

# when minors face major cons

*what attorneys*

*representing children*

*in delinquency, designation,*

*and waiver proceedings*

*need to know*

In 1996, responding to the widely held misperception that juvenile delinquency was out of control, driven largely by the media's disproportionate focus on youth violence,<sup>1</sup> the Michigan legislature passed one of the country's harshest packages of delinquency reform legislation (see sidebar). That legislation dramatically altered the way youth alleged to have violated the law are treated. Moreover, the legislature clearly intends that delinquency proceedings exist largely to punish children for their violations of the law. Both MCL 712A.2d(2)(e) (designation) and MCL 712A.4(4)(e) (waiver) make explicitly clear that one purpose of delinquency proceedings and the juvenile justice system is to punish rather than to rehabilitate. Many of

the newer provisions are clearly oriented to punish rather than to address a youth's best interests.<sup>2</sup> Unfortunately, Michigan's appellate courts have been slow to recognize this simple fact.<sup>3</sup>

These changes necessitate a reexamination by defense counsel of their approach to cases involving youthful defendants. This article will present a brief examination of unique defenses that should be considered in every case where a youngster is charged with a criminal offense, regardless of whether those charges are filed in the circuit court's general or family division. Before doing so, however, it is important to articulate clearly the role of defense counsel in delinquency proceedings.



# sequences

by Frank E. Vandervort

## Role of Defense Counsel

A recent iteration of the role of counsel by the Michigan Court of Appeals in *In re Whittaker*<sup>4</sup> necessitates revisiting the role of the child's attorney in a delinquency proceeding. In that case, the attorney, after consulting with the child's mother, waived the child's previously demanded jury trial. The court of appeals held that the family court was not obliged to directly address the youth to ensure that the waiver was his wish. In a footnote in the *Whittaker* case, the court suggested that a child demanding procedural protections such as a jury trial in the face of parental objection would present a "disturbing specter." But the parent is not the one who faces a loss of physical

liberty in a delinquency proceeding. Indeed, parents' interests may well be different than or even adverse to those of their children in delinquency proceedings.

More than 30 years ago, the United States Supreme Court held, in *In re Gault*,<sup>5</sup> that a child alleged to have committed a delinquent act is entitled to representation by legal counsel. The court clearly articulated the role of counsel:

*A proceeding where the issue is whether the child will be found to be "delinquent" and subjected to the loss of his liberty for years is comparable in seriousness to a felony prosecution. The juvenile needs the assistance of counsel to cope with the 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.*

Because the court is allegedly concerned with a child's best interests, in every delinquency proceeding the child may face years of incarceration for even the most minor offenses. (Indeed, Gerald Gault was sentenced to six years' incarceration for making an obscene phone call.)

Representing what a child's parent wants or what the lawyer believes will serve the child's best interests is not part of counsel's role in a delinquency proceeding. As with adult clients, the youth is the client and must direct the representation.<sup>6</sup>

### General Criminal Defenses Apply

Youth alleged to have violated the law are generally charged pursuant to the same statutes under which adults are charged with criminal offenses. The exception is violation of laws that occur because of the child's age—status offenses such as school or home truancy, or incorrigibility.<sup>7</sup> Therefore, counsel will want to examine, and, where appropriate, utilize, the defenses typically available to adults, which focus on weaknesses in the prosecution's case. For example, counsel should critically analyze the facts of each charge to determine whether the prosecution can muster sufficient evidence for each element of the offense beyond a reasonable doubt.

Counsel should pay special attention to any charge containing a specific intent requirement. The law generally presumes that a person intends the natural consequences of his or her behavior so that the court may infer a specific intent from an individual's actions.<sup>8</sup> For example, one who hits another in the head with a stick may be inferred to have intended to inflict great bodily harm. However, when dealing with offenses by youthful law violators, counsel should evaluate this proposition in relation to the child's developmental, mental, emotional, and social adjustment. Because of a lack of experience, the influence of violence in the home and community, and exposure to violence from various media, youth may have a very distorted understanding of the natural consequences of their behavior. Assuming that a person intends the naturally flowing consequences assumes a certain degree of moral development. Yet, for many developmental, social, and psychological reasons, youths who engage in violent acts have not progressed at a normal rate of moral development. Simply put, they cannot anticipate the consequences of their behavior. Thus, the court should not, in the delinquency context, infer intent from a child's acts.<sup>9</sup> If this is the case, counsel for the child-defendant should seek out appropriate evaluations and marshal this evidence to attack the specific intent element.

### Permissive Waiver and Designation

The Michigan Juvenile Code provides for automatic or permissive waiver as well as automatic or permissive designation. A prosecutor may file certain charges against a child 14, 15, or 16 years old automatically. See MCL 712A.2(a)(1). Likewise, the prosecutor may designate a child "to be tried in the same manner as an adult" for certain alleged violations. The prosecutor may seek a permissive waiver for

## fast facts

- When representing an alleged delinquent, the youth, not the parent, directs the representation.
- Because the general criminal code applies, consider any defense you would use in defending an adult criminal defendant.
- Carefully consider intent defenses as youthful offenders may not appreciate the consequences of their acts.
- Consider defenses rooted in a particular youth's developmental history, immaturity, or history of abusive victimization.
- Consider asking the court to order medical, psychological, or neurological exams to support your theory of the case.

any felony, MCL 712A.4(1), or seek designation for any offense, regardless of how minor. MCL 712A.2d(2). Automatic waiver occurs when the prosecutor simply files charges against a minor in the adult court and is limited to certain offenses, while permissive waiver takes place after the family division has held a hearing and determines that waiver is appropriate. Permissive waiver may be granted for any felony charge.<sup>10</sup> While the child is never afforded an opportunity to mount a defense against a case of automatic waiver or designation, he is afforded such an opportunity in permissive waiver or designation.<sup>11</sup>

Whether waiver or designation is being sought, the court may grant the request only if it finds that "the best interests of the juvenile and the public would be served" by granting the prosecutor's request.<sup>12</sup> This broad criterion provides an opportunity for defense counsel to present compelling evidence of why the prosecutor's request should be denied.

It is difficult to imagine how being subjected to the adult criminal justice system could ever serve the best interests of a child. Numerous studies have documented that children placed in adult jails and prisons (or so-called "youth prisons" that do not accommodate the developmental needs of children<sup>13</sup>) are disproportionately physically assaulted, sexually abused, and otherwise victimized by older prisoners and staff. Additionally, children placed in prisons are more likely to attempt or to commit suicide and receive less mental health treatment than those in juvenile facilities.<sup>14</sup> These facts would seem to make plain that children's best interests can never be served either by waiver (which assures an adult sentence) or by designation (which

may result in an adult sentence). One of the country's leading researchers on the cause and effect of violence upon children has decried the incarceration of our youth in adult correctional facilities and has urged the development of tranquil settings in which to house and treat these multiply traumatized kids as an alternative to the chaos and violence of the adult prison system.<sup>15</sup>

Similarly, despite politicians' claims to the contrary, incarcerating young law violators does not serve the interests of the public. First, while the wave of so-called juvenile reform legislation enacted around the country was billed as addressing violent crime, the truth is that approximately two in three youths sent into the adult correctional system are sent there for nonviolent offenses.<sup>16</sup> Because their crimes are nonviolent they are incarcerated for an average of nine years.<sup>17</sup> Secondly, numerous studies have documented that children sentenced as adults are more likely to re-offend upon release than those receiving treatment in the juvenile justice system.<sup>18</sup> Additionally, they are more likely to commit violent offenses if they re-offend. Thus, the public is actually made less safe in the long-run by putting youthful law violators into the adult correctional system.

So dramatic are the problems with the wholesale abandonment of treatment in favor of punishment for juvenile offenders that the National Council of Juvenile and Family Court Judges has launched a project aimed at telling the stories of successfully rehabilitated former delinquents.<sup>19</sup> Among the individuals whose stories are told is a retired United States senator, Alan Simpson of Wyoming, as

well as judges, prosecuting attorneys, business executives, and professional athletes.

### Defenses Unique to Children

In addition to typical criminal defenses, there are several defenses unique to children that counsel should consider in every case, whether delinquency, waiver, or designation. Counsel will want to carefully consider in each case whether a psychological or psychiatric examination should be sought, as well as the need for neurological assessment or medical examinations such as CAT scans or MRIs. In any given case, these examinations may prove to be invaluable tools in presenting these unique defenses.<sup>20</sup>

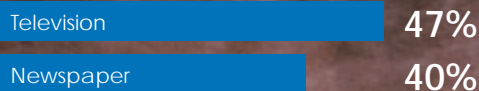
### Infancy

The infancy defense is rooted in the common law rule that children under seven years of age were conclusively presumed to be incapable of formulating a criminal intent. Since the establishment of the first juvenile court in 1899, we have not really had to address the issue of a child's competency based upon immaturity because the juvenile court was supposed to act to rehabilitate rather than to punish children, who were "adjudicated delinquent" rather than "convicted" of a crime. Recent changes in the philosophy of handling youthful law violators as well as the more severe punishment children face must cause us to resurrect the common law infancy defense.<sup>21</sup> There was a rebuttable presumption that children from seven to fourteen years of

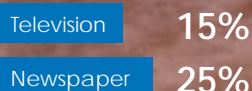
## making it worse? *Media coverage of youth violence*

### Percent of youth media coverage:

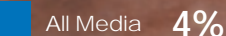
#### Crime and Violence:



#### Schools or Education:

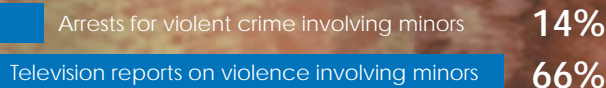


#### Other issues affecting children and youth (childhood poverty, child care, and child welfare):



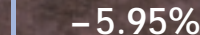
—Robert E. Shepherd, Jr., *How the Media Misrepresents Juvenile Policies (1997)*.  
[www.abanet.org/crimjust/juvjus/12-4hmmjp.html](http://www.abanet.org/crimjust/juvjus/12-4hmmjp.html)

#### Case Study—California 1993:



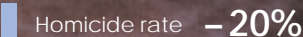
—Robert E. Shepherd, Jr., *How the Media Misrepresents Juvenile Policies (1997)*.  
[www.abanet.org/crimjust/juvjus/12-4hmmjp.html](http://www.abanet.org/crimjust/juvjus/12-4hmmjp.html)

#### Arrests of juveniles for serious felonies (1993–1995):



—Michigan State Police, *Uniform Crime Reports (April 1997)*.

#### In America 1992–1996:



—Vincent Schiraldi, *How Distorted Coverage of Juvenile Crime Affects Public Policy*.  
[www.cjcj.org/jpi/latimes111199.html](http://www.cjcj.org/jpi/latimes111199.html)





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age were incapable of forming a criminal intent. Those children over fourteen were assumed to be punishable just as adults were. Counsel should carefully consider both the child's chronological age *and* developmental age.<sup>22</sup>

While no Michigan case has directly addressed the infancy defense since the recent shift in philosophy of delinquency proceedings, a recent court of appeals case suggests that the infancy defense may once again be viable, even in juvenile proceedings.<sup>23</sup> In *In the Matter of Carey*,<sup>24</sup> the court addressed an allegedly delinquent child's right to a competency hearing in juvenile proceedings. In holding that a youth charged as being delinquent is entitled to a competency hearing, the court recognized that a child's mere youth may have an impact on whether he or she may be tried and held responsible for delinquent acts.<sup>25</sup> For this reason, counsel should raise the issue of the client's youth and immaturity as a defense to preclude a finding that he or she is capable of forming the intent to commit a delinquent act.

#### **Child's History of Abuse or Neglect**

Social science and medical research have established a clear correlation between a child's history of having been abused or neglected and later delinquent and violent behavior.<sup>26</sup> Harvard sociologist Orlando Patterson recently wrote that child abuse is "perhaps the greatest social cause of criminality."<sup>27</sup> Child abuse and neglect may take many forms—in utero alcohol or drug abuse, failure to adequately nurture a child in the early years of life, failure to provide necessary food, clothing or shelter, sexual abuse, and physical abuse that ranges from the relatively minor to intentional torture.

These forms of abuse and neglect may result in a number of physical and psychological conditions that may cause a child to act out aggressively and violently. Among these are neurological damage (for example, Attention Deficit Disorder),<sup>28</sup> impaired physical development of the brain,<sup>29</sup> physical injury to the brain as a result of inflicted injury,<sup>30</sup> impaired cognitive development,<sup>31</sup> and psychological trauma.<sup>32</sup>

Defense attorneys have long presented a client's history of childhood maltreatment at the dispositional/sentencing phase of proceedings in an effort to obtain a less severe punishment. This body of evidence is often used, for example, in efforts to avoid the death penalty.<sup>33</sup> More recent research in child and brain development demands that counsel develop an understanding of these literatures and use them earlier in the process—for example, to attack the ability to knowingly waive rights, to resist efforts to waive and designate children, and to assert diminished capacity and insanity defenses.<sup>34</sup>

#### **Exposure to Violence in Home and Community**

Direct victimization is not a prerequisite to the development of aggressive and violent acting out by children. A body of social science research has demonstrated links between children witnessing violence and their subsequent perpetration of violence. Sources of violence children may witness include domestic violence,<sup>35</sup> violence in the child's community,<sup>36</sup> and exposure to violence through the various media.<sup>37</sup> Such exposure may itself contribute to violent acting out by children or may operate in conjunction with the child's own direct victimization to increase the number and severity of violent acts by the child.<sup>38</sup>

#### **Conclusion**

Gone are the days when juvenile delinquency proceedings were intended to help wayward youth. The law has evolved and now severely punishes children for their current transgressions of the law and seeks to build a record upon which, at some future date, children may be incarcerated for years or decades. Thus, lawyers representing these children must aggressively resist the state's efforts to convict and incarcerate them. It is essential that attorneys representing children in juvenile delinquency, designation, and waiver proceedings develop and use to their clients' advantage an understanding of child development research relating to violence as this interdisciplinary knowledge may prove helpful in defending the youthful client.



Space limitations prohibit a truly thorough discussion of these matters. For more information, please contact the Michigan Child Welfare Law Resource Center, 611 Church Street, Suite 4C, Ann Arbor, MI 48104-3000. ◆

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#### Footnotes

1. See e.g., MCL 712A.18g; MCR 5.943(E)(4) (requiring that a child who is found to have used a firearm during the commission of any offense be removed from the family home and community and placed without regard to whether such a disposition will serve the child's best interests).
2. See *In re Whittaker*, 239 Mich App 26, 29 (1999) (arguing that delinquency proceedings are intended to emphasize rehabilitation rather than retribution as a rationale for providing less procedural protection).
3. *Id.* at 29.
4. Cf. *In re J M*, 769 A2d 656 (Vt 2001) (holding under a provision of Vermont law similar to the one at issue in *Whittaker* that the court committed reversible error when it did not question the youth directly regarding waiver of his rights).
5. 387 US 1 (1967).
6. Randy Hertz, et al., *Trial Manual for Defense Attorneys in Juvenile Court*, Volume II, at 13-14 (American Law Institute 1991) (describing parental direction of delinquency representation as "untenable" because it is the "prerogative of the 'client' to define the 'objectives of the representation.'").
7. See MCL 712A.2(a)(2), (3) and (4).
8. See, e.g., *People v Mattison*, 444 Mich 925 (1994) ("we have repeatedly permitted trial courts to infer intent from the circumstances surrounding the offense, even when a defendant has explicitly denied that such intent existed."); *People v Blume*, 443 Mich 476 (1993); *People v Johnson*, 407 Mich 196 (1979).
9. *Fire Insurance Exchange v Diehl*, 450 Mich 678 (1996) (in the civil context, intent to injure may not be inferred where a child is the aggressor even though in same circumstances such an intent could be inferred if the aggressor were an adult). See, James Garbarino, *Lost Boys: Why Our Sons Turn Violent and How We Can Save Them* 134-135 (1999).
10. MCL 712A.4(1).
11. Once the Family Division has waived jurisdiction, all subsequent charges must be waived unless there is a lack of probable cause to believe that the youth committed the alleged offense. See *People v Williams*, \_\_\_ Mich App \_\_\_ (2001) (Court of Appeals No 226596, April 20, 2001).
12. MCL 712A.2d(2); MCL 712A.4(4).
13. See, Desiree Cooper, *Youths Spending Time Behind Bars Find Adult World Waiting For Them*, *Detroit Free Press*, November 8, 1999 at \_\_\_.
14. See, e.g., Richard E. Redding, *Juvenile Offenders in Criminal Court and Adult Prison: Legal, Psychological, and Behavioral Outcomes*, 50 *Juv & Fam Ct J* 1, 9-11 (1999) ("juveniles placed in adult prisons are 500 times more likely to be sexually assaulted, 200 times more likely to be beaten by staff than are juveniles in juvenile facilities"); see generally, Ken Kolher, *Teen Inmates Can Be Easy Prey For Older Prisoners*, *Grand Rapids Press*, May 2, 2000 at 1; U.S.A. Today, *Push to Jail Juveniles Begins to Backfire*, March 10, 2000 at 16A, col. 1.
15. Garbarino, *Lost Boys*, note 9 at 207-238.
16. Rick Ruddell, et al., *Recent Trends and Issues in Canada and the United States*, 49 *Juv & Fam Ct J* 1, 11 (1998).
17. Kevin J. Strom, Bureau of Justice Statistics, *Juvenile Felony Defendants in Criminal Courts 1* (even when youth are incarcerated for violent felonies, they are incarcerated for an average of 11 years).
18. Richard E. Redding, *Juvenile Offenders in Criminal Court and Adult Prison: Legal, Psychological, and Behavioral Outcomes*, 50 *Juv & Fam Ct J* 1, 7-9 (1999) (reviewing numerous research studies and concluding "transfer to criminal court results in higher recidivism rates for most types of offenders").
19. See, e.g., National Juvenile and Family Court Judges, 8 *Juvenile and Family Justice Today* 10-12 (1999) (newsletter article describing two of numerous success stories from juvenile court).
20. For a helpful discussion of the practical issues involved with raising these defenses, see David R. Katner, *Raising Mental Health Issues—Other Than Insanity—In Juvenile Delinquency Defense*, 28 *Am J Crim L* 1 (Fall 2000).
21. More than one hundred years ago the United States Supreme Court held that a child under seven could not be found guilty of a crime. *Allen v United States*, 150 US 551 (1893). See generally, Andrew Walkover, *The Infancy Defense in the New Juvenile Court*, 31 *UCLA L Rev* 503 (1984); Rollin M. Perkins and Ronald N. Boyce, *Criminal Law* at 936-940 (Third Edition 1982).
22. Gillian Douglas, *The Child's Right to Make Mistakes: Criminal Responsibility and the Immature Minor*, in *Children's Rights and Traditional Values* 267 (Gillian Douglas and Leslie Sebba, eds. 1998) (quoting Blackstone, *Blackstone's Commentaries on the Laws of England*, Book IV 1st ed (1769) pp 23-24) (explaining that since the time of the common law of England these general outlines of criminal responsibility were subject to the cognitive abilities of the individual delinquency defendant).
23. A number of states' appellate courts have squarely addressed this issue. *In re Devon T*, 584 A2d 1287 (Md App 1991); *State in the Interest of C P & R D*, 514 A2d 850 (NJ Super Ct 1986) (nine-year-old held incapable of forming intent to commit sexual penetration); *Matter of Andrew M*, 398 NYS2d 824 (1977); *In re Gladys R*, 464 P2d 127 (Calif 1970); *State v Q D*, 685 P2d 557 (Wash 1984).
24. \_\_\_ Mich App \_\_\_ (2000) (Court of Appeals No 219592, May 19, 2000).
25. *Id.* (Slip Opinion at 5). Two states' appellate courts have recently cited *Carey* with approval. See *In re J M*, 769 A2d 656 (Vt 2001); *Golden v Arkansas*, 341 Ark 656; 21 SW3d 801 (Ark 2000).
26. Garbarino, *Lost Boys*, supra note 9; Robin Karr-Morse and Meredith S. Wiley, *Ghosts from the Nursery: Tracing the Roots of Violence* 108 (1997).
27. Orlando Patterson, *Life, Liberty and Excessive Force*, *New York Times*, Monday, February 28, 2000 at A23, Col 1.
28. Dorothy Otnow Lewis, et al., *Violent Juvenile Delinquents: Psychiatric, Neurological, Psychological, and Abuse Factors*, 18 *J Am Acad Psych* 307, 317 (1979) (violent delinquents "significantly more likely to manifest both major and minor signs of neurological impairment"); Dorothy Otnow Lewis, et al., *Neuropsychiatric, Psychoeducational, and Family Characteristics of 14 Juveniles Condemned to Death in the United States*, 145 *Am J Psychiatry* 584 (1988) ("juveniles condemned to death in the United States are multiply handicapped. They tend to have suffered serious [central nervous system] injuries, to have suffered since early childhood from a multiplicity of psychotic symptoms, and have been physically and sexually abused.").
29. Bruce Perry, et al., *Childhood Trauma, the Neurobiology of Adaptation, and "Use-Dependent" Development of the Brain: How "States" Become "Traits,"* 16 *Infant Mental Health Journal* 271 (1995) (identifying physical injuries to children's brains as a result of child abuse, especially those portions of the brain that control moral reasoning).
30. Lewis, *Condemned to Death*, note 28.
31. For example, G. J. Jurkovic and N. M. Pretice, *Relation of Moral and Cognitive Development to Dimensions of Juvenile Delinquency*, 86 *J Abnormal Psychology* 414 (1997).
32. See e.g., Dorothy Otnow Lewis, et al., *Biopsychosocial Characteristics of Matched Samples of Delinquents and Nondelinquents*, 26 *J Am Acad Child Adol Psych* 744 (1987); Dorothy Otnow Lewis, *Psychiatric, Neurological, and Psychoeducational Characteristics of 15 Death Row Inmates in the United States*, 143 *Am J Psychiatry* 838 (1986).
33. See for example, Dorothy Otnow Lewis, *Guilty by Reason of Insanity*.
34. On June 12, 2001, the Michigan Supreme Court issued its opinion in *People v Carpenter*, \_\_\_ Mich \_\_\_ (2001) (No. 115617), which eliminated diminished capacity defenses in Michigan in adult criminal prosecutions. It is unclear whether this holding applies to delinquency proceedings. See generally *In re Whittaker*, note 2; *In re McDaniel*, 186 Mich App 696 (1991).
35. John W. Fantuzzo and Wanda K. Mohr, *Prevalence and Effects of Child Exposure to Domestic Violence*, 9 *The Future of Children* 21 (1999) (children exposed to domestic violence tend to be more aggressive in their schools and communities); see generally, American Bar Association, *The Impact of Domestic Violence on Children* (1994).
36. James Garbarino, *Children in Danger: Coping with the Consequences of Community Violence*; D. A. Blyth and N. Leffert, *Communities as Contexts for Adolescent Development: an Empirical Analysis*, 10 *J Adolescent Research* 64 (1995).
37. Lt. Col. David Grossman, *Stop Teaching Our Kids to Kill: A Call to Action against T.V., Movie & Video Game Violence*.
38. Garbarino, *Lost Boys*, note 9 (discussing the accumulation of risk factors as a precursor of violence).