

Opinion No. 73-58

August 8, 1973

BY: OPINION OF DAVID L. NORVELL, Attorney General

TO: Mr. Chester H. Walter, Jr. Chief Public Defender New Mexico Public Defender
Department 239 Johnson Street Santa Fe, New Mexico 87501

QUESTIONS

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(a) Does the Public Defender Department, created by Laws of 1973, Chapter 156, have the responsibility of providing legal representation for indigent juveniles?

(b) If the answer to (a) is affirmative, may this representation be provided in the three pilot districts by department personnel, or must the representation be by private counsel appointed by the court?

CONCLUSIONS

(a) Yes.

(b) By private counsel appointed by the court but paid by the Public Defender Department.

OPINION

{*114} ANALYSIS

In enacting the Public Defender Act, Laws of 1973, Chapter 156, the Legislature did not mention juveniles, minors or children and did not provide directly for legal representation of such persons who are indigent. However, after considering certain provisions of the Children's Code, the Indigent Defense Act, and the general appropriations acts of 1972 and 1973, and reading them in the light of the Public Defender Act, it is the opinion of this office that the Public Defender Department has the responsibility of providing such representation, but only by means of private counsel appointed by the children's courts and compensated from funds appropriated to the Public Defender Department.

{*115} First, it should be noted that whether such representation will be provided by the states is no longer open to question. **In re Gault**, 387 U.S. 1, 87 S. Ct. 1428, 18 L. Ed. 2d 527 (1967) held that juveniles who are financially unable to employ private counsel must be provided adequate representation by the state. The Legislature, in enacting the Children's Code in Laws of 1972, Chapter 97 (compiled as §§ 13-14-1 to 13-14-45, N.M.S.A., 1953 Comp., 1972 Interim Supp.), met this responsibility by providing:

"13-14-25. Basic rights. -- * * *

"E. In all proceedings on a petition alleging delinquency or need of supervision and in those instances specified under other provisions of the Children's Code, the child and parents, guardian and custodian of the child shall be advised by the court or its representative that the child may be represented by counsel at all stages of the proceedings. If counsel is not retained for the child, or if it does not appear that counsel will be retained, counsel shall be appointed for the child, unless the right to appointed counsel is waived by the child and the parents, guardian or custodian.

"F. In proceedings on a petition alleging neglect the parents, guardian and custodian of the child shall be informed that they have the right to be represented by counsel and, upon request, counsel shall be appointed if the person is unable to obtain counsel for financial reasons, or if the court's discretion appointment of counsel is required in the interest of justice."

These basic rights were re-enacted by the Legislature in amending the Children's Code in Laws of 1973, Chapter 360, Section 7.

Another provision of the Children's Code, in Section 13-14-29, authorizes the court to pay, out of court funds, the "reasonable compensation for services and related expenses for counsel appointed by the court for a party." It should be noted that in 1972 when this law was passed the Legislature appropriated funds to the courts for "attorney . . . fees," in Laws of 1972, Chapter 98, page 665, without specifying that they were for indigent defense, but that counsel for indigents, both adults and children, were paid out of those funds. No funds for this purpose were appropriated to the courts in 1973; instead, such funds, in the amount of \$ 730,000, originally were placed in the appropriation of the Administrative Office of the Courts, Laws of 1973, Chapter 403, page 1966, but were transferred to the Public Defender Department under Section 2(N) of the act, which provided:

"N. If any items included in the General Appropriation Act of 1973 are appropriated in special acts of the thirty-first legislature, first session, the appropriations in the special acts shall apply and the appropriations for these items in the General Appropriation Act of 1973 are null and void."

The Public Defender Act, in Section 14, contains its own appropriations totalling \$ 783,800, which of course included capital outlay for starting up a new department. This sum was divided into two items, \$ 475,000 for the department itself and \$ 308,800 for the department to use "for the purpose of compensating attorneys providing representation to persons under the Indigent Defense Act."

Unfortunately, the Indigent Defense Act, Sections 41-22-1 to 41-22-10, N.M.S.A., 1953 Comp. (2d Repl. Vol. 6), contains no specific reference to juveniles, and in fact certain terminology used therein could lead to the conclusion that it is intended to apply solely to adults. It speaks of formal charges, conviction of serious crime (which includes

felonies and misdemeanors which carry a possible penalty of confinement for more than six months), and post-conviction proceedings -- all of which terminology is foreign to the wording and philosophy of the Children's Code. For instance, a children's court judgment is not a criminal conviction, and a child may be charged with a delinquent act, not a crime. There is no provision for post-conviction proceedings for children. However, it is equally true that the Indigent Defense Act does not specifically provide that its relief is limited to adults, and the matters of terminology can be reconciled with the Children's Code. In any event, funds appropriated to the courts for indigent defense have been used in the past for representation of minors as well as adults. In view of that precedent, of which the Legislature no doubt was aware, and in view of the Children's {**116*} Code's recognition of indigent children's right to representation by court-appointed counsel, and that right's reaffirmation by the 1973 Legislature, it is plausible that the Legislature intended that the Public Defender Department provide such representation.

The form of that representation, however, presents another problem. Like the Indigent Defense Act, the Public Defender Act is couched in terms of criminal procedure foreign to the Children's Code. More specifically, it provides in Section 10, in part:

"B. The district public defender shall represent every person without counsel who is financially unable to obtain counsel and who is **charged** in any court within the district **with any crime that carries a possible sentence of imprisonment.** * * *

"C. The district public defender shall represent any person within the district who is without counsel and who is financially unable to obtain counsel in any state **post-conviction proceeding.** * * *

"E. The district public defender may confer with any person who is not represented by counsel and who is being **forcibly detained.**" (Emphasis supplied)

Only the latter provision, permitting the district public defender to confer with persons being **forcibly detained**, is consistent with Children's Code terminology. We cannot extrapolate this into authority to represent children at all stages of children's court proceedings, but we do think it may be intended, and can be used, to provide children in detention with counsel at a stage prior to any court appearance and therefore before an attorney can be appointed.

It should be pointed out that the public defender program, except in its appellate aspects, is confined during the first fiscal year of its operation to three "pilot" districts -- the First, Second and Ninth Judicial Districts. It seems reasonable to assume that, at least for this limited period and area, it was the intention of the Legislature to confine the representation of indigent persons at the lower court levels to adults only, leaving the representation of children at that level to court-appointed private counsel, to be paid by the Public Defender Department on a scale of compensation to be set by the chief public defender under Section 14(B) of the act.

The Public Defender Act, in Section 8, provides for an appellate division, and part of its functions are as follows:

"C. The appellate division shall assist private counsel not employed under the Public Defender Act in any appellate, review or post-conviction remedy proceeding by providing representation for persons entitled to representation under the Indigent Defense Act."

Under the foregoing provision, the appellate division **shall assist** private counsel appointed by the court to represent children in appeals from children's court. The extent of this assistance would appear to be a matter to be determined by private counsel in conference with personnel of the appellate division. For instance, private counsel might brief the case on appeal, and the appellate division might argue it before the court of appeals, thus saving travel expenses. Here again, the fees to be paid private counsel are to be set by the chief public defender.

In cases transferred from children's court to district court under Section 13-14-27, the child is thereafter prosecuted as an adult, and of course the public defender department at that point may take over his representation or may allow court-appointed counsel to continue in the case under the Indigent Defense Act.

By: Dee C. Blythe

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