Due Process Rights and Children: Fifty Years of In re Gault – Part One

On May 15, 1967, the U.S. Supreme Court granted due process rights to children in the landmark case of *In re Gault*, 387 U.S. 1 (1967). The case involved 15-year-old Gerald Gault, who was taken into police custody without notice to his parents, held for four days, and committed to a juvenile facility for a maximum of six years for making a prank phone call to his neighbor. He received no prior notice of the charges and was adjudicated delinquent following an informal hearing with a judge without any witnesses or representation by counsel. His case would spark outrage today but was the norm for juvenile proceedings at the time. When the Supreme Court reversed Gault's adjudication, it transformed the nature of juvenile court by defining basic requirements of due process that now apply to all delinquency hearings. These rights include:

- the right to notice of the charges;
- the right to an attorney;
- the right to remain silent; and
- the right to confront and cross-examine witnesses.

While this decision marked a watershed moment in children's rights, the language of the Court was not absolute. The Supreme Court did not extend these rights to all juveniles. *Gault* applies only to juveniles whose adjudication of delinquency may result in commitment to a state institution, which excludes undisciplined juveniles. The Court also limited its holding to the adjudicatory stage, leaving states open to define due process in other stages of juvenile proceedings (*i.e.*, pre-adjudication, disposition, and post-disposition). *Gault*, 387 U.S. at 13. As a result, the decision did not completely change the legal landscape but left a legal patchwork among state jurisdictions that continues today. This post is the first in a series of posts that will discuss *Gault*'s impact on juvenile delinquency proceedings in NC and whether *Gault*'s promise of due process rights for children has been fully achieved.

Early Juvenile Court Proceedings

Prior to *Gault*, procedural protections such as notice of the charges, the privilege against self-incrimination, and the right to counsel were generally ignored in juvenile proceedings. Under the doctrine of *parens patriae* (the state as parent), delinquent juveniles were viewed as wards of the state and were not considered to be on trial. The juvenile court's goal was not to assign guilt or innocence, but rather to treat or rehabilitate the child. Early reformers thought that applying rigid rules of criminal procedure would only frustrate these benevolent purposes. *Id.* at 15-16. Thus, the state's duty to protect the health and welfare of juveniles outweighed the state's duty to protect their individual liberties.

Children were also denied procedural due process based on the view that, "unlike an adult, [a child] has a right 'not to liberty but to custody.'" *Id.* at 17. The state's role as *parens patriae* allowed it to step in and provide custody to children whose parents failed to do so. Writing for the majority in *Gault*, Justice Fortas explained that under this view, "[the state] does not deprive the child of any rights, because he has none. It merely provides the 'custody' to which the child is entitled." *Id.* As a result, the procedural safeguards that protected individual liberty in adult criminal trials were considered to be inapplicable to juveniles. This informality often led to arbitrary and unfair dispositions like the one in Gault's case.

From *Parens Patriae* to Due Process

Gerald Gault's "hearing" occurred in the judge's chambers and included his parents and two probation officers. The only written notice he received was a note from an officer on plain paper given to his mother three days before the hearing. The complaining witness was not present and did not consult with the judge at any time. Gault allegedly confessed to making a "lewd phone call" when the judge questioned him at his initial hearing without advising him of the right to remain silent or the right to an attorney. Based on his confession, he was committed to a state institution for a maximum of six years, although an adult charged with the same offense would have been subject to a fine of $5.00 to $50.00 and no more than two months in jail. The adult also would have received the benefit of a full hearing on the merits with adequate prior notice and the right to counsel.

The Supreme Court harshly criticized the denial of procedural protections to Gault under the guise that his commitment was not punitive but rather an attempt "to save him from a downward career." *Id.* at 26. Despite being called an "industrial school," the reality is that Gault was committed to an institution where he was subject to confinement for many years. The Court saw no reason why constitutional due process would not apply to such a significant restraint on a child's liberty, declaring that "the condition of being a boy does not justify a kangaroo court." *Id.* at 28.

Citing its recent decision in *Kent v. United States*, 383 U.S. 541 (1966), the Court reiterated that the state's paternalistic role in juvenile proceedings was not "an invitation to procedural arbitrariness." *Id.* at 30. In *Kent*, the Court held that the juvenile waiver process (or transfer to adult court) resulted in "such tremendous consequences" as to justify a hearing, effective assistance of counsel, and a statement of reasons. *Id.* Thus, like the waiver process, a delinquency hearing "must measure up to the essentials of due process and fair treatment." *Id.*

Gault established that due process in a delinquency hearing, at a minimum, requires:

- **Notice of Charges.** Notice must be given to the juvenile and his or her parents, in writing, of the specific charges or factual allegations sufficiently in advance of the proceeding to allow them a "reasonable opportunity to prepare." at 33.
- **Right to Counsel.** Juveniles and their parents must be notified of the juvenile's right to

counsel and the right to appointed counsel if they cannot afford to hire one. at 41.

- **Right to Remain Silent.** A juvenile's admission may not be used against him or her in a delinquency proceeding absent "clear and unequivocal evidence" that the admission was made with knowledge that the juvenile had the right to remain silent and would not be penalized for exercising this right. at 44.
- **Right to Confrontation and Cross-Examination.** Absent a valid confession, an adjudication of delinquency must be based upon "sworn testimony subjected to the opportunity for cross-examination." at 57.

Due Process Rights Beyond *Gault*

Despite *Gault*'s mandate, "due process" still hasn't been clearly defined in juvenile proceedings. Because the decision applies only to adjudication hearings, questions still remain about the scope of due process applicable to other stages of juvenile court. In a previous post, I addressed questions related to a juvenile's due process rights during dispositional hearings, which are still unclear.

The Supreme Court also left open the question of indigence with respect to the right to counsel. In North Carolina, juveniles are presumed to be indigent, and thus, automatically receive appointed counsel when alleged to be delinquent. G.S. 7B-2000. They also have other statutory due process protections that go beyond *Gault*'s minimum requirements. G.S. 7B-2405. However, these rights are not guaranteed to juveniles in every state.

Likewise, the Court failed to outline the privilege against self-incrimination for juveniles and allowed states to determine procedures related to a juvenile's waiver of rights. North Carolina has long provided juveniles with the right to have a parent present during a custodial police interrogation. G.S. 7B-2101. However, courts often find that juveniles were not "in custody" during police questioning, and thus, were not entitled to have a parent present. This remains true even though the Court held in *J.D.B. v. North Carolina*, 131 S. Ct. 2394 (2011), that officers must apply a "reasonable child" standard when determining whether they must administer warnings to juveniles.

Recent Reform Efforts in North Carolina

In 2015, the General Assembly passed House Bill 879 which was intended to improve consistency and enhance due process in several juvenile court proceedings. For example, it created new G.S. 7B-2408.5 (modeled after G.S. 15A-977) to establish a procedure for filing motions to suppress in juvenile court. Prior to the enactment of this statute, there was no uniformity in the way juvenile courts handled motions to suppress. Some courts followed the established adult criminal procedure, while others created local solutions with varying degrees of formality.

Similarly, a prosecutor's ability to dismiss a juvenile petition, which was not addressed in the Juvenile Code, varied widely. Some courts only allowed dismissals by order of the court, while

others gave prosecutors some discretion to dismiss the petition if certain conditions were met. Under new G.S. 7B-2404(b), it is clear that prosecutors may voluntarily dismiss a petition with or without leave, similar to their authority in criminal court. These and other procedural reforms promote uniformity and fairness in the juvenile process, consistent with *Gault*'s holding. (See this post for a full summary of HB 879).

As the 50th anniversary of *Gault* approaches, the National Juvenile Defender Center is commemorating the decision through its "Gault at 50" campaign which urges juvenile defenders and other juvenile advocates to recommit themselves to protecting the rights of children. The campaign recognizes that while *Gault* was a huge step forward in seeking justice for juveniles, more work is necessary. Stay tuned for additional posts on *Gault* and how its promise is still being fulfilled.

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Special thanks to Evan Lee, a third year student at Campbell Law School and summer intern at the Office of the Juvenile Defender for his research which contributed to this post.

Due Process Rights and Children: Fifty Years of In re Gault – Part Two, the Right to Counsel

This post is the second in a series focused on *In re Gault*, the U.S. Supreme Court case which mandated that the core due process rights applicable to adults in criminal proceedings must also be afforded to juveniles who are alleged to be delinquent. Perhaps the most significant of these rights is the right to counsel.

The Supreme Court strongly condemned the denial of counsel to children in a proceeding which carries "the awesome prospect of incarceration" until the age of majority. 387 U.S. 1, 36. In such proceedings, a juvenile needs legal representation "to cope with problems of law, to make skilled inquiry into the facts, to insist upon regularity of the proceedings, and to ascertain whether he has a defense and to prepare and submit it." *Id.* Thus, in delinquency hearings "which may result in commitment to an institution in which the juvenile's freedom is curtailed," the child and his or her parents must be notified of the child's right to counsel, or if they cannot afford counsel, that counsel will be appointed. *Id.* The NC Juvenile Code codified and expanded the right to counsel in G.S. 7B-2000 by requiring the appointment of counsel for all juveniles who are alleged to be delinquent without the need to show indigency. Despite this progress, advocates still question whether the right to counsel for juveniles extends far enough.

Evolution of a Juvenile's Right to Counsel in NC

Immediately following the *Gault* decision, the General Assembly enacted former G.S. 110-29.1 (1967 Cum. Supplement), which essentially followed the language of *Gault* and guaranteed a right to counsel to juveniles facing the possibility of commitment to a training school (what we now call a youth development center) and a right to appointed counsel to those who were indigent. Appellate decisions interpreting *Gault* also required affirmative evidence in the record that the trial court gave prior notice of the juvenile's right to counsel to the juvenile and the juvenile's parents and "confronted [them] with the need for specific consideration" of whether they chose to waive it. *In re Stanley*, 17 N.C. App. 370, 371 (1973) (reversed based on trial court's failure to properly advise juvenile and his parents of right to counsel); *In re Garcia*, 9 N.C. App. 691, 694 (1970) (same).

In 1979, the Juvenile Code Revision Committee, part of the former Department of Crime Control and Public Safety, recommended amending the law to provide that juveniles have the right to counsel "in all [juvenile] proceedings" and that the court may appoint counsel at any stage of the proceedings but *must* appoint counsel for juveniles alleged to be delinquent unless counsel has been retained or waived by the juvenile. The General Assembly considered these recommendations but determined that counsel must be provided for delinquent juveniles at all stages without the possibility of waiver and regardless of indigency. *See* former G.S. 7A-584 (1980). Thus, juveniles in North Carolina have been afforded automatic appointment of counsel in delinquency cases since 1980.

Juvenile Defense Services in NC

North Carolina indigent defense providers have consistently recognized the importance of juvenile defense. The first two state funded public defender offices founded in 1970, located in Guilford and Cumberland counties, immediately provided representation to juveniles. Currently, all but two of the state district offices represent juveniles. One of these districts, Mecklenburg County, is home to the non-profit law firm Council for Children's Rights (CFCR). Formerly known as the Children's Law Center, CFCR has maintained a contract to represent juveniles in Mecklenburg County since 1987, making it one of the oldest indigent defense contracts in NC. CFCR promotes best practices in juvenile defense including the use of in-house investigators and social workers. Although *Gault* did not extend the right to counsel in appeals, juveniles receive appellate representation through the Office of the Appellate Defender.

In the late 1990's, renewed national interest in the quality of juvenile defense prompted the American Bar Association and the National Juvenile Defender Center to perform state assessments of quality of counsel. From 2001 to 2002, North Carolina participated in an assessment and the results were detailed in the 2003 report, "An Assessment of Access to Counsel and Quality of Representation in Delinquency Proceedings." The report revealed a lack of standards, guidance, training, and technical support for juvenile defense counsel. As a result, in 2005, the NC Office of Indigent Defense Services created the statewide Office of the Juvenile Defender (OJD). OJD's mission is to improve the quality of defense counsel by creating standards and guidelines, improving education and training opportunities for juvenile defenders, and building a community of specialized representation among public defenders, contractors, and privately assigned counsel.

Extending the Right to Counsel Beyond *Gault*?

In *Gault*, the Supreme Court emphasized that children, even more than adults, need "the guiding hand of counsel at *every step in the proceedings* against [them]." 387 U.S. 1, 36 (emphasis added). However, the Court's holding was limited to the adjudicatory phase of a delinquency proceeding and did not address how the right to counsel impacts "the totality of the relationship of the juvenile and the state." 387 U.S. 1, 13. The Court specifically declined to consider the applicability of due process rights to the "pre-judicial . . . post-adjudicative or dispositional process." *Id.* This means that juveniles do not have a constitutional right to counsel at other critical stages of the proceeding that influence the outcome of the juvenile's case.

For example, while attorneys are appointed early in the process, counsel typically is not present during the intake investigation, which determines whether a court counselor will approve the case for court (unless the offense is non-divertible and *must* be approved). Although court counselors consider numerous factors in deciding whether to file a complaint against a juvenile as a juvenile petition, the counselor's face-to-face meeting with the juvenile and the juvenile's parent or guardian is an important part of this determination. *See* G.S. 7B-1701 (requiring *reasonable efforts*

by court counselors to personally meet with the juvenile's family for divertible offenses). Some defenders have advocated for the right to be present at intake to protect their client's interests.

Defenders also question the need for "on call" counsel for juveniles who are placed in detention awaiting an initial secure custody hearing. Although juveniles must be represented by counsel at the hearing on the need for continued custody, held within five days, the initial order placing the juvenile in secure custody is usually entered by the judge *ex parte;* therefore juveniles may be subject to law enforcement interrogation without access to counsel. Other gaps in representation may occur post-disposition, such as during periods of probation or when juveniles are placed in locked facilities. Undisciplined juveniles, youth who are accused of being disobedient or truant, also must face the court without counsel.

Meaningful access to counsel might also include a more holistic representation that goes beyond the delinquency charges to allow defenders to represent a juvenile who is suspended from school or needs special education services; or to obtain an expunction for a juvenile who faces barriers to employment or housing from an adjudication of delinquency. However, with no constitutional or statutory right to counsel in such proceedings, juveniles lack this type of representation. While some organizations such as Advocates for Children's Services or Council for Children's Rights can provide some additional services beyond the normal scope of the juvenile defender's representation, ultimately, a reevaluation of the scope of the juvenile's right to counsel may be necessary to truly allow for holistic representation.

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Due Process Rights and Children: Fifty Years of In re Gault – Part Three, the Right to Notice

The right to receive "notice" of a criminal charge or other alleged misconduct is considered to be one of the core requirements of the Due Process Clause of the Fourteenth Amendment to the United States Constitution. Although due process requirements vary depending on the circumstances, at a minimum, a person is entitled to notice and an opportunity to be heard before suffering a loss of life, liberty, or property by the government. *In re D.B.*, 186 N.C. App. 556, 564 (2007). This basic protection was not afforded to juveniles prior to *In re Gault*, 387 U.S. 1 (1967), which extended due process rights to children. Why is notice so important? When must notice be given? How much notice is required? These questions and others are answered in this third post in a series about *Gault*'s role in protecting the rights of juveniles in delinquency proceedings over the past fifty years.

Why is notice important?

Receiving constitutionally sufficient notice of the charges is not just a perfunctory mandate. It serves three important functions: (1) to enable the juvenile to prepare a defense, (2) to allow the court to enter an adjudication of delinquency based on the alleged offense, and (3) to protect the juvenile from double jeopardy. *In re S.R.S.*, 180 N.C. App. 151, 155-56 (2006).

The right to mount a defense against the charges, another tenet of *Gault*, is largely dependent on knowledge of the specific allegations. In some cases, the juvenile, parent, guardian, relatives, or friends may speculate or receive incomplete information regarding the allegations. Misinformation about an alleged act can cause confusion which may negatively impact the juvenile's initial meeting with counsel. Once the juvenile receives specific notice of the facts upon which a petition is based, defense counsel may proceed with accurate information to explore potential defenses and determine the direction of the case.

How much notice is required?

You may recall that 15-year-old Gerald Gault was taken into police custody without notice to his parents after his neighbor accused him of making a prank phone call. Gerald's parents discovered he was in custody after sending his older brother out to look for him that evening. When Gerald's mother went to the detention facility, she was told that a hearing would be held in juvenile court the next day. On the day of the hearing, the arresting officer filed a "petition" that simply alleged Gerald was a minor under the age of 18 in need of the protection of the court because he was a "delinquent." No factual basis for the charge was provided. Gerald's parents were not served with the petition and did not see it until two months later at a habeas proceeding. The only written notice they ever received was a note on plain paper with the date of the next hearing, delivered by an

officer three or four days after Gerald was initially taken into custody. *Gault*, 387 U.S. 5-6.

It's no surprise that the Supreme Court found this notice to be inadequate. The Court held that to comply with constitutional due process requirements, notice must be given that would be deemed adequate in a civil or criminal case. That is, it "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." *Id.* at 33. The notice must also be in writing. Finally, because juvenile proceedings threaten not only the juvenile's liberty interests but also a parent's right to the custody of his or her child, the notice must be provided to both the juvenile and the juvenile's parents. *Id.*

When must notice be given?

The constitutional requirements for notice established by *Gault* are codified in several Juvenile Code statutes. Notice of important details, particularly the possibility of confinement, must be given to juveniles and their parents at every stage of a juvenile proceeding. Some of the key notice provisions (and consequences for violating them) include:

- **Written Notice of the Allegations**

A juvenile petition must assert facts that properly allege a criminal offense and identify the juvenile as the perpetrator "with sufficient precision clearly to apprise the juvenile of the conduct which is the subject of the allegation." G.S. 7B-1802. The failure to properly allege each element of a criminal offense is a fatal defect which deprives the court of jurisdiction. *In re M.S.*, 199 N.C. App. 260 (2009). A jurisdictional defect can be raised at any time, even after an adjudication of delinquency has already occurred. *Id.* Thus, an appellate court will vacate the adjudication if the defect is discovered on appeal.

- **Service of the Summons and Petition**

Notice of the facts invoking the court's jurisdiction must be provided by service of the juvenile petition and summons on the juvenile and the juvenile's parent or guardian at least five days prior to the scheduled hearing (unless the court shortens the time for service). G.S. 7B-1806. "The purpose of the juvenile summons is to provide notice to the juvenile and the juvenile's parent or guardian of the juvenile's rights, and of the date and time of the pending hearings." *In re S.C.B.*, 177 N.C. App. 811 (2006). The district court has no subject matter jurisdiction, if the petition and summons are not served. *See In re Mitchell*, 126 N.C. App. 432 (1997).

- **Notice of Rights When Making Admissions**

Before accepting a juvenile's admission of the allegations in a petition (similar to a guilty plea in criminal court), the judge is required to advise the juvenile of certain rights and determine whether

the juvenile is making an informed decision with a full understanding of the consequences. G.S. 7B-2407. If a judge fails to make even one of the inquiries required by G.S. 7B-2407, it is reversible error. *In re T.E.F.*, 359 N.C. 570 (2005).

- **Notice of Hearings**

Unless notified in open court or the court orders otherwise, a juvenile and his or her parent(s) must receive five days prior written notice of the date and time of all scheduled hearings. G.S. 7B-1807. These notice requirements apply generally to all types of juvenile hearings, including custody review hearings, adjudication and disposition hearings, probation violation hearings, and post-release supervision hearings.

- **Notice of Probation Violations and/or Extensions**

Juveniles must receive notice and have an opportunity to be heard before the court may revoke the juvenile's probation or extend the probation term. G.S. 7B-2510(c) and (e). In general, the notice must inform the juvenile of the purpose of the hearing and allege probation violations with sufficient detail to notify the juvenile of the potential consequences. *See In re D.S.B.*, __ N.C. App. __, 768 S.E.2d 922 (2015) (juvenile had actual notice that he was subject to a level 3 disposition for a violation of probation despite a clerical error in the motion for review). The five-day written notice requirement in G.S. 7B-1807 also applies.

- **Notice of Extended YDC Commitments**

Juveniles may not be committed to the Division of Adult Correction and Juvenile Justice for placement in a youth development center longer than an adult could be imprisoned for the same offense, unless the Division determines they need further rehabilitation. G.S. 7B-2513(a). If the Division plans to extend a juvenile's commitment beyond the maximum term, it must provide *written* notice to the juvenile and the juvenile's parents 30 days prior to the juvenile's scheduled release date. G.S. 7B-2515(a). This notice requirement protects the juvenile's right to timely object to the extension and request a hearing. Thus, notice that fails to comply with the statutory requirements is reversible error which may result in the juvenile's release. *See In re J.L.H.*, 230 N.C. App. 214 (2013) (verbal notice 30 days prior to juvenile's scheduled release was insufficient).

- **Notice of Post-Release Supervision Violations**

Similar to probation revocation, juveniles must receive notice and have an opportunity to be heard before the court may revoke a juvenile's post-release supervision. G.S. 7B-2516. Violations of post-release supervision can result in revocation which triggers recommitment of the juvenile to a YDC. As a result, the Juvenile Code requires written notice of the nature and content of the alleged violations and notice that the purpose of the hearing is to determine whether the juvenile has

violated the terms of the post-release supervision such that revocation should be ordered. G.S. 7B-2516(a)(1). Although the statute requires “reasonable notice” to the juvenile, the five-day written notice requirement in G.S. 7B-1807 likely controls.

This list of notice requirements in the Juvenile Code, while incomplete, illustrates the importance of proper notice in protecting a juvenile’s right to a fair hearing – the fundamental meaning of due process. It also illustrates why charging errors in a juvenile petition matter so much (like alleging a larceny from *Walmart* instead of *Walmart, Inc.*) and why the court’s admission colloquy with a juvenile must be perfect. Our appellate courts have repeatedly said that there is a “greater duty to protect the rights of a respondent in a juvenile proceeding than in a criminal prosecution.” *T.E.F.*, 359 N.C. at 575. Complying with these notice requirements is one of the ways juvenile court participants fulfill this duty.

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Due Process Rights and Children: Fifty Years of In re Gault – Part Four, the Right to Confrontation

The Confrontation Clause of the Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend. VI. This protection applies to state court criminal actions by virtue of the Fourteenth Amendment. It also applies to juvenile proceedings because of *In re Gault,* 387 U.S. 1 (1967). Simply put, the right to confrontation allows juveniles to face their accusers in court and dispute their testimony through cross-examination. It allows juveniles to challenge the state's evidence and protects them from the improper admission of certain testimonial hearsay under *Crawford*. This post explains a juvenile's right to confront and cross examine witnesses and how far it extends in juvenile court.

The Right to Confrontation

The allegations against Gerald Gault stemmed from an alleged lewd phone call to a neighbor. However, in none of the proceedings that led to Gerald's ultimate confinement was the neighbor ever called to testify. There was no opportunity for Gerald to contest either the call being made or the substance of the alleged call through face-to-face confrontation. Explaining how the denial of this right, along with an invalid confession, impacted Gerald's case, the Supreme Court stated:

[t]he Arizona Supreme Court held that sworn testimony must be required of all witnesses including police officers, probation officers and others who are part of or officially related to the juvenile court structure. We hold that this is not enough. No reason is suggested or appears for a different rule in respect of sworn testimony in juvenile courts than in adult tribunals. Absent a valid confession adequate to support the determination of the Juvenile Court, confrontation and sworn testimony by witnesses available for cross-examination were essential for a finding of delinquency and an order committing Gerald to a state institution for a maximum of six years.

387 U.S. at 56. Thus, confrontation includes the right to be present and to cross examine witnesses who testify under oath.

The court later explained in *Crawford v. Washington* that the primary purpose of confrontation is to ensure that evidence is reliable "by testing [it] in the crucible of cross-examination." 541 U.S. 36, 61 (2004). This protection is particularly important in juvenile proceedings which often turn on a "he said – she said" scenario, where the trier of fact must determine the truth based on the credibility of witnesses and the content of their statements.

Because cross-examination is essential for assessing the reliability of evidence, the Confrontation Clause bars the admission of certain hearsay statements. Under *Crawford*, "testimonial"

statements made by witnesses who do not appear in court are not admissible unless the witness is unavailable and there has been a prior opportunity for cross-examination. *Id.* at 68. Testimonial statements include, at a minimum, prior testimony at a preliminary hearing, grand jury proceeding, or trial, and statements to police officers during interrogations. *Id.* For a more detailed discussion of the *Crawford* analysis, see Jessica Smith, *Understanding the New Confrontation Clause Analysis*: Crawford, Davis, *and* Melendez-Diaz, available at http://sogpubs.unc.edu/electronicversions/pdfs/aojb1002.pdf).

Confrontation in Juvenile Adjudication Hearings

In addition to confrontation rights under the state and federal constitutions, the Juvenile Code confers a statutory right to confront and cross examine witnesses in juvenile adjudication hearings. *See* G.S. 7B-2405. In at least two unpublished decisions, the Court of Appeals has reversed adjudications based on violations of the juvenile's right to confrontation at trial. *See In re A.J.W., K.S.W.*, No. COA07-1229 (N.C. Ct. App. Oct. 7, 2008) (the admission of testimonial statements made by non-testifying witnesses to a detective violated *Crawford*); *In re A.L.*, No. COA04-1452 (N.C. Ct. App. Jan. 3, 2006) (the admission of the victim's "show up" identification of the juvenile as the offender was testimonial, and thus, violated *Crawford*). However, the Court of Appeals also held that statements are non-testimonial when made in response to preliminary questions by investigating officers during an ongoing emergency. *See In re A.L.*, No. COA04-1452 (statements made by assault victim immediately upon the officer's arrival on the scene were non-testimonial). Non-testimonial hearsay does not violate the Confrontation Clause but must be admissible under the Rules of Evidence.

Confrontation rights apply not only to adjudication hearings but also to juvenile admissions. G.S. 7B-2407 provides that an admission may be accepted only after the court is satisfied that the juvenile understands, among other rights, that the juvenile is waiving the right to be confronted by the witnesses against the juvenile. The court's failure to advise a juvenile regarding the waiver of confrontation rights before accepting the admission is reversible error. *In re P.L.N.*, No. COA07-1414 (N.C. Ct. App. July 15, 2008) (unpublished); *In re M.A.M.*, No. COA08-968 (N.C. Ct. App. April 7, 2009) (unpublished).

Confrontation Beyond the Adjudicatory Hearing

The Juvenile Code extends the right to confrontation beyond the adjudication hearing. For example, juveniles have the right to examine witnesses at secure and non-secure custody review hearings. G.S. 7B-1906(d). At probable cause hearings, juveniles "may testify, call, and examine witnesses" and "[e]ach witness shall testify under oath or affirmation and be subject to cross-examination." G.S. 7B-2202(b).

Although still unsettled, the right to confrontation likely applies to juvenile probation revocation hearings but not as a requirement of the Sixth Amendment or the Juvenile Code. The Juvenile

Code does not specifically require confrontation at probation hearings (although a hearing is required) and the Sixth Amendment does not apply because probation is not a stage of a criminal trial. *See State v. Belcher*, 173 N.C. App. 620 (2005). However, as a matter of due process under the Fourteenth Amendment, adult probationers are entitled "to confront and cross examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation." *Gagnon v. Scarpelli*, 411 U.S. 778, 786 (1973). This limited right to confrontation is codified in G.S. 15A-1345(e).

Without specifically addressing whether *Gagnon* applies to juveniles, the N.C. Court of Appeals has implied that juveniles also have a due process right to confront witnesses at probation hearings. In an unpublished case, *In re D.W-S.*, No. COA12-233 (N.C. Ct. App. Oct. 2, 2012), the juvenile argued that his right to confrontation was violated when his court counselor testified about behavior reports prepared by staff members at a detention center where the juvenile was confined. The court counselor had no first-hand knowledge of the incidents described in the reports, and the staff members who wrote the reports did not testify. Without specifically holding that the juvenile's right to confrontation was violated, the court applied harmless error analysis and found no prejudicial error in the admission of the evidence.

There are many unresolved questions about the scope of confrontation beyond the adjudication hearing. However, given the nature of juvenile probation revocation hearings, it would seem that juveniles are entitled to at least the same due process protections at probation revocation as adult defendants. *Compare In re O'Neal*, 160 N.C. App. 409, 413 (2003) ("the better view is to treat a juvenile probation violation as analogous to the revocation of probation in the criminal justice system[.]").

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Due Process Rights and Children: Fifty Years of In re Gault – Part Five, the Privilege Against Self-Incrimination

Juvenile defenders, the court system, the governor, and other advocates recently celebrated a historic moment in juvenile justice. Monday was the 50th Anniversary of the *In re Gault* decision, which guaranteed juveniles the right to due process in delinquency proceedings. In honor of the event, this multiple part series on due process has explored the history of *Gault* and how it transformed juvenile court by ensuring that juveniles have the right to notice, the right to counsel, and the right to confrontation and cross-examination. This final post discusses the Fifth Amendment privilege against self-incrimination and the protection it provides to juveniles, assuming they understand what it means and know how to assert it.

The Fifth Amendment Privilege and Juveniles

In 1964, Gerald Gault was ordered to serve nearly six years in a state industrial school for allegedly making a prank phone call. His adjudication was based upon a confession obtained without his parents or a lawyer being present and without advising him of the right to remain silent. The Arizona courts decided that such formalities (*i.e.*, the advisement of rights and participation of lawyers and parents) were unnecessary in juvenile court where the goal was treatment and not punishment. The U.S. Supreme Court disagreed.

Recognizing that children are more prone to coerced confessions than adults, the court rejected the notion that the Fifth Amendment privilege did not apply to children due to the labeling of juvenile court as "civil" and not criminal. 387 U.S. 1, 45. Describing the harsh realities of juvenile court, the Supreme Court held that:

juvenile proceedings to determine 'delinquency,' which may lead to commitment to a state institution, must be regarded as 'criminal' for purposes of the privilege against self-incrimination. To hold otherwise would be to disregard substance because of the feeble enticement of the 'civil' label-of-convenience, which has been attached to juvenile proceedings. Indeed, in over half of the states, there is not even assurance that the juvenile will be kept in separate institutions, apart from adult 'criminals.' In those states, juveniles may be placed in or transferred to adult penal institutions after having been found 'delinquent' by a juvenile court. For this purpose, at least, commitment is a deprivation of liberty. It is incarceration against one's will, whether it is called 'criminal' or 'civil.' And our Constitution guarantees that no person shall be compelled to be a witness against himself when he is threatened with deprivation of his liberty[.]

Id. at 49-50.

Gault* also extended the *Miranda* rule to *juveniles, requiring law enforcement officers to advise juveniles in custody of their Fifth Amendment rights prior to any questioning. Under the *Miranda*

rule, statements made by a juvenile while "in custody" are inadmissible in court unless *Miranda* warnings were given and the juvenile knowingly and voluntarily waived the juvenile's rights. The *Gault* court recognized that "special problems may arise with respect to waiver of the privilege by or on behalf of children," but did not establish any specific requirements for such waivers. *Id.* at 55. As a result, state laws vary significantly with respect to whether and how juveniles may waive their rights and whether they must do so in the presence of a parent or an attorney.

NC Juvenile Code Requirements

North Carolina law provides juveniles with special protections that go well beyond *Gault*'s minimum requirements. G.S. 7B-2405, which codifies the privilege against self-incrimination and other due process rights for juveniles, mandates that trial courts *shall* protect these rights in the adjudication hearing. The Juvenile Code also requires:

Notice to Parents When a Juvenile is in Custody. When a juvenile is taken into temporary custody by a law enforcement officer without a court order, the officer must notify the juvenile's parents and inform them of their right to be present with their child until a decision is made as to whether continued custody is necessary. G.S. 7B-1901(a)(1).

Advisement of the Right to Parental Presence During Custodial Interrogation. In NC, juveniles under the age of 18 are entitled to have a parent present during a custodial interrogation. Thus, before a law enforcement officer questions any juvenile who is in custody, the officer must advise the juvenile of the following rights: (1) that the juvenile has a right to remain silent; (2) that any statement made by the juvenile can be used against him or her; (3) that the juvenile has the right to have a parent, guardian, or custodian present during questioning; and (4) that the juvenile has the right to an attorney and that one will be appointed if the juvenile is not represented and wants representation. G.S. 7B-2101(a). When officers fail to give these warnings, any statements made by a juvenile while in custody are inadmissible in court. *In re K.D.L.*, 207 N.C. App. 453 (2010).

No Waiver of Rights by Juveniles Under Age 16. NC law now requires that when a juvenile is under the age of 16, a parent or an attorney must be present during the custodial interrogation in order for the juvenile's statements to be admissible in court. Also, if an attorney is not present, both the parent and juvenile must be informed of the juvenile's rights; although, only the juvenile can waive his or her rights. G.S. 7B-2101(b).

Advisement of Rights When Accepting Juvenile's Admission. A trial court may only accept a juvenile's admission (*i.e.*, guilty plea) after personally addressing the juvenile to make six mandatory inquiries, including informing the juvenile that the juvenile has the right to remain silent and that anything the juvenile says may be used against him or her. G.S. 7B-2407. Because there is a greater duty to protect the rights of juveniles in juvenile proceedings, the court's failure to address even one of these mandatory inquiries is reversible error. *In re T.E.F.*, 359 N.C. 570

(2005).

Advisement of Rights When Juvenile Testifies. In order to comply with the mandate in G.S. 7B-2405 to protect a juvenile's privilege against self-incrimination, trial court judges must advise juveniles of the right to remain silent before allowing the juvenile to testify in his or her own delinquency proceeding. *In re J.R.V.*, 212 N.C. App. 205 (2011).

Requiring the advisement of these warnings prior to interrogations by law enforcement and before a juvenile enters admissions in court increases the likelihood that juveniles will understand their rights and will have an opportunity to exercise them. However, potential barriers may still exist.

The Practical Reality

Some advocates argue that these statutory protections do not go far enough, if juveniles cannot fully understand their rights or effectively assert them. According to this article in the ABA Journal, most youth find *Miranda* rights to be confusing, and nearly 90% of them waive their rights without understanding the consequences.

Another potential barrier to juveniles exercising their rights is the requirement that juveniles must satisfy adult legal standards to trigger their rights under *Miranda*. Until six years ago when the Supreme Court decided *J.D.B. v. North Carolina*, police officers applied a "reasonable adult" standard to determine when they must advise a juvenile of *Miranda* and juvenile rights. *J.D.B.* held that the *Miranda* custody test must account for a child's youth and its unique characteristics. However, recent appellate decisions reveal that courts have not significantly changed how they apply the *Miranda* analysis to interrogations of juveniles (see this bulletin addressing the reasonable child standard).

Advocates also argue that juveniles should not be allowed to waive their rights without the assistance of a parent or attorney. North Carolina law, by requiring the presence of a parent or attorney during custodial interrogations of juveniles younger than 16, implicitly recognizes that children lack the capacity to understand their rights without a helpful adult. Despite this protection, juveniles continue to face barriers when attempting to invoke their rights.

In 2015, the NC Court of Appeals held in *State v. Saldierna* that a 16-year-old possibly attempted to invoke his right to have a parent present during a police interrogation when he asked the detective if he could call his mother, which triggered a requirement that the interrogating officers clarify his statement before proceeding. However, last December, the NC Supreme Court reversed the decision. It held that a juvenile must clearly and unambiguously invoke the statutory right to have a parent present during a custodial interrogation, just like an adult must do to invoke *Miranda* rights. *State v. Saldierna*, __ N.C. __, 794 S.E.2d 474 (2016). A prior blog post discusses why the Supreme Court's decision possibly conflicts with *J.D.B.*'s mandate that police officers and courts must account for the special vulnerability of juveniles during police interrogations.

Despite these potential barriers, significant progress has been made in the fifty years since *Gault*, especially in North Carolina. Let us know your thoughts about additional ways courts can better protect a juvenile's rights.