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IN DEFENSE OF A YOUTH
Gregory L. Curtis

INTRODUCTION

The task of representing a youth in juvenile court is a difficult one. Juvenile proceedings have until recently been regarded as civil rather than criminal, but the infusion of criminal procedural protections into this civil structure during the past decade make these proceedings unique within the legal system. In order to represent a child effectively, it is essential that counsel understand the law, the proceedings, and the corresponding responsibilities within the youth court system. This comment describes the various stages in the youth court from the time the child is brought into custody through preliminary procedures, adjudication, disposition, probation violation and revocation, and possible transfer into adult court. This discussion is intended to function as a survey of the task of juvenile representation.

AN OVERVIEW OF THE ROLE OF COUNSEL

On July 1, 1974, the Montana Youth Court Act (hereinafter referred to as the Youth Court Act) became effective. Under earlier Montana law the juvenile court dealt with youthful offenders in an informal manner. It was generally assumed that the juvenile court judge, the juvenile probation officer, and the parents of the youth acted in his behalf, so that legal counsel could not be necessary and might even serve to disrupt the rehabilitative atmosphere of the proceedings.

The United States Supreme Court, however, in the now famous decision of In re Gault, rejected the argument that a child did not need the aid of counsel in a delinquency proceeding which "may result in commitment to an institution in which the juvenile's freedom is curtailed, . . . ". The court held that due process protections applied in juvenile proceedings:

... the child and his parents must be notified of the child's right to be represented by counsel retained by them, or if they are un-

3. R.C.M. (1947) § 10-611 (Repealed July 1, 1974) provided that "the court may conduct the hearing in an informal manner and may adjourn the hearing from time to time."
5. Id. at 41.
able to afford counsel, that counsel will be appointed to represent the child.6

Montana, in its Youth Court Act, has provided that a youth may be represented by counsel in all stages of the proceedings.7 Because of the recent changes in statutory juvenile law and the selective application of the Due Process Clause of the Fourteenth Amendment in Gault and its progeny, many attorneys in Montana are certain to find that they are representing youth with greater frequency than in past years. It is essential for these attorneys to understand the nature of the Youth Court, the intricacies of the Youth Court Act, and the working of agencies which serve the court.

At the outset it must be noted that while the Code of Professional Responsibility declares that a lawyer should represent his client zealously, zealous adversarial representation may not always be to the youth’s advantage. Adversary representation of a juvenile is often in conflict with the informal, rehabilitative nature of the Youth Court. To effectively represent his client, a lawyer must often act as an advisor or social counselor, subordinating advocacy to the “best interests” of the child.

The attorney who best represents a youth will recognize that he is often the only person the child trusts. Parents, the probation officer, and the judge may all oppose what the child wants. To be most effective, the lawyer should first listen to the youth and provide friendly counsel. He should then consider dispositional alternatives and work with the judge, the probation officer, schools and social agencies to obtain the best possible results. When it appears that no satisfactory result can be obtained and the child opposes the petition of delinquency and the possible institutionalization which may result upon adjudication of that petition, the previously subordinated role of advocate must surface to ensure that every protection be provided for the youthful client.

Because conflicts of interest may arise, counsel must maintain the interest of the child above all other obligations. In cases where the parents have employed counsel to express desires which are contrary to the best interests of their child, it is the duty of counsel to inform the court of the conflict and request a guardian ad litem be appointed for the child.8 The role of counsel can best be shown by discussing separately each stage of the proceedings in the Youth Court.

6. Id.
7. R.C.M. 1947, § 10-1218(3).
PRELIMINARY PROCEDURES

Preliminary procedure, often referred to as pre-adjudication, includes all stages of the proceedings from the time the child is first brought into the system until an adjudication upon a filed petition has begun.

Youth Court Jurisdiction

Under the Youth Court Act the Youth Court has jurisdiction over a juvenile whenever it appears that he may be a delinquent youth, a youth in need of supervision or a youth in need of care.9 These terms are defined by the Youth Court Act as follows:

*delinquent youth*—one who has committed an offense which, if committed by an adult, would consitute a criminal offense or who violates any condition of his probation.10

*Youth in Need of Supervision*—one who

(a) violates any Montana municipal or state law regarding use of alcoholic beverages by minors; or

(b) habitually disobeys the reasonable and lawful demands of his parents or guardian, or is ungovernable and beyond their control; or

(c) being subject to compulsory school attendance is habitually truant from school; or

(d) has committed any of the acts of a delinquent youth but who the court in its discretion chooses to regard as a youth in need of supervision.11

*Youth in Need of Care*—a youth who is dependent or is suffering from abuse or neglect.12

Although the Youth Court has jurisdiction over youth in need of care, provisions for dealing with such cases are not within the Youth Court Act and are therefore not discussed in this comment.

The Youth Court has exclusive original jurisdiction of all proceedings over youth alleged to be delinquent or in need of supervision.13 The court also has concurrent jurisdiction with justice, municipal and police courts, over traffic and fish and game violations committed by children. The Youth Court, however, has exclusive jurisdiction over three traffic offenses; driving while intoxicated, failing to stop at an accident, and repeated violations for driving without a valid license.14

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11. R.C.M. 1947, § 10-1203(13).
"Custody" is the term used to describe the process by which juveniles are physically brought into the control of the Youth Court. A youth may be taken into custody by a law enforcement officer when so ordered by any court, or by a law enforcement officer pursuant to a lawful arrest for violation of the law.\textsuperscript{15} The Youth Court Act makes no provision for a citizen's arrest of a juvenile. As a result, it is questionable that any private citizen may detain a juvenile for violation of any law without being subject to criminal liability for unlawful detention and civil liability for false imprisonment. The Youth Court Act states that custody "is not arrest except for the purpose of determining the validity of the taking under the constitution of Montana or the United States."\textsuperscript{16}

When a policeman takes a child into custody upon belief of delinquent behavior, there are several dispositions available to the police ranging from outright release to referral to the juvenile court.\textsuperscript{17} In Montana, the officer may release the youth into the custody of an adult upon a written promise or other assurance from the person that he will bring the youth before the probation officer.\textsuperscript{18} The youth should be detained for a period of time only when the police officer determines that detention is necessary, when the property or person of the youth or another is endangered, when the youth may abscond or be removed from the jurisdiction of the court, when he has no parent, guardian, or other person able to care for him and return him to the court, or when the court has ordered his detention.\textsuperscript{19}

Only rarely will an attorney be present to represent the youth when the police officer makes his determination, but if counsel is present, he should force the officer to consider whether there is a basis to detain the youth. When the police officer has determined to hold the youth, he is required to immediately notify the probation officer of the youth's apprehension and detention and must provide a written report to the probation officer as soon as practicable.\textsuperscript{20}

Under Montana law, counsel must be involved and parents notified only when a petition or other proceeding has been initiated. However, there is no stated requirement that anyone notify the parents or counsel merely that the child is being detained, since

\textsuperscript{15} R.C.M. 1947, § 10-1211(1).
\textsuperscript{16} R.C.M. 1947, § 10-1211(2).
\textsuperscript{17} PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: JUVENILE DELINQUENCY AND YOUTH CRIME 12 (1967).
\textsuperscript{18} R.C.M. 1947, § 10-1213(1).
\textsuperscript{19} R.C.M. 1947, § 10-1212.
\textsuperscript{20} R.C.M. 1947, § 10-1212(2).
detention alone is not a "proceeding". Further, while the police officer must determine that there is no parent or guardian capable of custody of the child, he is not obliged to contact the parents or guardian to do so. Therefore, because a petition need not be filed until the youth has spent five working days in custody, it is conceivable that the child could be held for such a period without anyone being notified, and without talking to anyone about his case. Of course, he may request a detention hearing by filing a petition with the court, but it is not likely that a juvenile would be aware of his right to a hearing nor is it probable that he could write to or obtain access to the court without police or juvenile probation cooperation.

Counsel may be present at all stages of the proceedings and the youth must be notified of his right to counsel when he is brought into custody. But, as previously noted, being held in jail is not a stage of the proceedings. The Youth Court Act may well be constitutionally deficient because it fails to provide notice of detention to the parents, because it does not require that the youth be provided opportunity for counsel when first taken into custody, and because it does not require a detention hearing before a judge. Other states require that a youth be given a detention hearing 24 to 36 hours after the child enters custody. If an attorney is appointed to represent a child after he has spent several days in jail, without a hearing, counsel, or notice to his parents, counsel should seek the youth's release and dismissal of the charges for denial of the youth's civil rights.

**Detention Hearing**

If the probation officer refuses to release the youth, the attorney should petition the youth court for a detention hearing and at-

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21. R.C.M. 1947, § 10-1209(6) provides that a youth must be released from custody if no petition is filed within five working days from date of initial confinement unless good cause can be shown to detain the youth.

22. R.C.M. 1947, § 10-1216(5) allows the youth, his parents or guardian or his counsel to petition for a hearing to determine if custody is necessary and what form the custody should take.

23. R.C.M. 1947, § 10-1218(3).

24. R.C.M. 1947, § 10-1209(4)(a) provides that the probation officer shall advise the youth of his rights.

25. For example, Oregon law requires that "no child shall be held in detention more than 24 hours, excluding Saturdays, Sundays, and judicial holidays, except on order of the court made pursuant to a hearing on the matter of detention." OREGON REVISED STATUTES 419.577(3) (1974). Illinois requires that a youth detained must be brought before a judicial officer within 36 hours, exclusive of Sundays and legal holidays, for a detention hearing. ILLINOIS REVISED STATUTES, ch. 37 § 703-5 (1961).

tempt to persuade the judge to release the child. A detention hearing is the juvenile equivalent to a preliminary hearing in adult criminal cases.

In order to detain a child it must be determined that: 1 there is probable cause to believe that the youth committed the act in question; and 2 that the youth must be detained. 27 Although no specific criteria for detention by the court are listed in the Youth Court Act, the criteria upon which the judge rules should logically be the same as those made by the probation officer: protection of person and property, possible removal of the youth from the jurisdiction, or the absence of adult supervision and care.

In countering detention, the attorney may argue that it is contrary to the intent of the Act that a child be detained in jail. 28 Montana law permits a youth to be detained in an adult jail only when there are no other facilities present, 29 but many jurisdictions in the state have no alternative but to hold the child in a jail cell. It may be a persuasive argument that to detain a child, especially a young and impressionable child, in an adult jail, even though he is separated from adults, does not promote the wholesome mental and physical development of the child. Additional arguments may include the following: (1) the youth would miss vital school or work time if not released; (2) the juvenile's life will be disrupted if he is incarcerated; (3) an adult charged with the same offense would probably be released on a modest bond or his own recognizance; (4) the juvenile will be forced to associate with other detained juveniles who may be dangerous or who may teach the youth criminal behavior; (5) the youth, being of slight build and younger than most detained juveniles, may be forced to submit to deviate sexual assaults; (6) the ability of the juvenile to participate in the preparation of his defense is severely curtailed. 30

Bail

If the court refuses to release the youth, the attorney may petition the court to set bail for the juvenile. There is no mention of bail for a juvenile in the Youth Court Act, and the United States Supreme Court has not ruled on the issue of the right to bail for a

28. R.C.M. 1947, § 10-1202(1) declares that one express legislative purpose of the Montana Youth Court Act is "to provide for the care, protection and wholesome mental and physical development of a youth ... ."
29. R.C.M. 1947, § 10-1214(1)(e).
30. R. Steigmann, supra note 27 at 3-17, citing R. Bouches and J. Goldfarb, California Juvenile Court Practice, 54 (California Continuing Education of the Bar: 1968).
juvenile. However, an argument for bail can certainly be constructed from the following constitutional provisions. First, the Eighth Amendment of the United States Constitution provides that "excessive bail shall not be required." Additionally, the 1972 Montana Constitution provides in Article II, section 15, that:

The rights of persons under 18 years of age shall include, but not be limited to, all the fundamental rights of this Article unless specifically precluded by laws which enhance the protection of such persons.

There is no statute in the Montana Youth Court Act which specifically precludes bail or which enhances the protection of a youth to meet this constitutional mandate. Further, Article II, section 21, of the 1972 Montana Constitution states that:

All persons shall be bailable by sufficient sureties, except for capital offenses, when the proof is evident or the presumption great.

It must be noted that it may not always be desirable to force the issue of bail. Where the youth may be transferred to adult court or may well be found delinquent and be institutionalized, it is often better to have the juvenile remain in jail for a few days than to jeopardize negotiations where a nonjudicial consent agreement can be obtained.

Habeas Corpus

If the judge refuses to release the youth or set bail, then the attorney may consider the civil remedy of Habeas Corpus. The Youth Court Act provides that "all . . . remedies available to an adult in a criminal proceeding under the Montana Code of Criminal Procedure shall be available to a youth proceeding under this act." Habeas Corpus is therefore available, and would be a proper remedy to question the detention. Again, it must be cautioned that the informal, conciliatory, rehabilitative nature of the Youth Court may be disrupted if Habeas Corpus is sought. It may be better for the youth to spend some time in jail rather than destroy a chance for an informal agreement by seeking to override the court.

Venue Transfer

Where a youth is detained in one place and he resides in an-
other, the locality in which he resides has "initial jurisdiction."\textsuperscript{33} The meaning of this statutory pronouncement is unclear, but the Youth Court Act provides that transfers of venue may be made to the county where the youth is apprehended, where he allegedly violated the law, or where his parents or guardian reside, whenever the Youth Court judges of both jurisdictions agree.\textsuperscript{34}

But there is no provision for determining which jurisdiction will prevail when the judges do not agree. For example, a youth over the age of sixteen may commit a homicide in W county, be apprehended in X county, reside in Y county, and have parents or guardians in Z county. If county W wants to prosecute the youth for deliberate homicide after transferring him to adult court, and counties Y and Z want him returned to those respective counties for rehabilitation, the Act provides no priority system upon which county X can rely to determine where the child should be sent, or whether he should remain in X county. It may be argued by counsel for the youth that since the county of residence, Y county, has initial jurisdiction, it should have priority over the youth.

\textit{Informal Agreements Made by the Probation Officer}

Whenever the court has been notified that a youth appears to be delinquent or in need of supervision, the probation officer must conduct a preliminary inquiry. If he determines that the youth needs some attention he must either: (1) provide counseling, refer the youth and parents to another agency, or take other informal action not amounting to probation or detention; (2) provide for treatment or probation agreed upon by the youth and his parents or guardian through a "consent adjustment without petition"; or (3) refer the matter to the county attorney for the filing of a petition alleging that the youth is delinquent or in need of supervision.\textsuperscript{35}

The purpose of an informal agreement is to avoid the trauma and stigma of the formal determination that the child is delinquent or in need of supervision. It allows the parties involved to obtain dispositional alternatives not generally available to the Youth Court, and it also avoids the negative self-image that a child will often have after formal adjudication—the fear of being treated as a delinquent by family, neighbors, peers, and teachers.

\textit{Counseling or Referral to Another Agency}

The probation officer may feel that it is in the best interest of

\textsuperscript{33} R.C.M. 1947, § 10-1207(1).
\textsuperscript{34} R.C.M. 1947, § 10-1207(2).
\textsuperscript{35} R.C.M. 1947, § 10-1209(5)(a),(b) and (c).
the youth to obtain aid from another source. If the primary problem is truancy, the school counselor or a special education teacher may be the person to whom the youth is referred.

If the probation officer feels that probation is appropriate, he may impose it only with the consent adjustment without petition or upon an adjudication of a petition alleging delinquency or need of supervision. No probation may be imposed unilaterally by the probation officer.

An example of a beneficial referral is the case of a 14 year old boy who has serious emotional problems, has a record of truancy, and has run away from two private boys' homes on several occasions. He was two years behind in school and was "placed" in a class beyond his abilities. Because he had run away several times on previous placements and had recently been involved in some larcenous acts, the probation department was considering his placement in a detention facility. The boy's mother and new step-father objected to any placement and wanted to try him at home once more. A new special education program for junior high age students with reading disabilities was located. With the encouragement of the court, the boy was kept home and referred to the special education agency. Reports on the boy over the past six months have been favorable. Since he is responding to concentrated help in school, he is not having serious problems at home or in public.

Consent Adjustment Without Petition

The Montana Youth Court Act provides that a written agreement between the probation officer, the youth, and his parents or guardian may be made in order to avoid formal adjudication and to provide probation, placement in a foster home, placement in a district youth guidance home or other teen home or half-way house, or transfer to the department of institutions for placement in a state facility other than a detention facility. If the complaint alleges that a felony has been committed or if the youth has been or will be detained, the Youth Court judge must also agree to the consent adjustment.36

A consent adjustment has one peculiarity beneficial to the child: no statement by the youth to a probation officer or another person who is counseling or giving advice to the youth pursuant to a consent adjustment may be used against the youth in the Youth Court or in any criminal proceeding.37 For example, a 17 year old youth and his parents sign a consent adjustment with the probation.

37. R.C.M. 1947, § 10-1210(3).
officer, stating that the youth is to be on probation for a given period of time and is to report to and be counseled by the probation officer for the admitted act of misdemeanor theft. In a subsequent meeting, the youth confides to the probation officer that he took the item onto a mountain with a friend, quarreled with the friend, stabbed him to death, and buried him on the mountain. The statements by the youth are privileged communications and may not be used to substantiate delinquency in the Youth Court or to prosecute the youth for homicide or any other crime in adult court. While this example may be extreme, the purpose of the provision is to protect a youth who confides in his counselor for the purpose of rehabilitation and to allow juvenile probation officers to assure the youth that they will be acting to help him, not to turn him over to the authorities for his prior conduct. Without this provision, juvenile probation officers would be less effective as counselors.

**Consent Decree**

A consent adjustment as described above must be made prior to the filing of a petition. Once a petition has been filed, the counsel for a youth can seek to procure a similar informal agreement, called a "consent decree." At any time after the filing of a petition and before entry of a judgment, the court may suspend the proceedings and place the youth under supervision, upon terms and conditions negotiated by the same parties required for a consent adjustment. The dispositional alternatives for a consent decree are identical to those allowable under the consent adjustment. The youth may not be placed in a detention facility under either a consent decree or consent adjustment. However, while similar to a consent adjustment, the effect of a consent decree differs substantially.

With a consent decree, the proceedings are only suspended, while in a consent adjustment they are terminated. If the child who obtains a consent adjustment gets into further trouble, the new trouble may warrant the filing of a petition against him, but should not provoke prosecution on the original offense. By contrast, however, if a child who has agreed to a consent decree gets into further trouble, the prosecution of his original offense may be re-initiated in the Youth Court upon a petition or a transfer hearing. Another disadvantage to the consent decree is that it does not protect the youth from any incriminating statements made during counseling whereas the consent adjustment provides such protection.

Counsel for a youth should make every attempt to obtain a consent adjustment and should dissuade the county attorney from

filing a petition whenever possible. If the petition has been filed it still may be to the youth’s advantage to obtain a consent decree, especially if it is possible that he would be transferred into adult court. A consent decree does give the youth another chance, avoids a formal record, and avoids the immediate possibility of being sent to a detention facility.

**ADJUDICATION, OR JUDGMENT ON A PETITION**

*The Petition*

If the juvenile probation officer feels that formal action against a youth is warranted, he must refer the case to the country attorney for filing a petition alleging that the youth is delinquent or in need of supervision. In some states, anyone may file a petition against a juvenile, but in Montana only the county attorney may file a petition in Youth Court.

A petition must state the names of the youth and his parents or guardian, the facts of jurisdiction, the facts of the offense alleged, and other facts required by the Youth Court Act.

*The Adjudicatory Hearing*

If no informal disposition can be obtained from the country attorney or juvenile probation officer, and the petition has not been withdrawn, the youth will be brought before the court for an adjudicatory hearing. An adjudicatory hearing is a fact-finding judicial appearance by the youth and his counsel, the juvenile probation officer, county attorney, and witnesses.

The purpose of the hearing is to determine whether the youth did in fact commit the acts alleged in the petition. Under earlier law, the adjudicatory hearing was held informally and could be adjourned by the court from time to time. In 1967, however, the United States Supreme Court, in *Gault*, held that a youth was entitled to certain minimal due process rights when he is charged with being a delinquent and may be institutionalized for his alleged act. With the inclusion of due process rights came a degree of

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41. R.C.M. 1947, § 10-1215 also requires the name of the offense, birthdate and residence address of the youth, residence addresses of parents, whether youth is in custody, a list of witnesses, and the statute rule, regulation, or provision of law which the youth allegedly violated.
42. See explanation, supra note 3.
43. In re Gault, supra note 4.
formality in the juvenile system not unlike adult criminal proceedings. The United States Supreme Court does not require that the juvenile court conform with all of the requisites of a criminal trial, but only with the essentials of due process and fair treatment. Enumeration and discussion of these requirements will follow.

Bifurcation or Separation of the Adjudicatory and Dispositional Stages

Under the early juvenile codes, courts did not always distinguish between the fact-finding and the dispositional stages of the hearing. The essential question was not whether the child was guilty, but rather whether he could be helped. No specific charges were required to be brought; a course of conduct might have been considered sufficient to warrant the determination of delinquency. To alleviate the failure by juvenile courts to differentiate clearly between the adjudicatory hearing, held to determine the truth of the allegations in the petition, and the disposition proceeding, when the juvenile's background is considered to decide what to do with him the President's Commission on Law Enforcement and Administration of Justice recommended that:

Juvenile court hearings be divided into an adjudicatory hearing and a dispositional one, and the evidence admissible at the adjudicatory hearing should be so limited that findings are not dependent upon or unduly influenced by hearsay, gossip, rumor, and other unreliable types of information.

Montana has provided a bifurcated hearing process. The adjudicatory hearing is held to determine whether the contested offenses are supported by proof beyond a reasonable doubt. After the youth has been found to be delinquent or in need of supervision, a dispositional hearing is held to determine which rehabilitative program would be best suited to the youth's needs.

In the adjudicatory hearing, the attorney representing a youth must become an advocate for the child. The Gault case provided certain due process protections which must be present in every adjudicatory hearing. To best represent his client, the attorney should know which rights are available in a juvenile proceeding.

46. R.C.M. 1947, § 10-1220.
47. R.C.M. 1947, § 10-1221.
Notice of the Charges

"Notice, to comply with due process requirements, must be given sufficiently in advance of scheduled court proceedings so that reasonable opportunity to prepare will be afforded, and it must 'set forth the alleged misconduct with particularity.'" 48 Montana provides that a summons be served upon the youth, and upon his parents, guardian, or custodian having actual custody of the youth. 49 The summons must be served at least five days before the stated appearance. 50 There is little question therefore that Montana's notice provisions satisfy constitutional due process requirements.

Right to Counsel

Where a youth is charged with being delinquent, and may be committed to an institution as a result of adjudication, "the child and his parents must be notified of the child's right to be represented by counsel retained by them, or if they are unable to afford counsel, that counsel be appointed to represent them." 51 Whenever a youth is taken into custody in Montana, he must be immediately and effectively advised of his right to counsel. 52 If the youth is under twelve years old, his parents may effectively waive his right to counsel. 53 Where the interests of the parents conflict with those of the youth, the court should appoint a guardian ad litem to protect the interests of the child. 54 Counsel appointed to represent the youth could also be designated as guardian ad litem. Wherever the child is separated from his parents, it should be presumed that the parents who waive his right to counsel are acting contrary to the best interests of the youth, and a guardian ad litem and counsel should be appointed to represent the child.

When the child is over twelve, he and his parents may agree to waive counsel. If he wants counsel and his parents do not, counsel will be appointed for him. If he wants to refuse counsel, contrary to his parents' desires, he may do so only after conferring with an attorney. 55

48. In re Gault, supra note 4 at 33.
49. R.C.M. 1947, § 10-1216.
50. R.C.M. 1947, § 10-1217(1).
51. In re Gault, supra note 4 at 41.
52. See discussion, supra note 24.
53. R.C.M. 1947, § 10-1218(1)(b)(i), provides for parental waiver, but it is questionable whether waiver by the parents should ever be allowed where the freedom of the youth is at stake.
In addition:

Neither the youth nor his parents or guardian may waive counsel if commitment to a detention facility or youth forest camp or to the department of institutions for a period of more than six (6) months may result from adjudication.56

This protective provision is one of the most important ones in the Youth Court Act. Because a youth may be declared delinquent for the commission of any offense which would be a criminal offense if committed by an adult,57 and may be placed in a detention facility if declared delinquent,58 no youth who allegedly committed a criminal offense may waive counsel. A youth must be immediately and effectively advised of his constitutional rights upon being taken into custody. In any circumstance where a criminal act is alleged or suspected to have been committed by the youth, he must be advised of his right to counsel and he cannot waive his right to counsel; and any statement made without the presence of counsel is inadmissible.

Self-Incrimination

The Constitutional privilege against self-incrimination is applicable to juveniles as well as to adults.59 Montana has provided that in a delinquency adjudication, no statement inadmissible in adult criminal court will be admitted as evidence in the Youth Court. As was discussed in the section on right to counsel, a youth may not waive counsel for any allegedly delinquent act in Montana. An extrajudicial confession or admission made without presence of counsel could be attacked in two ways: first, the right to counsel cannot be waived, so the statement made without counsel is inadmissible; secondly, even if a child could waive counsel, any waiver of a right must be a knowing and intelligent waiver of that right. Whenever an admission has been obtained without the presence of counsel, it must be shown with certainty to have been voluntary, not coerced or suggested or "... the product of ignorance of rights or of adolescent fantasy, fright or despair."60

It should be noted that the Montana statute provides protec-

56. R.C.M. 1947, § 10-1218(3). A detention facility is defined in R.C.M. 1947, § 10-1203(17) and presently includes Pine Hills School in Miles City and Mountain View School in Helena.
58. R.C.M. 1947, § 10-1222(1)(d) only states that a youth declared in need of supervision may not be placed in a detention facility. By negative implication, a delinquent youth may be placed in a detention facility.
59. In re Gault, supra note 4 at 55.
60. Id.
tion only for a youth alleged to be delinquent. Perhaps it was felt that a youth in need of supervision need not be provided the same protection concerning self-incriminating matter, although such a distinction does not appear to be logically supportable. Notwithstanding this distinction in the statutes, counsel should still be able to rely upon the fact that the United States Supreme Court did not qualify or limit the privilege against self-incrimination to those circumstances where the youth may be incarcerated. Nor is the privilege limited to criminal cases, but may be claimed in civil proceedings where no institutionalization or criminal penalty could result.61 Even though juvenile proceedings are civil rather than criminal, and although a need of supervision decree does not have the severe consequences of detention which are possible in a delinquency determination, the youth has a right not to incriminate himself.

Confrontation and Cross-examination of Witnesses

The determination of delinquency and subsequent commitment to an institution may not be sustained unless any sworn testimony is subject to cross-examination and confrontation.62 Montana has provided that a youth may confront his accusers in any proceeding on a petition, whether he is charged with being delinquent or in need of supervision.63

Admissibility of Evidence

The United States Supreme Court limited itself in Gault to the adjudicatory stage of the juvenile proceedings and did not address itself to other stages of the proceedings. Evidentiary matters which occur during the pre-adjudicative stages of the juvenile proceedings have not been tested before the highest court. For example, a youth’s right against unreasonable search and seizure has not been constitutionally settled. In Montana, however, the legislature has provided that no evidence illegally seized will be admissible in a juvenile proceeding where delinquency is alleged.64

Burden of Proof

Because juvenile proceedings are generally considered to be civil, rather than criminal, in nature, the burden of proof formerly required to be carried by the state was a preponderance of the evidence. In 1970, however, the United States Supreme Court declared

61. Id. at 49.
62. Id. at 57.
63. R.C.M. 1947, § 10-1218(6).
64. R.C.M. 1947, § 10-1218(1)(c)(ii).
that whenever a juvenile has allegedly committed an act which would be a criminal offense if charged against an adult and the youth may be judged delinquent as a consequence, proof beyond a reasonable doubt must be established by the state.\(^6\) The Youth Court Act requires that proof beyond a reasonable doubt be established in delinquency and in need of supervision judgments.\(^6\)

**Jury Trial**

A jury trial in state juvenile delinquency proceedings is not required under the Due Process Clause of the Fourteenth Amendment.\(^7\) A youth may demand a jury trial in Montana, but if he fails to do so, his right to it is waived.\(^8\)

**Other Rights**

Many of the details of procedure in the juvenile court adjudicatory process are presently in a state of flux. Some rights which must be provided to adults are also available to juveniles, while other rights are not. Montana has attempted to give youths the right to many adult criminal protections. The adjudicatory hearing must be recorded verbatim to provide a proper basis for appeal.\(^9\) Whenever an adjudicatory hearing is ordered, it must be given preferential priority over other matters before the court.\(^10\) Additionally, the petition hearing must begin within fifteen days after service to necessary parties or be dismissed with prejudice, ensuring a speedy trial to the accused youth.\(^11\) Once a youth has been discharged from probation or has successfully complied with the terms of the disposition of a petition, he cannot be proceeded against in any court again for the same offense.\(^12\) The youth may appeal to the Supreme Court of Montana from any judgment in the Youth Court, and may be given a stay of execution upon the judgment if provisions for custody and care of the youth are made pending hearing of the appeal.\(^13\)

The youth does not, however, have the right to a public trial. The general public is excluded from all proceedings on a petition unless the petition alleges that a felony has been committed. When

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65. In the Matter of Winship, *supra* note 44.
68. R.C.M. 1947, § 10-1220(1).
69. R.C.M. 1947, § 10-1220(3).
70. R.C.M. 1947, § 10-1220(1).
71. R.C.M. 1947, § 10-1219.
72. R.C.M. 1947, § 10-1224(4). Although this double jeopardy protection is stated in the "consent decree with petition" statute, it should be applicable whenever probation or supervision has been satisfactorily completed. It is unfortunate that the provision was so placed.
73. R.C.M. 1947, § 10-1225(1) and (2).
DEFENSE OF YOUTH

When a felony is alleged, persons with a legitimate interest, including radio, television and newspaper reporters, must be allowed to be present. It is possible that counsel for a youth may desire that the proceedings be made public. Where it appears that the youth is not being treated fairly by the court, counsel could seek to make the court respond to public pressure by demanding that the proceedings be made public. Privacy in the Youth Court is grounded upon the presumption that the court is there to rehabilitate, not punish, the child. It may be that it is unconstitutional to deny a child the right to a public trial upon his request based upon the youth’s assertion that the public would be repulsed by the harshness of treatment in the court.

THE DISPOSITIONAL PROCESS

The dispositional hearing has been separated from the adjudicatory stage of the proceedings. It is essential that the finding of delinquency or need of supervision be based solely upon proof of the child’s actions, not upon the social history or rehabilitative needs of the child. For this reason, the matters which may be brought before the court differ substantially in the two hearings.

In the adjudicatory hearing, only matters relevant and competent to the issue of culpability may be introduced; in the dispositional hearing, however, any matter which sheds light upon the needs of the child is proper. Montana law provides that a social summary be submitted to the court by the probation officer in writing before the dispositional hearing is held.

If the youth admits guilt, the dispositional hearing may be held immediately after he has admitted to the court that the offenses alleged in the petition are true. In these circumstances, counsel should request that the social history be made prior to the adjudicatory hearing in order to allow the youth to begin the rehabilitative program as soon as possible.

Where the youth denies the allegations in the petition, no social history should be allowed until the judgment on the petition has been entered. Postponing the social summary helps to ensure that the judgment on the petition will not be colored by the “rehabilitative needs” of the youth.

Montana law requires that defense counsel be given a copy of the social summary. To be effective during the dispositional hear-

74. R.C.M. 1947, § 10-1220(5).
75. R.C.M. 1947, § 10-1221(2).
77. R.C.M. 1947, § 10-1221(3).
ing, counsel should ascertain the accuracy of the reports and be able to provide alternatives to the disposition proposed in the summary report.

The probation officer who filed the social summary, and anyone else who prepared any portion of the social summary, may be subpoenaed by the youth, his parents, guardian, or counsel. The author of each report may be cross-examined concerning the content of the report and conclusions submitted by that person. Counsel should question the probation officer or other officials to determine if they have made any oral comments or recommendations to the judge. Statements not in the report may have a substantial effect upon the judge and cannot be questioned unless the attorney is aware of them.

When the social summary and the recommendations of the probation officer are contrary to the realistic desires of the client, counsel for the youth should try to counterbalance the substantial influence a probation officer often has upon the judge. In making a dispositional plea, the attorney should consider filing affidavits in mitigation of the child’s actions or in support of action sought by the child. “Such affidavits would ordinarily be obtained from an employer of the child, friends, relatives, the child’s physician, psychologist or psychiatrist, . . .”

In addition to affidavits, counsel may request an independent social history or psychological examination of the child. Expert testimony and advice may also prove to be an important factor in the dispositional determination by the judge.

All alternative dispositions should be considered. It is possible that the court would consider the placement of the child with friends or relatives of the family who can provide a stable supervised environment. Judges often agree that a youth who has been mislead by companions would benefit most by a change of surroundings.

Placement in district youth guidance homes throughout the state should be sought. These youth homes often have room for a few youths from other districts. Aftercare, an agency within the Department of Institutions, may also be contacted to make a placement.

The dispositional hearing is to be recorded verbatim and is not open to the public unless a felony has been alleged, as is the case in the adjudicatory hearing.

Although the Montana legislature has statutorily required that supervision, care, and rehabilitation be provided to the youthful

78. R.C.M. 1947, § 10-1221(2).
79. H. Johnson, Jr., supra note 77 at § 6.8.
offender, facilities and programs which aid in the rehabilitative process have not been expanded to meet these goals. It is often true that the only realistic choices available are outright dismissal, probation under loose and infrequent supervision, or commitment to the state reform school. Even though some district youth guidance homes and other "teen homes" are presently operational, placement in a juvenile facility is often difficult to obtain for a youth, and usually requires a significant amount of preparation by the defense counsel.

In those situations where no placement is available, the youth may well be faced with the likelihood of institutionalization in a detention facility. Although it is beyond the scope of this comment, counsel should be aware that there are several recent federal court decisions which have recognized a constitutional right to treatment for institutionalized juveniles. Where the state institutionalizes a person on the theory of rehabilitation, without observing the due process protections of the criminal system, confinement of that person is a violation of due process if no treatment is forthcoming.

**Probation Review and Revocation**

Probation is the most frequently used method of rehabilitation; it provides the youth another chance and allows him to remain in a family environment in most cases. In many cases, the youth responds well to probation and manages to stay out of trouble. In those situations where the youth violates the conditions of probation or engages in further unlawful acts, the Youth Court may respond with more structured rehabilitation. Counsel should be aware that the process of probation review and revocation is different under each type of probationary agreement.

The Montana statute authorizing a consent adjustment without petition makes no provision for revocation of probation. When a youth violates his probation, a petition may be filed upon the act which constituted a breach of a probationary condition if that breach will independently support a petition. It is questionable whether a petition may be initiated for acts upon which the consent

80. R.C.M. 1947, § 10-1212(2).
84. R.C.M. 1947, § 10-1202(3) provides that rehabilitation be achieved in a family environment whenever possible.
adjustment is based.

It is also unclear whether the youth's signature on the consent adjustment constitutes an admission to the "admitted facts which bring the case within the jurisdiction of the court."85 No statement by the youth to a juvenile probation officer or other counselor during a conference incident to the consent adjustment may be used against the youth.86 However, this privileged communication might not be extended to cover the "admitted facts" in the consent adjustment.

In order to minimize the possibility of a petition upon violation of probation, counsel should attempt to limit the admitted facts in the consent adjustment to include only a statement that the youth admits he has acted in an unlawful manner which brings him within the jurisdiction of the court.87

Provisions for violation of probation have been made in cases where the youth is subject to a consent decree. When the youth fails to comply with a probationary condition, the original petition may be reinstated and the proceedings on it continued to the conclusion of the case.88

When a youth violates a probationary condition upon a formal decree of delinquency or need of supervision, petition to revoke probation may be filed. The petition must contain the same information and be screened in the same manner as petitions alleging delinquency or need of supervision. The petition to revoke probation should state the terms of probation violated and the alleged facts which support the violation. The youth is not entitled to a jury, and the standard of proof is the same standard used in the probation revocation of an adult.89

The Montana statute provides that the court may make any judgment of disposition it could have made in the original case.90 Evidently, a youth in need of supervision who violates a condition of probation may not be sent to a detention facility because he could not have been sent there under the original judgment. In order to be sent to a detention facility, the county attorney would have to file a delinquency petition alleging the violation of a probationary condition.91 The youth would be entitled to a jury and the state

86. R.C.M. 1947, § 10-1210(3).
87. A statement to this effect would comply with R.C.M. 1947 § 10-1210(1)(a).
88. R.C.M. 1947, § 10-1224(3).
89. R.C.M. 1947, § 10-1228. The standard of proof is the same in juvenile probation revocation as it is in adult probation revocation.
90. R.C.M. 1947, § 10-1228.
91. To be sent to a detention facility, the youth must be declared delinquent, and the state must comply with the standards set for a delinquency petition, See discussion, supra note 58.
would have to prove beyond a reasonable doubt that the youth breached a probationary condition.

**TRANSFER TO CRIMINAL COURT**

A transfer is the procedure by which a Youth Court waives its exclusive jurisdiction over a youth in order that he may be tried as an adult in district court for an alleged criminal offense. Transfers are made when there are reasonable grounds to believe that the youth has committed a serious crime indicating a maturity and emotional attitude which made it very unlikely resources available to the Youth Court would be rehabilitative. When the youth has been transferred into district court, jurisdiction in the Youth Court is terminated with respect to acts alleged.

A youth may be transferred into district court in Montana only when he is sixteen years of age or older when the alleged criminal act occurred. No youth under the age of sixteen may be prosecuted for a criminal offense in district court, nor may a juvenile over sixteen who has not been transferred by the Youth Court.

Before a youth may be transferred, a petition must be filed against the youth in the Youth Court, a motion for transfer must be made by the county attorney, and a hearing must be held to determine if the transfer should be made. A written notice of the transfer hearing must be given to the youth and his parents, guardian, or custodian at least ten days before the hearing is held. The transfer hearing is to be held in conformity with the rules for an adjudicatory delinquency hearing, except that a jury trial cannot be demanded.

Under the Montana Youth Court Act, a transfer may be made only when the alleged unlawful act is one of the following:

1. criminal homicide, including deliberate, mitigated deliberate, and negligent homicide;
2. arson;
3. aggravated assault;
4. robbery;
5. burglary or aggravated burglary;

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92. Transfer, or waiver of jurisdiction into adult court, was reviewed in *Kent v. U.S.*, 383 U.S. 541 (1966). In that case, the Supreme Court ordered that the transfer of a youth in the District of Columbia comply with the requirements of notice, a hearing, and a written finding by the judge of his reasons for waiver.

95. R.C.M. 1947, § 10-1229(4).
96. R.C.M. 1947, § 10-1229(1).
98. R.C.M. 1947, § 10-1229(1)(b).
6. sexual intercourse without consent;
7. aggravated kidnapping;
8. possession of explosives or;
9. criminal sale of dangerous drugs for profit.99

Before the youth may be transferred, the court must also determine that there are reasonable grounds to believe that: (1) the youth committed the act, (2) the offense was so serious that there is no treatment for the youth obtainable by juvenile facilities which will adequately protect the community, and (3) the alleged offense was committed in an aggressive, violent, or premeditated manner.100 These three requirements are conjunctive; all of them must be met before transfer may be allowed.

The primary issue in the transfer hearing is whether the youth may be appropriately and effectively dealt with in the juvenile system. No determination of guilt as to the alleged act is to be made. If there are reasonable grounds to believe he committed the act, he may be considered for transfer.

Technically, each enumerated offense must be committed in either a violent, aggressive, or premeditated manner before the youthful offender will be transferred. It should be noted that such offenses as negligent homicide and negligent arson, while the result of a destructive or injurious force, do not involve a vehement, passionate, conscious or intentional design to destroy as required by the statute. In charges of negligent homicide, negligent arson, sale of dangerous drugs for profit, or sexual intercourse without consent, where the female is more than three years younger than the juvenile, the court will seek to determine the extent of premeditation, aggression, or force involved. Jurisdiction should be retained by the Youth Court where it can be shown that the youth is not a threat to society and is likely to be rehabilitated.

To effectively defend a motion to transfer a youth to district court, counsel should attempt to show that the juvenile system has rehabilitative resources which will aid his client. Upon the motion, the prosecution may attempt to show that previous rehabilitative attempts by juvenile agencies had failed.

Practice Tip: In cases where the child has previously received the benefits of the juvenile court rehabilitatory process (such as counseling, probationary supervision or incarceration in an institution) and the social worker reasons that future attempts at rehabilitation will fail because past attempts have failed, counsel may well review the quality of services offered to the child in the past and

100. R.C.M. 1947, § 10-1229(1)(d).
measure the same against the quality of services which ought to have been provided. This is particularly true in areas where case workers have extremely heavy case loads, or where either time or facilities necessary for proper treatment have been unavailable.101

Facts which would tend to shed light upon the immaturity of the youth or the limited involvement he had in the act alleged would decrease the likelihood of transfer.

If the Youth Court judge does not waive jurisdiction and denies the transfer, counsel should consider disqualifying the judge in further proceedings.102 Because he has listened to the social history of the child and other matter not relevant to the determination of delinquency, he may be predisposed to find adversely upon the alleged facts of the case.

The decision to transfer the youth is considered a judgment by the Youth Court, and therefore should be appealable to the Supreme Court of Montana. A stay of the criminal proceedings in district court is allowed until the appeal has been heard.103

RECORDS, FINGERPRINTS AND PHOTOGRAPHS

Most juvenile court laws provide that youthful indiscretion will remain a secret between the court and the juvenile offender. To provide the best rehabilitative environment, it is essential that the youth not be branded for life as one who has a criminal or antisocial mentality. "This claim of secrecy, however, is more rhetoric than reality."104 Even when there are comprehensive protective statutes, employers, governmental agencies, and the military often have ways of procuring information from Youth Court records. On some occasions, the military will refuse to accept a person or will not allow him to enter a special training school unless it is given access to juvenile files. Private employers word application forms so that the prospective employee feels bound to disclose his "confidential juvenile records." An example of an intrusion into the private juvenile records may be seen in the University of Montana Law School Moral Character and Fitness Statement which asks:

Have you ever been summoned, arrested, taken into custody, indicted, convicted or tried for, or charged with, or pleaded guilty to, the violation of any law or ordinance in which the penalty was or could be a fine or imprisonment? Include all such incidents no matter how minor the infraction or whether guilty or not. Although

102. Disqualification is provided in R.C.M. 1947, § 10-1223.
103. R.C.M. 1947, § 10-1225(1) and (2).
104. In re Gault, supra note 4 at 24.
a conviction may have been expunged from the records by order of court, it nevertheless must be disclosed in your answer to this question.

Yes ___ No ___ If your answer is yes, state the crime, the court in which you were charged, the disposition of the charge, and any extenuating circumstances which you wish to mention.

In order to provide for the protection of the youth in the future, counsel should review the case after the youth as completed any dispositional judgment and has reached his eighteenth birthday. After the youth has inspected his record, counsel should seek to have the judge expunge it. Although the Youth Court Act does not provide for expungement prior to ten years from the date of sealing of the record, some judges may be persuaded to use their inherent equity power to ensure that the rehabilitated juvenile not suffer additionally for his youthful indiscretion. In this way, the youth will be able to say that he has no record and the court cannot be pressured to expose a file which no longer exists.

An additional problem arises, however, when the youth's acts have become general knowledge to the community. Expunction of the Youth Court record would not eliminate the possibility that an employer or governmental agency would obtain information from police records or other non-judicial sources. In these cases, it is better for the youth to acknowledge the juvenile record so that he can establish any mitigating circumstance and a favorable discharge from the supervisory status.

Montana law provides that law enforcement, probation officer, and Youth Court records not be disclosed to the public unless so ordered by the Youth Court. Only legal officers, the staff of the Youth Court, the youth, his parents, guardian, and counsel have access to these records without obtaining an order of the court.

Counsel must be aware that many counties throughout the state have not provided that these records and all copies of the records be kept confidential while the person is a youth and be sealed upon his majority. Juveniles may be booked into the jail in the same book with adults. Police practice may list the names of all adults and juveniles allegedly involved in a criminal incident making no attempt to maintain the confidentiality of the youths listed. Copies of police and probation reports may be sent to agencies, attorneys, or other courts with no record kept of these transactions. It is the job of the defense attorney to see that the court, the proba-

105. R.C.M. 1947, § 10-1231(1)(f) allows a youth to inspect his record after it has been sealed.


tion officer and the police obey provisions which are intended to keep records of the client confidential.

Montana provides that only the youth court may order fingerprinting and photographing of youths.\textsuperscript{108} In order to ensure the protective confidentiality for his client, counsel should be certain that these fingerprints and photographs be destroyed upon the termination of the case.\textsuperscript{109}

**CONCLUSION**

Recent developments in juvenile law have made the defense attorney a key figure in the Youth Court proceedings. "Counsel is the confidant, spokesman, and protector of rights for the juvenile."\textsuperscript{110} The juvenile's defender should remember that he is working for the ultimate benefit of his client. So long as the state acts in its role as *parens patriae*, it is in the youth's best interest that the attorney act as counselor and advisor, subrogating his role as an advocate. When the state seeks to imperil the interests of the child, or fails to act in his best interest through ignorance, incompetence, or carelessness, the attorney must become a fierce adversary. He must challenge the juvenile system to provide his client with the due process protections and the rehabilitative services every youth has the right to expect. No child deserves less.

\textsuperscript{108} R.C.M. 1947, § 10-1218(2)(a).
\textsuperscript{109} The statutes provide for destruction under R.C.M. 1947 § 10-1218(2)(c).