

FAIR DEFENSE LAWS AS THEY RELATE TO JUVENILE

THE UNITED STATES CONSTITUTION THE SIXTH AMENDMENT

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

COMMENTARY: *The Sixth Amendment guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense." This fundamental right applies to the states through the Fourteenth Amendment. See Gideon v. Wainwright, 372 U.S. 335, 352 (1963). Per the Supreme Court's decision in Gideon, indigent defendants charged with a felony who cannot afford to retain an attorney have an absolute right to counsel appointed by the court. Id. at 342. On the same day that the Supreme Court decided Gideon, it also held that denying the assistance of counsel on appeal because a defendant could not afford to pay for an attorney constituted "discrimination against the indigent." Douglas v. California, 372 U.S. 353, 355 (1963). The Supreme Court extended the right to counsel to include counsel in juvenile court proceedings in In re Gault. 387 U.S. 1 (1967). In Argersinger v. Hamlin, the Court also extended the right to counsel to include counsel for either felony or misdemeanor offenses if the defendant is facing jail time. 407 U.S. 25 (1972). The Sixth Amendment's right to counsel was later interpreted to guarantee that a defendant receives effective assistance of counsel. Strickland v. Washington, 466 U.S. 668 (1984). In Strickland, the Court created a test for evaluating ineffective counsel. To establish a successful claim of ineffective-assistance of counsel, a defendant must show first that counsel's performance fell below an objective standard of reasonableness. Id. at 687. Second, a defendant must show that but for counsel's deficient performance, there is a reasonable probability that the outcome of the proceeding would have been different. Davis v. State, 278 S.W.3d 346, 352 (citing and interpreting Strickland, 446 U.S. at 692). More recently, the Supreme Court held that defendants have received ineffective counsel when they are not informed of the deportation consequence of a guilty plea. Padilla v. Kentucky, 559 U.S. 356, 374 (2010).*

THE TEXAS CONSTITUTION ARTICLE 1.

BILL OF RIGHTS. TEXAS CONSTITUTION

Sec. 10. Rights of Accused in Criminal Prosecutions.

In all criminal prosecutions the accused shall have a speedy public trial by an impartial jury. He shall have the right to demand the nature and cause of the accusation against him, and to have a copy thereof. He shall not be compelled to give evidence against himself, and shall have the right of being heard by himself or counsel, or both, shall be confronted by the witnesses against him and shall have compulsory process for obtaining witnesses in his favor, except that when the witness resides out of the State and the offense charged is a violation of any of the anti-trust laws of this State, the defendant and the State shall have the right to produce and have the evidence admitted by deposition, under such rules and laws as the Legislature may hereafter provide; and no person shall be held to answer for a criminal offense, unless on an indictment of a grand jury, except in cases in which the punishment is by fine or imprisonment, otherwise than in the penitentiary, in cases of impeachment, and in cases arising in the army or navy, or in the militia, when in actual service in time of war or public danger.

Comment: *Texas Family Code Section 54.03(e) referring specifically to adjudication hearings states, "Evidence illegally seized or obtained is inadmissible in an adjudication hearing." It should also be noted that the Family Code also refers to a juvenile's constitutional rights in providing that its purpose is "...to provide a simple judicial procedure... in which the parties are assured a fair hearing and their constitutional and other legal rights recognized and enforced". (emphasis added) It has already been settled that a minor has the same constitutional right to be secure in his person from unreasonable seizures as an adult, and the Fourteenth Amendment and the Bill of Rights protect minors as well as adults.*

FAMILY CODE CHAPTER FIFTY-ONE: GENERAL PROVISIONS

Sec. 51.10. RIGHT TO ASSISTANCE OF ATTORNEY; COMPENSATION.

(a) A child may be represented by an attorney at every stage of proceedings under this title, including:

- (1) the detention hearing required by Section 54.01 of this code;
- (2) the hearing to consider transfer to criminal court required by Section 54.02 of this code;
- (3) the adjudication hearing required by Section 54.03 of this code;

- (4) the disposition hearing required by Section 54.04 of this code;
- (5) the hearing to modify disposition required by Section 54.05 of this code;
- (6) hearings required by Chapter 55 of this code;
- (7) habeas corpus proceedings challenging the legality of detention resulting from action under this title; and
- (8) proceedings in a court of civil appeals or the Texas Supreme Court reviewing proceedings under this title.

(b) The child's right to representation by an attorney shall not be waived in:

- (1) a hearing to consider transfer to criminal court as required by Section 54.02;
- (2) an adjudication hearing as required by Section 54.03;
- (3) a disposition hearing as required by Section 54.04;
- (4) a hearing prior to commitment to the Texas Juvenile Justice Department as a modified disposition in accordance with Section 54.05(f); or
- (5) hearings required by Chapter 55.

(c) If the child was not represented by an attorney at the detention hearing required by Section 54.01 of this code and a determination was made to detain the child, the child shall immediately be entitled to representation by an attorney. The court shall order the retention of an attorney according to Subsection (d) or appoint an attorney according to Subsection (f).

(d) The court shall order a child's parent or other person responsible for support of the child to employ an attorney to represent the child, if:

- (1) the child is not represented by an attorney;
- (2) after giving the appropriate parties an opportunity to be heard, the court determines that the parent or other person responsible for support of the child is financially able to employ an attorney to represent the child; and
- (3) the child's right to representation by an attorney:
 - (A) has not been waived under Section 51.09 of this code; or
 - (B) may not be waived under Subsection (b) of this section.

(e) The court may enforce orders under Subsection (d) by proceedings under Section 54.07 or by appointing counsel and ordering the parent or other person responsible for support of the child to pay a reasonable attorney's fee set by the court. The order may be enforced under Section 54.07.

(f) The court shall appoint an attorney to represent the interest of a child entitled to representation by an attorney, if:

- (1) the child is not represented by an attorney;
- (2) the court determines that the child's parent or other person responsible for support of the child is financially unable to employ an attorney to represent the child;
- and
- (3) the child's right to representation by an attorney:

- (A) has not been waived under Section 51.09 of this code; or
- (B) may not be waived under Subsection (b) of this section.

(g) The juvenile court may appoint an attorney in any case in which it deems representation necessary to protect the interests of the child.

(h) Any attorney representing a child in proceedings under this title is entitled to 10 days to prepare for any adjudication or transfer hearing under this title.

(i) Except as provided in Subsection (d) of this section, an attorney appointed under this section to represent the interests of a child shall be paid from the general fund of the county in which the proceedings were instituted according to the schedule in Article 26.05 of the Texas Code of Criminal Procedure, 1965. For this purpose, a bona fide appeal to a court of civil appeals or proceedings on the merits in the Texas Supreme Court are considered the equivalent of a bona fide appeal to the Texas Court of Criminal Appeals.

(j) The juvenile board of a county may make available to the public the list of attorneys eligible for appointment to represent children in proceedings under this title as provided in the plan adopted under Section 51.102. The list of attorneys must indicate the level of case for which each attorney is eligible for appointment under Section 51.102(b)(2).

(k) Subject to Chapter 61, the juvenile court may order the parent or other person responsible for support of the child to reimburse the county for payments the county made to counsel appointed to represent the child under Subsection (f) or (g). The court may:

- (1) order payment for each attorney who has represented the child at any hearing, including a detention hearing, discretionary transfer hearing, adjudication hearing, disposition hearing, or modification of disposition hearing;
- (2) include amounts paid to or on behalf of the attorney by the county for preparation time and investigative and expert witness costs; and
- (3) require full or partial reimbursement to the county.

(l) The court may not order payments under Subsection (k) that exceed the financial ability of the parent or other person responsible for support of the child to meet the payment schedule ordered by the court.

COMMENTARY: *Juvenile proceedings are quasi-criminal in nature even though they are classified as civil proceedings. In re D.A.S., 973 S.W.2d 296, 298 (Tex. 1998) (citing In re Gault, 387 U.S. 1, 30 (1967)). Like criminal defendants, juveniles have a constitutional right to counsel during the delinquency determination. Id. Miranda warning requirements apply to juveniles as well. In re Gault, 387 U.S. at 55. The Anders procedure for withdrawal of counsel set forth by the Supreme Court extends to juvenile appeals. In re D.A.S., 973 S.W.2d at 298.*

Sec. 51.101. APPOINTMENT OF ATTORNEY AND CONTINUATION OF REPRESENTATION.

(a) If an attorney is appointed under Section 54.01(b-1) or (d) to represent a child at the initial detention hearing and the child is detained, the attorney shall continue to represent the child until the case is terminated, the family retains an attorney, or a new attorney is appointed by the juvenile court. Release of the child from detention does not terminate the attorney's representation.

(b) If there is an initial detention hearing without an attorney and the child is detained, the attorney appointed under Section 51.10(c) shall continue to represent the child until the case is terminated, the family retains an attorney, or a new attorney is appointed by the juvenile court. Release of the child from detention does not terminate the attorney's representation.

(c) The juvenile court shall determine, on the filing of a petition, whether the child's family is indigent if:

- (1) the child is released by intake;
- (2) the child is released at the initial detention hearing; or
- (3) the case was referred to the court without the child in custody.

(d) A juvenile court that makes a finding of indigence under Subsection (c) shall appoint an attorney to represent the child on or before the fifth working day after the date the petition for adjudication or discretionary transfer hearing was served on the child. An attorney appointed under this subsection shall continue to represent the child until the case is terminated, the family retains an attorney, or a new attorney is appointed by the juvenile court.

(e) The juvenile court shall determine whether the child's family is indigent if a motion or petition is filed under Section 54.05 seeking to modify disposition by committing the child to the Texas Juvenile Justice Department or placing the child in a secure correctional facility. A court that makes a finding of indigence shall appoint an attorney to represent the child on or before the fifth working day after the date the petition or motion has been filed. An attorney appointed under this subsection shall continue to represent the child until the court rules on the motion or petition, the family retains an attorney, or a new attorney is appointed.

Sec. 51.102. APPOINTMENT OF COUNSEL PLAN.

(a) The juvenile board in each county shall adopt a plan that:

- (1) specifies the qualifications necessary for an attorney to be included on an appointment list from which attorneys are appointed to represent children in proceedings under this title; and
- (2) establishes the procedures for:
 - (A) including attorneys on the appointment list and removing attorneys from the list; and

- (B) appointing attorneys from the appointment list to individual cases.
- (b) A plan adopted under Subsection (a) must:
 - (1) to the extent practicable, comply with the requirements of Article 26.04, Code of Criminal Procedure, except that:
 - (A) the income and assets of the child's parent or other person responsible for the child's support must be used in determining whether the child is indigent; and
 - (B) any alternative plan for appointing counsel is established by the juvenile board in the county; and
 - (2) recognize the differences in qualifications and experience necessary for appointments to cases in which:
 - (A) the allegation is:
 - (i) conduct indicating a need for supervision or delinquent conduct, and commitment to the Texas Juvenile Justice Department is not an authorized disposition; or
 - (ii) delinquent conduct, and commitment to the department without a determinate sentence is an authorized disposition; or
 - (B) determinate sentence proceedings have been initiated or proceedings for discretionary transfer to criminal court have been initiated.

CHAPTER FIFTY-FOUR: JUDICIAL PROCEEDINGS

Sec. 54.01. DETENTION HEARING.

- (a) Except as provided by Subsection (p), if the child is not released under Section 53.02, a detention hearing without a jury shall be held promptly, but not later than the second working day after the child is taken into custody; provided, however, that when a child is detained on a Friday or Saturday, then such detention hearing shall be held on the first working day after the child is taken into custody.
- (b) Reasonable notice of the detention hearing, either oral or written, shall be given, stating the time, place, and purpose of the hearing. Notice shall be given to the child and, if they can be found, to his parents, guardian, or custodian. Prior to the commencement of the hearing, the court shall inform the parties of the child's right to counsel and to appointed counsel if they are indigent and of the child's right to remain silent with respect to any allegations of delinquent conduct, conduct indicating a need for supervision, or conduct that violates an order of probation imposed by a juvenile court.
- (b-1) Unless the court finds that the appointment of counsel is not feasible due to

exigent circumstances, the court shall appoint counsel within a reasonable time before the first detention hearing is held to represent the child at that hearing.

(c) At the detention hearing, the court may consider written reports from probation officers, professional court employees, or professional consultants in addition to the testimony of witnesses. Prior to the detention hearing, the court shall provide the attorney for the child with access to all written matter to be considered by the court in making the detention decision. The court may order counsel not to reveal items to the child or his parent, guardian, or guardian ad litem if such disclosure would materially harm the treatment and rehabilitation of the child or would substantially decrease the likelihood of receiving information from the same or similar sources in the future.

(d) A detention hearing may be held without the presence of the child's parents if the court has been unable to locate them. If no parent or guardian is present, the court shall appoint counsel or a guardian ad litem for the child, subject to the requirements of Subsection (b-1).

(e) At the conclusion of the hearing, the court shall order the child released from detention unless it finds that:

- (1) he is likely to abscond or be removed from the jurisdiction of the court;
 - (2) suitable supervision, care, or protection for him is not being provided by a parent, guardian, custodian, or other person;
 - (3) he has no parent, guardian, custodian, or other person able to return him to the court when required;
 - (4) he may be dangerous to himself or may threaten the safety of the public if released;
- or
- (5) he has previously been found to be a delinquent child or has previously been convicted of a penal offense punishable by a term in jail or prison and is likely to commit an offense if released.

(f) Unless otherwise agreed in the memorandum of understanding under Section 37.011, Education Code, a release may be conditioned on requirements reasonably necessary to insure the child's appearance at later proceedings, but the conditions of the release must be in writing and a copy furnished to the child. In a county with a population greater than 125,000, if a child being released under this section is expelled under Section 37.007, Education Code, the release shall be conditioned on the child's attending a juvenile justice alternative education program pending a deferred prosecution or formal court disposition of the child's case.

(g) No statement made by the child at the detention hearing shall be admissible against the child at any other hearing.

(h) A detention order extends to the conclusion of the disposition hearing, if there is one, but in no event for more than 10 working days. Further detention orders may be

made following subsequent detention hearings. The initial detention hearing may not be waived but subsequent detention hearings may be waived in accordance with the requirements of Section 51.09. Each subsequent detention order shall extend for no more than 10 working days, except that in a county that does not have a certified juvenile detention facility, as described by Section 51.12(a)(3), each subsequent detention order shall extend for no more than 15 working days.

(i) A child in custody may be detained for as long as 10 days without the hearing described in Subsection (a) of this section if:

(1) a written request for shelter in detention facilities pending arrangement of transportation to his place of residence in another state or country or another county of this state is voluntarily executed by the child not later than the next working day after he was taken into custody;

(2) the request for shelter contains:

(A) a statement by the child that he voluntarily agrees to submit himself to custody and detention for a period of not longer than 10 days without a detention hearing;

(B) an allegation by the person detaining the child that the child has left his place of residence in another state or country or another county of this state, that he is in need of shelter, and that an effort is being made to arrange transportation to his place of residence; and

(C) a statement by the person detaining the child that he has advised the child of his right to demand a detention hearing under Subsection (a) of this section; and

(3) the request is signed by the juvenile court judge to evidence his knowledge of the fact that the child is being held in detention.

(j) The request for shelter may be revoked by the child at any time, and on such revocation, if further detention is necessary, a detention hearing shall be held not later than the next working day in accordance with Subsections (a) through (g) of this section.

(k) Notwithstanding anything in this title to the contrary, the child may sign a request for shelter without the concurrence of an adult specified in Section 51.09 of this code.

(l) The juvenile board may appoint a referee to conduct the detention hearing. The referee shall be an attorney licensed to practice law in this state. Such payment or additional payment as may be warranted for referee services shall be provided from county funds. Before commencing the detention hearing, the referee shall inform the parties who have appeared that they are entitled to have the hearing before the juvenile court judge or a substitute judge authorized by Section 51.04(f). If a party objects to the referee conducting the detention hearing, an authorized judge shall conduct the hearing within 24 hours. At the conclusion of the hearing, the referee shall

transmit written findings and recommendations to the juvenile court judge or substitute judge. The juvenile court judge or substitute judge shall adopt, modify, or reject the referee's recommendations not later than the next working day after the day that the judge receives the recommendations. Failure to act within that time results in release of the child by operation of law. A recommendation that the child be released operates to secure the child's immediate release, subject to the power of the juvenile court judge or substitute judge to reject or modify that recommendation. The effect of an order detaining a child shall be computed from the time of the hearing before the referee.

(m) The detention hearing required in this section may be held in the county of the designated place of detention where the child is being held even though the designated place of detention is outside the county of residence of the child or the county in which the alleged delinquent conduct, conduct indicating a need for supervision, or probation violation occurred.

(n) An attorney appointed by the court under Section 51.10(c) because a determination was made under this section to detain a child who was not represented by an attorney may request on behalf of the child and is entitled to a de novo detention hearing under this section. The attorney must make the request not later than the 10th working day after the date the attorney is appointed. The hearing must take place not later than the second working day after the date the attorney filed a formal request with the court for a hearing.

(o) The court or referee shall find whether there is probable cause to believe that a child taken into custody without an arrest warrant or a directive to apprehend has engaged in delinquent conduct, conduct indicating a need for supervision, or conduct that violates an order of probation imposed by a juvenile court. The court or referee must make the finding within 48 hours, including weekends and holidays, of the time the child was taken into custody. The court or referee may make the finding on any reasonably reliable information without regard to admissibility of that information under the Texas Rules of Evidence. A finding of probable cause is required to detain a child after the 48th hour after the time the child was taken into custody. If a court or referee finds probable cause, additional findings of probable cause are not required in the same cause to authorize further detention.

(p) If a child is detained in a county jail or other facility as provided by Section 51.12(l) and the child is not released under Section 53.02(f), a detention hearing without a jury shall be held promptly, but not later than the 24th hour, excluding weekends and holidays, after the time the child is taken into custody.

(q) If a child has not been released under Section 53.02 or this section and a petition has not been filed under Section 53.04 or 54.05 concerning the child, the court shall order the child released from detention not later than:

- (1) the 30th working day after the date the initial detention hearing is held, if the child

is alleged to have engaged in conduct constituting a capital felony, an aggravated

controlled substance felony, or a felony of the first degree; or

(2) the 15th working day after the date the initial detention hearing is held, if the child

is alleged to have engaged in conduct constituting an offense other than an offense listed in Subdivision (1) or conduct that violates an order of probation imposed by a juvenile court.

(q-1) The juvenile board may impose an earlier deadline than the specified deadlines for filing petitions under Subsection (q) and may specify the consequences of not filing a petition by the deadline the juvenile board has established. The juvenile board may authorize but not require the juvenile court to release a respondent from detention for failure of the prosecutor to file a petition by the juvenile board's deadline.

(r) On the conditional release of a child from detention by judicial order under Subsection (f), the court, referee, or detention magistrate may order that the child's parent, guardian, or custodian present in court at the detention hearing engage in acts or omissions specified by the court, referee, or detention magistrate that will assist the child in complying with the conditions of release. The order must be in writing and a copy furnished to the parent, guardian, or custodian. An order entered under this subsection may be enforced as provided by

Chapter 61.

COMMENTARY: "[D]etention orders under section 54.01 of the Family Code are interlocutory in nature and are not appealable." *In re J.C.L., No. 10-11-00407-CV, 2011 Tex. App. LEXIS 8756, *4 (Tex. App.—Waco, Oct. 28, 2011) (mem. op.)*. "A juvenile, just as any other person, may challenge a restraint upon his or her liberty by filing an application for writ of habeas corpus in the proper court." *M.B. v. State, 905 S.W.2d 344, 346 (Tex. App.—El Paso, 1995, no pet.) (mem. op.)*.