally processed delinquency cases has changed little in the past two decades (Hockenberry & Puzzanchera, p.52 [graph], 2021).

The Supreme Court issued opinions in many cases distinguishing the mind of a juvenile from that of an adult. Justice Anthony M. Kennedy spoke of the susceptibility of juveniles to erratic and unpredictable behavior in *Roper v. Simmons* (2005). In *Miller v. Alabama* (2012), Justice Elena Kagan emphasized the lesser culpability and greater capacity for change seen in juveniles. The system by which they may learn should reflect the adult system we wish for these young offenders to later thrive in and build upon. As a juvenile becomes entangled in the system, legal factors become less relevant to a judge's decisions regarding the sentence assigned (Minor

et al., 1997). Without the aid of counsel, a juvenile may not even be able to make a knowing, intelligent, or voluntary dispensation of legal advice.

The IJA/ABA should continue to gather data and resources to track juveniles in the system, including statistics relating to waivers of counsel, final dispositions, and recidivism. Minnesota created an incentive plan that prohibits judges from considering prior misdemeanor convictions if the defendant had no assistance of counsel (Feld & Schaefer, 2010). Other states should follow suit to ensure the best possible outcome for juveniles in the system to exemplify the original vision of the Juvenile Court: to serve as surrogates for those with no guidance, to help a juvenile see the error of his ways and reform, and to create not a criminal, but a worthy citizen.

References

(2016). Constitutional law right to counsel - Department of Justice files statements of interest supporting meaningful juvenile right to counsel - Statement of interest of the United States, N.P. ex rel. Darden v. State, No. 2014-CV-241025 (Ga. Super. Ct. Mar. 13, 2015). *Harvard Law Review*, *129*(3), 875-882.

Argersinger v. Hamlin, 407 U.S. 25 (1972). https://supreme.justia.com/cases/federal/us/407/25/

Barker v. Wingo, 407 U.S. 514 (1972). https://supreme.justia.com/cases/federal/us/407/514/

Butts, J. A. (1997). Necessarily relative: Is juvenile justice speedy enough? *Crime and Delinquency*, *43*(1), 3-23.

DiLulio, J. (1995, November 27). The coming of the super-predators. *The Weekly Standard*. https://www.washingtonexaminer.com/weekly-standard/the-coming-of-the-super-predators

Dressler, J., Thomas, G. C., & Medwed, D. S. (2020). The criminal process: Failures, choices, and legitimacy. *Criminal procedure: Investigating crime.* West Academic Publishing.

Feld, B. C. & Schaefer, S. (2010). The right to counsel in juvenile court: Law reform to deliver legal services and reduce justice by geography: Juveniles' right to counsel. *Criminology and Public Policy*, *9*(2), 327-356.

Gideon v. Wainwright, 372 U.S. 335 (1963). https://supreme.justia.com/cases/federal/us/372/335/

Hockenberry, S. & Puzzanchera, C. (2021). *Juvenile Court Statistics 2019* [Data set]. National Center for Juvenile Justice. https://www.ojjdp.gov/ojstatbb/njcda/pdf/jcs2019.pdf

In re Gault, 387 U.S. 1 (1967). https://supreme.justia.com/cases/federal/us/387/1/

In re Winship, 397 U.S. 358 (1970). https://supreme.justia.com/cases/federal/us/397/358/

Institute for Judicial Administration/American Bar Association (IJA/ABA) Joint Commission on Juvenile Justice Standards (1979). *IJA-ABA juvenile justice standards. https://www.americanbar.org/groups/criminal_justice/standards/JuvenileJusticeStandards/*

Kent v. United States, 383 U.S. 541 (1966). https://supreme.justia.com/cases/federal/us/383/541/

Landess, J. (2016). Civil and constitutional rights of adjudicated youth. *Child and Adolescent Psychiatric Clinics of North America, 25*(1), 19-26.

Mack, J. W. (1909). The juvenile court. *Harvard Law Review, 23*(2), 104-122.

McKeiver v. Pennsylvania, 403 U.S. 528 (1971). https://supreme.justia.com/cases/federal/us/403/528/

Minor, K. I., Hartmann, D. J., & Terry, S. (1997). Predictors of juvenile court actions and recidivism. *Crime and Delinquency, 43*(3), 328-344.

Strickland v. Washington, 466 U.S. 668 (1984). https://supreme.justia.com/cases/federal/us/466/668/

U.S. Const. amend. V

U.S. Const. amend. VI

U.S. Const. amend. VIII

U.S. Const. amend. XIV

United States Department of Justice (n.d.). *National advisory committee on juvenile justice and delinquency prevention – Annual report, first*, (NCJ 86365) [Annual/periodic report]. https://www.ojp.gov/ncjrs/virtual-library/abstracts/national-advisory-committee-juvenile-justice-and-delinquency-2

United States Department of Justice (2015). *Statement of interest of the United States: N.P., et al. v. The State of Georgia, et al.* [Court filing]. https://www.justice.gov/sites/default/files/crt/legacy/2015/03/13/np_soi_3-13-15.pdf

United States v. Cronic, 466 U.S. 648 (1984). https://supreme.justia.com/cases/federal/us/466/648/

Violent Crime Control and Law Enforcement Act of 1994, 42 U.S.C. § 14141

Wilbur et al. v. City of Mount Vernon et al., No. 2:2011cv01100, W.D. Wash. 2013. (Document 325) [Court document]. https://law.justia.com/cases/federal/district-courts/washington/wawdce/2:2011cv01100/176960/325/