STATE OF MICHIGAN

COURT OF APPEALS

In re EE, Minor.

PEOPLE OF THE STATE OF MICHIGAN,

Petitioner-Appellee,

v

EE,

Respondent-Appellant.

FOR PUBLICATION
April 13, 2023

No. 358457
Eaton Circuit Court
Family Division
LC No. 21-020559-DL

In re AE, Minor.

PEOPLE OF THE STATE OF MICHIGAN,

Petitioner-Appellee,

v

AE,

Respondent-Appellant.

No. 358458
Eaton Circuit Court
Family Division
LC No. 21-020558-DL

Before: GLEICHER, C.J., and BOONSTRA and CAMERON, JJ.

CAMERON, J. (*concurring*).

I agree with the majority's conclusion that children prosecuted for truancy have a statutory right to counsel under MCL 712A.17c(2) and MCR 3.915(A). I also agree with my colleague's concurring opinion to the extent it notes that United States Supreme Court precedent has recognized a constitutional right to counsel for children facing the prospect of incarceration. But in my view, the concurring opinion takes Supreme Court precedent one step further, asserting that the United States and Michigan constitutions guarantee all children prosecuted for truancy (and

presumably most other status offenses) the right to a court-appointed attorney regardless of the risk of incarceration to the child. I write separately to explain why I consider this to be a significant and unwarranted departure from Supreme Court precedent.[1]

The Fifth Amendment to the United States Constitution provides, in part: "No person shall be . . . deprived of life, liberty, or property, without due process of law . . . ." US Const, Am V. Similarly, the Fourteenth Amendment states: "No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . ." US Const, Am XIV. The protections afforded under the Fifth Amendment apply to the states under the due process clause of the Fourteenth Amendment. *In re Gault*, 387 US 1, 47; 87 S Ct 1428; 18 L Ed 2d 527 (1967). *Gault* recognized that these authorities guarantee children a constitutional right to counsel for certain juvenile proceedings, stating:

> [T]hat [in a] delinquency proceeding which may result in commitment to an institution in which a juvenile's freedom is curtailed, the child and his parents must be notified of the child's right to be represented by counsel retained by them, or if they are unable to afford counsel, that counsel will be appointed to represent the child. [*Id*. at 41.]

In other words, *Gault* establishes an unqualified constitutional right to counsel, provided that the juvenile faces incarceration.

The Michigan Legislature expanded this right, requiring a trial court to advise a child of their right to counsel regardless of whether the trial court considered imposing incarceration. MCL 712A.17c; see also MCR 3.915(A). But unlike *Gault*, this statutory right to counsel is qualified because it applies to only certain violations of the juvenile code. The concurrence proposes a new rule that would offer a constitutional right to counsel regardless of the charges or whether the juvenile is facing incarceration.

In my view, there are several factors that militate against finding a constitutional right in this case. Among them is that not even criminal defendants have an unfettered constitutional right to counsel. Criminal defendants enjoy the full panoply of constitutional protections. Yet, this Court has consistently held that a defendant charged with misdemeanor conduct has no constitutional right to counsel where no incarceration is ultimately imposed. See *People v Richert*, 216 Mich App 186, 194; 548 NW2d 924 (1996). Why then would juveniles prosecuted with status offenses be constitutionally entitled to a court-appointed attorney, while defendants charged with misdemeanors not involving incarceration are not? The concurrence proposes a new rule that extends well beyond the protections afforded to criminal defendants and those already afforded to juveniles under the Fourteenth Amendment and the Bill of Rights. *Gault*, 387 US at 13-14.

[1] In general, it is inappropriate to consider constitutional questions that are unnecessary to the resolution of a case. I do so here to provide an alternative analysis of the constitutional issue.

I also disagree with the assertion that counsel is necessary to protect against the "serious and long-lasting collateral consequences of an adjudication for a status offense." I suppose some status offenders might agree with this statement. But a status offender's opinion is not the basis for the attachment of a constitutional right. Indeed, the purpose of the juvenile court is rehabilitation, not retribution. See *id*. at 16 (discussing the original purpose of the juvenile court was to "treat[]" and "rehabilitate[]."). Moreover, the idea that a child might suffer "long-lasting" consequences is mitigated by Michigan's newly-enacted "Clean Slate for Kids" law which restricts from public view juvenile-delinquency records, except for individuals with a "legitimate interest." MCL 712A.28(3). Thus, I disagree that children need protection from the very services intended to rehabilitate them. Moreover, in cases where a juvenile faces a "spiral of escalating punishments," the right to counsel under *Gault* and our statutory scheme already offer the juvenile the right to counsel. All this is to say that I believe the concurrence's proposed rule goes too far.

It is also necessary to address the issues involving parental interference and whether that impacts the waiver of the right to counsel. Criminal defendants in Michigan are entitled to waive their right to counsel. In those circumstances, the trial court is required to make a record whether the defendant's waiver was knowing, intelligent, and voluntary. *People v Anderson (Donny)*, 398 Mich 361, 368 (1976); see also MCR 6.005(D). Here, the children never affirmatively waived their right to counsel. Instead, the various court-appointed attorneys were permitted to withdraw after they complained that their clients' father insisted that he be allowed to participate in attorney-client discussions with his children. But the record is unclear whether the children wanted their father to participate in the attorney-client meetings or, as the attorneys asserted, that the father was improperly interjecting himself into confidential discussions. The record is unclear because the trial court never asked the children if they wanted their father to participate in discussions. In my view, the trial court should have taken an approach common in criminal proceedings before allowing an attorney to withdraw. This approach would have included questioning the children directly about the circumstances concerning their legal representation and whether their father was interfering in their relationships with their attorneys. If the children indicated they desired to waive their right to counsel, then the trial court should have then determined whether their waiver was knowing, intelligent, and voluntary.

This case also highlights the challenges a trial court faces when balancing parental rights and a child's legal representation. At one end are the parents' constitutionally-protected interests in the upbringing of their children. See, e.g., *Meyer v Nebraska*, 262 US 390, 400; 43 S Ct 625; 67 L Ed 1042 (1923). At the other end is the attorney's duty to provide competent representation to their client. MRPC 1.1 ("A lawyer shall provide competent representation to a client."). These two interests diverge when a parent's goals for their child conflict with the attorney's role in advocating for their client. The record suggests that this may have been an issue because the attorneys represented that the father was interfering with their representation of the children. But, again, the record remains unclear because the trial court failed to make a complete record of the apparent conflict.

In sum, I agree with the majority that juveniles adjudicated for truancy in Michigan have a statutory right to counsel. I also acknowledge that under *Gault*, children facing incarceration have a constitutional right to counsel. But, I disagree with the concurrence's proposed rule that, in all circumstances, children have a constitutional right to counsel. In my view, this case could have

been resolved had the trial court made a more complete record concerning the issues related to the children's legal representation.

/s/ Thomas C. Cameron
/s/ Mark T. Boonstra