THE SPECIAL EDITION
PRETRIAL REPORTER

A BI-MONTHLY PUBLICATION OF THE PRETRIAL JUSTICE INSTITUTE WWW.PRETRIAL.ORG JULY 2009

In this issue:

EXECUTIVE DIRECTOR'S LETTER

Dear Friends:

The Juvenile Detention Alternatives Initiative (JDAI) has been on the forefront of juvenile detention reform for over 15 years. Working with over 100 sites nationwide to implement policies and programs, JDAI focuses on core values of collaboration, data-driven decisions, objective admissions, alternatives to detention, and tackling the issues of conditions of confinement, racial and ethnic disparities and other special populations. PJI has partnered with JDAI since its inception because we share similar visions: to ensure those in the same situation are treated equally and that the right people are placed in the right settings when immersed in the judicial system. This special issue of the Pretrial Reporter spotlights such reform efforts, reflecting not only the impact JDAI has in its own sites, but movement throughout the

Executive Summary

This issue of The Pretrial Reporter contains the following:

National Notes:

- Massachusetts Right to Bail for Juveniles: An overview of the law and its enforcement.
- New Policy Brief examines the treatment of Latino youth in the criminal justice system, including youth incarcerated in adult facilities and its potential side effects, initiatives to reduce racial and ethnic disparities and policy recommendations.
- JDAI Report discusses the harm in using fixed restraints in juvenile detention, legal and professional precedents to abolish or limit restraints, and ways to transition away from such use.
- New Juveniles Laws in Alabama, Illinois and New Mexico address changes in juvenile detention and release standards, along with improving children's rights in the pretrial stage.
- Portland establishes new collaborative to train police on alternative community services and problem-solving skills.

Cases:

- Nevada Supreme Court struck down state's presumptive certification provision, citing violation of juveniles' rights against self-incrimination under the Fifth and Fourteenth Amendments to the US Constitution.
- California Court of Appeal ruled that courts must determine the shackling of youth in any juvenile court proceeding on an individual case-by-case basis.
- Florida adopts rule to require meaningful access to counsel before a youth waives his or her right to counsel.
- Kansas Supreme Court finds new Juvenile Code akin to adult criminal laws, gives juveniles the right to a jury trial.
- California Court of Appeal finds Life Without Parole sentence for 14 year-old juvenile unconstitutional.

EXECUTIVE DIRECTOR'S LETTER (CONTINUED)

country to improve juvenile justice overall.

The stories singled out in this issue also echo the similarities at the pretrial stage between adult and juvenile courts. At the same time, the stories highlighted in this issue only make the news because of their rarity. Ignorance of the law is not a defense in court, and it should not be an excuse for police, probation, judicial officials, attorneys or other personnel who interact with youth in the court system. As the juvenile and adult criminal systems continue to intermingle, especially in the pretrial stages, we hope this issue will spur discussion and action to enhance programs and policies within your site. Visit the JDAI Help Desk at www.jdaihelpdesk.org for a wealth of material on local, state and national juvenile detention reform activities.

National Notes

A JUVENILE'S RIGHT TO BAIL IN MASSACHUSETTS AND ITS ENFORCEMENT

The concept of the "Right to Bail" was a fundamental part of the English legal system long before it was established under the Eighth Amendment of the U.S. Constitution. Despite such precedent, individuals under the age of 18 do not automatically have possession of all of the fundamental rights laid out by our federal government – including the right to bail. While the U.S. Supreme Court has stated in cases such as In re Gault that juveniles share certain rights with their adult counterparts when it comes to due process, the Court has also stated that juveniles do not have an express right to bail under the U.S. Constitution. That, then, leaves the matter to state laws and individual courts to decide whether youth deserve to have such a right when facing the juvenile legal system. While some states such as Colorado and Georgia provide opportunities for juveniles to have the right to bail (C.R.S Sections 19-2-508 and 19-2-509 and GA URJC 9.1 respectively), such standards are restricted to certain circumstances or procedures directed specifically towards juvenile court. Massachusetts is the only state to provide juveniles with the full right to bail. However, as described below, there is just as much to learn from what is still missing in enforcing such rights in the Massachusetts system, as there is in learning about the actual rules in place.

Under Massachusetts law, both juveniles and adults are entitled to the same rights to pretrial release on personal recognizance or bail as provided under M.G.L. c. 276 §58. Under these standards, if the youth is not immediately released upon arrest, and is being detained, the youth is entitled to have a bail commissioner set bail. Additionally, as cited in Paquette v. Commonwealth, 440 Mass. 121,125 (2003) and other cases, "the preferred result" under the statute is release on personal recognizance. Additionally, only juveniles over the age of 13 may be detained. In a significant ruling regarding juveniles' right to bail, the Massachusetts Supreme Court found in Commonwealth v. Jake J, that a Juvenile Court judge had authority to impose pretrial probation with conditions on a juvenile with his consent for his release pending trial, and implicitly had inherent power to revoke the juvenile's bail for violation of the conditions (as long as there was clear and convincing evidence that the juvenile violated the previously established conditions and that the juvenile was unlikely to abide by any other conditions or combination of conditions).

However, even with the laws in place and courts clarifying them, reports have shown that many juveniles who are arrested have not been given access to a bail commissioner or judge in the same way an adult would, resulting in the youth being unjustly held. In 2007 police departments failed to provide more than 300 of the 2233 youth detained in facilities with access to a bail commissioner. Another statistic reported in the Boston Globe cited that 4,200 youths arrested in 2004 were held overnight or for a weekend in pre-arraignment detention, with no chance to seek bail – and 500 of those were illegal detainments of kids under age 14. One reason for such instances could be attributed to confusion by the police of the requirement that, when a youth is arrested, a probation officer must be contacted to provide an advisory opinion on whether to detain the youth until arraignment. Under the letter of the law, the probation officer would make an advisory opinion based upon the youth's past record and the police officer's description of the alleged event, and then if it is advised that the youth be held, this recommendation is supposed to be forwarded to the bail commissioner. The bail commissioner then would hold a hearing at the police station or in pre-arraignment detention, assessing, much like in an adult case, whether the youth will appear in court. Yet, all too often, the process stops with the call to the probation officer, and the youth is detained until the arraignment hearing solely based on the probation officer's recommendation. Simply put, such consultation with a probation officer should never be a substitute for the determination of a bail commissioner. Furthermore, in similar circumstances, conditions of probation must be set by the sentencing judge; not the probation officer. (Commonwealth v. McDonald, 50 Mass. App. Ct. 220 (2000))

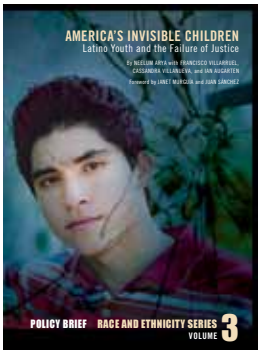
"Under Massachusetts law, both juveniles and adults are entitled to the same rights to pretrial release on personal recognizance or bail."

Another troubling occurrence occurs when bail commissioners simply do not appear when requested. One reason for such inconsistency is that some bail commissioners believe that they would not be compensated for their efforts. Bail commissioners usually receive $40 per person for their services but only if the person actually posts bail, and since most youth are dependent on their parents to post bail, if the parent cannot or refuses to do so after bail has been set, the commissioner does not receive payment. Another significant obstacle in ensuring that juveniles are afforded the same rights as adults when it comes to pretrial release, as was noted in the telling 2006 report "Do You Know Where the Children Are? A Report of Massachusetts Youth Unlawfully Held Without Bail" was the simple fact that most juveniles cannot afford an attorney and thus, court-appointed attorneys are not appointed until the child is brought to court for the arraignment. Thus, there is no way to protect the child from pre-arraignment detention. In other circumstances, if a youth does violate conditions of release, they have a right to a due process hearing to consider revocation of their release, but, again, youth are not always provided access to counsel for these proceedings. Thus youth are not afforded the same opportunity for a defense from revoking their freedom as adult have with their constitutional right to counsel.

Massachusetts has taken important steps toward limiting the use of pretrial juvenile lockups and reducing the number of youth of color in detention facilities. This includes implementing the Juvenile Detention Alternatives Initiative to develop alternatives to juvenile detention. Yet, more needs to be done to educate police, bail commissioners and others within the juvenile justice system regarding a juvenile's right to bail, who has authority to make such decisions, and the procedures to appeal the decisions.

The report "Do You Know Where the Children Are? A Report of Massachusetts Youth Unlawfully Held Without Bail" is available at www.youthadvocacyproject.org. The report "Locking Up Our Children: The Secure Detention of Massachusetts Youth After Arraignment and Before Adjudication" is available at www.aclum.org.

REPORT LOOKS AT DISPROPORTIONATE DETENTION OF LATINO YOUTH



According to a new Policy Brief, compared to white youth, Latino youth are four percent more likely to be petitioned to juvenile court, 16 percent more likely to be adjudicated delinquent, 28 percent more likely to be detained, 41 percent more likely to receive an out-of-home placement, 43 percent more likely to be waived to the adult system, and 40 percent more likely to be admitted to adult prison. One-third of Latino youth being held in juvenile facilities are in pretrial status. More than 70 percent of these are charged with non-violent offenses. Moreover, 54 percent of Latino youth prosecuted in the adult system are detained pretrial, and 72 percent of these are held in adult jails. In all, one quarter of incarcerated Latino children are held in adult prison or jail.

"Moreover, 54 percent of Latino youth prosecuted in the adult system are detained pretrial, and 72 percent of these are held in adult jails."

"America's Invisible Children: Latino Youth and the Failure to Justice," from the Campaign for Youth and the National Council of La Raza, traces the experiences of Latino youth that may be leading to these outcomes. According to the document, one-third of Latino youth were living in poverty in 2007, nearly three times the proportion for white non-Latino youth. In 2006, 37 percent of Latino youth lived in a family in which neither parent had full-time, year-round employment, compared to 25 percent of white youth. In 2007, 40 percent of Latinos ages 25 and older were not high school graduates, compared to 14 percent of whites and 18 percent of African Americans. "[E]conomists have calculated that each Latino male who graduates from high school is associated with a savings to the criminal justice system of more than $38,300," including the costs of trial, sentencing and incarceration, noted the document.

Once they are detained, Latino youth face even more obstacles, according to the brief. Forty percent of jails provide no educational services, only eleven percent provide special education services, and just seven percent provide vocational training. "Because of their

age, most youth in jails have not completed their high school education and need classes to graduate or obtain a GED or to acquire vocational skills to get a job."

The policy brief highlights efforts of several jurisdictions to address these issues. For example, officials in Santa Cruz County, California established a task force that developed an objective risk assessment instrument and built partnerships with community-based organizations to provide culturally-appropriate alternatives to detention. As a result of these efforts, the proportion of the juvenile detention population comprised of Latinos fell from 70 percent to below 50 percent, and the average daily population of Latino youth fell from 34 to 17.

A series of policy recommendations are presented in the brief. Among the recommendations for Congress are to: strengthen the "Disproportionate Minority Contact" core requirement of the Juvenile Justice and Delinquency Prevention Act, close the loophole in the Act allowing youth charged as adults to be housed in adult jails, improve data systems to track youth prosecuted in the adult system and assure that data are disaggregated by race and ethnicity, and oppose legislation that increases the transfer of youth to the adult system. Among the recommendations for state and local policymakers are to: stop housing youth in adult jails and prisons, redirect resources from incarceration to culturally competent and community-based options, use judicial waiver as the sole mechanism for trying youth as adults, and improve data systems to track youth prosecuted as adults, disaggregating by race and ethnicity.

A copy of the Policy Brief can be downloaded at www.jdaihelpdesk.org under Reducing Racial Disparities/Undocumented Youth.

TRANSITIONING AWAY FROM FIXED RESTRAINTS

A new report, prepared by the Youth Law Center addresses constitutional and other issues relating to the use of fixed restraints in juvenile detention facilities. The report is the first in a series addressing key issues of conditions of confinement, stemming from the core values of the Juvenile Detention Alternatives Initiative (JDAI) that no youth should be unnecessarily held in detention, and those who are detained must be held in safe, humane conditions.

"[t]he fact that the vast majority of juvenile detention centers...manage crisis behavior without resort to such devices serves as the best evidence that fixed restraint is not necessary to maintain a safe, effective facility."

According to the report, "fixed restraint" refers to "the attaching of a child's hands, feet or other body parts to a fixed object such as a bed, chair or bolt in the floor or wall." While noting that the use of fixed restraints in juvenile detention facilities is rare – used in fewer than five percent of such facilities – the report notes that the consequences of their use are large. The report noted how seclusion and restraint have led to numerous documented instances of asphyxiation, chocking, strangulation, broken neck, blunt head trauma, dehydration, cardiac and/or respiratory arrest, and death.

The report cites case law that has either severely limited the circumstances in which fixed restraints can be used and the manner in which they are to be used, or completely prohibited their use. The report also reviews professional standards which either prohibit or drastically limit their use.

Aside from the constitutional and moral issues of using fixed restraints, the report points out that "[t]he fact that the vast majority of juvenile detention centers in the country manage crisis behavior without resort to such devices serves as the best evidence that fixed restraint is not necessary to maintain a safe, effective facility." The key, according to the report, is to have proper classification, adequate, well-trained staff, and proper mental health support.

In transitioning away from the use of fixed restraints, the report recommends that institutional policies be revised to address training on de-escalation and crisis intervention techniques, employing a hierarchy of intervention beginning with the least restrictive, and having an overall shift in mentality that restraints should not be seen as a failure of the child, but a failure of the system to anticipate the need for alternative interventions or support. The report notes that either in-house expertise or outside consultants can be engaged to help with the transition.

The report, "Moving Away From Hardware: The JDAI Standards on Fixed Restraint," is available on the JDAI Help Desk at www.jdaihelpdesk.org under Conditions of Confinement/General Reports.

RECENT LEGISLATIVE CHANGES IN THREE STATES ADDRESS JUVENILE DETENTION ISSUES

ILLINOIS

In the last year the Illinois General Assembly has made two significant changes to the Juvenile Court Act of 1987 and the Unified Code of Corrections concerning juvenile defendants. One statutory change focused on the age in which someone is considered a minor and the resulting creation of a task force to investigate the impact of the change in age of a minor (705 ILCS 405/5-105,5-120, 5-121) while the other addressed the timing to access to counsel for juveniles (705 ILCS 405/5-415, 5-105).

The General Assembly agreed to increase the age at which a juvenile can be considered a minor from 16 years to 17 years when charged with misdemeanor offenses, citing research showing 37 other states, the District of Columbia, the federal government and "nearly every other country" all use 18 years as the age of juvenile court jurisdiction. They noted that research shows there is a disproportionate impact on minority youth when tried as an adult at age 17. They also consulted research on adolescent brain development which demonstrated 'that the center of the brain that controls reasoning and impulsivity is not fully developed until the early twenties'.

This new legislation also resulted in creating the "Illinois Juvenile Jurisdiction Task Force." The task force will be comprised of members of the House and Senate, Directors from various juvenile justice offices and the Administrative Office of the Illinois Courts, and representatives from the State's Attorney, Public Defender, County Board, and Probation Departments. The task force will be responsible for studying the impact, development, funding and timeline to accommodate the expansion of juvenile jurisdiction to youth age 17. Requirements include providing a year-end report with recommendations for expanding the juvenile court jurisdiction to include youth age 17 charged with felony offenses.

The second significant legislative change provides juveniles with immediate and meaningful access to counsel. According to past law, a minor who was taken into temporary custody had to be brought before a judge within 40 hours to determine possible detention or shelter care. Under the new amendments, these rights were expanded with the court now being responsible for providing counsel immediately upon the filing of a petition to keep the juvenile in custody. The amendments also stated in clear language that no detention or shelter care hearing shall occur without the youth having adequate time to meet with his or her counsel and prepare a defense.

These legislative changes were signed into law on February 10, 2009 and August 18, 2008 respectively.

NEW MEXICO

New Mexico's Governor Richardson signed the Children's Code Revision Bill SB248 into effect on April 7, 2009. The Bill addresses topics pertaining to juvenile offenders and child abuse and neglect, including growing concerns in juvenile detention.

"Youth who are in a juvenile detention facility cannot automatically be transferred to an adult jail simply because they turn eighteen."

In the revisions it was clarified that juveniles are entitled to the same basic rights as adults along with all the rights under the Delinquency Act. The changes also addressed the manner in which juveniles may be detained during the pretrial stage. A juvenile arrested for an alleged delinquent act can no longer be held in an adult facility for more than six hours. If a juvenile is detained in an adult facility he/she must be in a setting that is segregated by sight and sound from the adults. If a juvenile is placed in a shelter care facility, as means of temporary placement, there has to be a judicial review in 30 days. A subsection was also added allowing a juvenile in out-of-home placement to be able to request a review of the placement's appropriateness. Additionally, youth who are in a juvenile detention facility cannot automatically be transferred to an adult jail simply because they turn eighteen.

The revisions also address issue of release. A new definition was drafted for "supervised release" which meant the early release of a juvenile with specific conditions in order to protect public safety and help with reintegration back into the community. The idea of supervised release replaced that of parole as part of the changes regarding release of juveniles pursuant to the creation of a Juvenile Public Safety Advisory Board to replace

the current Juvenile Parole Board. Another upgrade in the system was that juveniles could be released to an authorized adult if the parent or guardian could not be present within the release time frame. This lifts a great weight off the system when a parent is simply unable to be present during the timeframe for release.

Sections 32A-2-23.1 and 2 were added to the Code, modeled after Missouri's procedure to release juveniles, shifting power to the Children, Youth, and Families Department (CYFD) to determine release while considering public safety, the extent of the juvenile's rehabilitation, the adequacy and suitability of the proposed plan, the juvenile's best needs, and the juvenile's behavioral and medical health all be considered before determining if a delinquent is eligible for release.

ALABAMA

Changes stemming from the Alabama Juvenile Justice Act of 2008 help to clarify the juvenile detention process and limit the need for juvenile detention in the state.

Important additions to Alabama's laws now outline the manner in which a juvenile can be detained, including prohibiting the secure custody of status offenders and very young children. Any juvenile placed in detention must have a written recommendation from the probation officer and that is only if no other means of rehabilitation are adequate. Moreover, if the juvenile is 10 years or younger, he/she cannot be detained, and those age 11 or 12 can only be detained by court order, unless charged with a Class A Felony or another offense that caused death or serious bodily injury. A status offender who violates a valid court order cannot be detained for more than 72 hours in any given six month period. Under these circumstances, the status offender must be interviewed within 24 hours by an authorized representative of the department, and the report must be submitted to the court in writing within 48 hours of the offender's arrival. And if a violation has not been established a hearing must be held to determine if there is a reasonable cause for the detention placement. With nothing included in the prior law, the new additions bring Alabama into compliance with the federal Juvenile Justice and Delinquency Prevention Act, which prohibits the use of secure facilities for status offenders and greatly restricts youth from being placed in adult jails.

Alabama has adopted similar language to that used by Marion County, Indiana and Clayton County, Georgia regarding "best interest screening." Under §12-15-120(b), a petition can only be filed by an intake officer alleging a child is delinquent if specific findings show that it is in the best interests of the public and the child – thus keeping public safety and the juvenile in mind when making decisions. The new standard is intended to screen cases and divert some away from formal case processing thereby conserving the courts' resources.

While the old statutes required that children be informed immediately of their rights while in custody, the new amendments make it clear that such communication must be done in language understandable to the child. Changes were also made pertaining to the role of a juvenile defense attorney prior to delinquency proceedings. The new laws, which are based on In re Gault's opinion that every child "requires the guiding hand of counsel at every step in the proceedings against him", state that a juvenile's defense attorney now must always meet with his/her client prior to the hearing and as necessary to prepare the case. The attorney must clearly explain the situation and all options available at each

stage in language appropriate for the client and, as apparent as it may seem, even though the client is a minor the attorney must honor the client's requests. It is now in written form that an attorney must act with commitment and dedication when advocating on the child's behalf. Along with carrying out the requests of the client, the attorney is required to be at all court hearings, file any motions in a timely manner, and be familiar with the resources available to the child through the court and community.

PORTLAND POLICE COMMUNITY PARTNERSHIP PROGRAM

Multnomah County, Oregon continues to be a leader in collaboration by establishing the Portland Police Bureau Community Partnership Program. This pilot program will give new police officers the opportunity to learn a variety of community policing based skills by interning at various organizations in the community that 'interface' with the Police Bureau. The organizations' target demographics would include: the chronic homeless population, addicted and mental health community, at risk juveniles, and numerous minority outreach programs.

"Police represent the first contact in the criminal justice process and therefore it is important for them to experience what occurs within the decision points that follow."

On the juvenile side, training will be tailored more towards front-end decision making, detention alternative programs, preliminary hearings and probation case management. One of the goals for the Program is to promote having "the right kid in the right place," and thus ensure police are aware of all available resources when having to make on-the-spot decisions when facing youth in trouble. It is also critical for police to believe that they can be part of the decision-making while still disagreeing over some issues.

Police represent the first contact in the criminal justice process and it is just as important for them to experience what occurs within the decision points that follow. During a three-day training orientation officers will have classroom exposure to the Department of Community Justice's structure and philosophy, along with hands-on experience with case processing, various community supervision options, and probation and parole arrest authority. One noteworthy inclusion in the training agenda is the opportunity offered police to return to work stations at a later date to learn more about an issue of special interest.

To read more about the Community Partnership Training Program and hear an audio of the initial orientation, visit www.co.multnomah.or.us/dcj/community_partnership.shtml

Cases

IN THE MATTER OF WILLIAM M., NO. 48649, AND IN THE MATTER OF MARQUES B., NO. 48650, SUPREME COURT OF NEVADA, 11/26/08

Nevada Revised Statute 62B.390(2) and (3) creates a rebuttable presumption that a juvenile over the age of 13 who is charged with committing any one of enumerated offenses falls outside the jurisdiction of juvenile court and must be certified to criminal court. To rebut that presumption the juvenile court must find clear and convincing evidence that the juvenile's criminal actions were substantially influenced by substance abuse or emotional or behavioral problems. Appellants in this case argued that to provide such clear and convincing evidence requires juveniles to admit guilt to the charges thus violating their Fifth Amendment right against self-incrimination.

"The Court first established that the Fifth Amendment's right against self-incrimination applies in juvenile certification proceedings."

In the case of William M., after being picked out of a police lineup William was charged with being a look out during a robbery of a store. A court psychologist agreed that William abused illegal substances and had several behavioral issues. The dilemma for William over the issue of certification to criminal court was that even though it was apparent that he had substance abuse and behavioral problems, he could not link those problems to the offense for which he was charged because he denied involvement in that offense. The juvenile court ordered the case certified to criminal court after finding that William failed to rebut the presumption for transfer.

In the case of Marques B., Marques was arrested in connection with a robbery. As in the other case, a court psychologist found that Marques had substance abuse and behavioral issues but Marques could not provide the nexus between those problems and the offense because he denied being involved. Marques also had severe learning disabilities that showed that he was "just barely able to understand what is going on," but the juvenile court's evaluation found that the deficits were not sufficient to have him deemed incompetent, and the juvenile court certified the case to criminal court.

The two defendants appealed to the Nevada Supreme Court challenging the constitutionality of the rebuttable presumption statute. The Court first established that the Fifth Amendment's right against self-incrimination applies in juvenile certification proceedings. The Court next determined that requiring a nexus between substance abuse or behavioral problems and the charged offense does require juveniles to

incriminate themselves. As a result the Court unanimously concluded that the statute is unconstitutional and remanded the cases back to the juvenile court. The Court noted that the juvenile court could still certify the juveniles to criminal court using another statute that allows the court to do so under certain circumstances, present in these cases if the court finds that public safety and interest would be better served by doing so.

TIFFANY A. V. THE SUPERIOR COURT OF LOS ANGELES COUNTY, 150 CAL.APP.4TH 1344, CA COURT OF APPEAL, 5/21/2007

The defendant, Tiffany A., was initially charged with the crime of unlawful taking of a vehicle (which was owned by her mother). At an uncontested pre-deposition hearing the defendant objected to the fact that she was shackled with ankle chains during the proceedings, a practice used for all detained minors at all proceedings, and subsequently filed a motion to prohibit the use of shackles upon minors in the absence of an individualized evidentiary showing of manifest need. The Superior Court rejected the motion and the defendant appealed.

"…the trial court, not law enforcement personnel, must make the decision that an accused be physically restrained in the courtroom."

The Superior Court objection to Tiffany's motion was premised on the fact that such proceedings are before a judge, do not involve witnesses, and are brief and/or uncontested, thus negating the need to show cause for individual cases. The general policy to use restraints for all minors was warranted given safety concerns arising from the design of the courthouse and the lack of sufficient numbers of security personnel. Finally, the court argued that case law limiting the use of restraints in the courtroom arises only in the context of criminal proceedings involving adults, and thus this case law should not be applied in the context of juvenile delinquency proceedings. The Sheriff's Sergeant also was on record in support of the policy, stating that having ankle restraints was like having another deputy present and causes the minor to think twice about any attempt to escape.

Upon appeal, the Court of Appeal initially found that Tiffany had standing because, although Tiffany's specific case was already moot when she was released from custody, the issue involved is an "important public interest concerning the treatment of minors in our juvenile delinquency court system that is likely to reoccur." The Court then turned to the issue at hand which dealt with whether the juvenile delinquency court can legally adopt a blanket policy requiring the use of physical restraints for all minors at all court proceedings without requiring an additional showing of need for restraints for each minor. Citing state and federal case law that went back to 1871 the Court discussed how the judicial system did not favor the use of restraints in criminal proceedings unless the specific case showed a manifest need. "Need" was deemed to arise only when a defendant demonstrated through conduct unruliness, an intent to escape, or

engaged in other "nonconforming conduct or planned nonconforming conduct" that would disrupt the judicial process unless restraints were in place. Yet, while previous cases had held there was a lower level of "need" in preliminary hearings, it was the People's duty to establish that need at whatever amount required. Additionally, the Court cited that the trial court, not law enforcement personnel, must make the decision that an accused be physically restrained in the courtroom.

Given such overwhelming precedent the Court concluded that courts cannot have a general policy of shackling all juvenile defendants. Any decision to shackle a minor who appears in the Juvenile Delinquency Court for a court proceeding must be evaluated on a case-by-case basis as to the conduct and behavior of that individual minor. The Court also noted that no California court had ever endorsed the use of physical restraints based solely on the defendants' status in custody, the lack of courtroom security personnel or the inadequacy of the court facilities, and, thus, courts cannot use those reasons to justify the shackling of juveniles. The level of need necessary to support restraints will also depend on the type of proceeding. Finally, the Court also rejected the argument that such standards only applied to adult criminal proceedings, concluding that the use of shackles in a courtroom, absent an individual showing of need, creates the very tone of criminality juvenile proceedings were intended to avoid.

IN RE: AMENDMENT TO FLORIDA RULE OF JUVENILE PROCEDURE 8.165(A), NO. SC07-1162, SUPREME COURT OF FLORIDA, 5/1/2008

In 2004 the Juvenile Court Rules Committee filed a report before the Supreme Court of Florida proposing amendments to the Florida Rules of Juvenile Procedure. Proposed amendments included requiring that a youth be given a meaningful opportunity to confer with counsel before waiving his or her right to counsel and that all such waivers be in writing, as well as requiring that when a youth enters a plea or is being tried for a delinquent act, the written waiver of counsel be submitted "in the presence of a parent, legal custodian, responsible adult relative, or attorney assigned by the court to assist the youth, who shall verify on the written waiver that the youth's decision to waive counsel has been discussed with the youth and appears to be knowing and voluntary." These amendments were partly based on reports of a disturbing number of children waiving their right to counsel in delinquency proceedings.

"Young children waive counsel, sometimes with subtle encouragement by judges, and without counsel present or any discussion of potential disadvantages."

While the Court accepted the amendment that all waivers be in writing, it deferred a decision on having meaningful consultation with counsel before waiving that right believing that it was the legislature's place to create such a rule and that Florida law should specifically create a right for children to consult counsel. The Court also

believed that because of the unknown financial impact on public defenders there needed to be legislative, not judicial change.

After consultation with the Florida Public Defenders Association (FPDA) and further research, the Committee resubmitted the proposed amendment in 2007. The Court adopted the amendment this time, agreeing that consultation with an attorney prior to waiving counsel is an important and necessary procedural safeguard protecting a juvenile's constitutional right to counsel. In its decision, the Court cited In re Gault, a case that stated that a youth has a right to counsel at all stages of a delinquency proceeding. Protecting a youth's right to counsel includes ensuring that a waiver of that right by the youth is done voluntarily and knowingly, especially given children's range in fully understanding the importance of counsel. The FPDA also had cited minimal potential financial impact as a result of the new wavier rule.

The Court also relied on the National Juvenile Defender Center's assessment of children's access to counsel in Florida's delinquency proceedings. The report brought some sobering facts to light, including: Young children waive counsel, sometimes with subtle encouragement by judges, and without counsel present or any discussion of potential disadvantages; a written waiver seems to be regarded as a substitute for a meaningful inquiry into the child's understanding; the rule requiring consultation with an adult about the waiver decision is routinely disregarded; and that consultation with a parent may also be an inadequate safeguard, given the other subtle disincentives for exercising the right to counsel.

The dissenting opinion agreed that juveniles should have to consult with an attorney before waiving their right to having one for trial. However, the dissent disagreed that it is a judicial function to enact this change, arguing that this is a substantive and not procedural change, which is best left to the legislature.

Editor's comment: As an attorney, I see "having" the right to a jury trial (the Matter of L.M. case) as a pretrial justice issue – part of that "meaningful time" spent with counsel includes deciding whether to be before a judge or jury – and is one of the many decisions a defendant must make before the trial. The Antonio de Jesus Nuñez case was included as a symbol of the clash between juveniles and the adult criminal system. By acknowledging that the offender should have never been considered for such a sentence based on his age, background and nature of the crime, the court provided another piece in ensuring that similar people in similar situations are treated the same way – at any stage in the legal process.

IN THE MATTER OF L.M., NO. 96,197, SUPREME COURT OF KANSAS, 6/20/2008

The case at hand dealt with a juvenile's right to a jury trial and how Kansas' "sweeping changes" to the juvenile justice system since 1984 impacted current practices. The defendant, sixteen year old L.M., had been prosecuted in juvenile court on charges of

aggravated sexual battery and possession of alcohol. L.M. was denied a request for a jury trial and was subsequently found guilty. After a confirmation by the Court of Appeals, L.M. appealed to the Kansas Supreme Court on the sole issue of whether he had a constitutional right to a jury trial in a juvenile offender proceeding.

The defendant specifically challenged the constitutionality of K.S.A. 2006 Supp. 38-2344(d), which provided that a juvenile who pleads not guilty is entitled to a "trial to the court," and K.S.A. 2006 Supp. 38-2357, which gives the district court complete discretion in determining whether a juvenile should be granted a jury trial. The Court initially acknowledged Findlay a twenty-four year old Kansas ruling that stated juveniles did not have a constitutional right to a jury trial given that juvenile adjudications were not considered criminal prosecutions based on then Kansas law. The Court had also relied on the US Supreme Court's ruling in McKeiver v. Pennsylvania where a plurality of the Court held that juveniles are not entitled to a jury trial under the Sixth and Fourteenth Amendments to the Constitution. Although the defendant recognized the importance of the previous two rulings he asked the Court to overturn Findlay relying on the following arguments: 1) Changes in the Revised Kansas Juvenile Justice Code (KJJC) had eroded the child-cognizant, paternal, and rehabilitative purposes of the juvenile offender process, thereby requiring the Court to recognize a juvenile's right to a jury trial under the federal Constitution; 2) Juveniles are entitled to a jury trial under the Kansas Constitution; and 3) Regardless of whether all juveniles are constitutionally entitled to a jury, the defendant should have received one because he ran the risk of having to register as a sex offender.

"The Court found that such changes to the juvenile justice system had, indeed, "eroded the benevolent parens patriae character" that previously distinguished it from the adult criminal system."

According to the Court, while the old Kansas juvenile codes were focused on rehabilitation and the State's parental role, the new KJJC had shifted focus to protecting the public, holding juveniles accountable, and making juveniles more productive members of society. Accordingly, these purposes were more aligned with the legislative intent for the adult sentencing statutes which included protecting the public by incarcerating dangerous offenders for a long period of time, holding offenders accountable by prescribing appropriate consequences for their actions, and encouraging offenders to be more productive members of society by considering their individual characteristics, circumstances, needs, and potentialities in determining their sentences. The new KJJC also included language similar to the Kansas Criminal Code such as requiring juveniles to plead guilty, not guilty, or nolo contendere like adults charged with a crime, and referred to the term of commitment to a juvenile correctional facility as a "term of incarceration." The Court found that the "conceptualization of juvenile offenders stresses the similarities between child and adult offenders far more than it does their differences."

Besides amending the 1982 codes to reflect the purpose and provisions included in the adult criminal code, the legislature also had removed some of the protective provisions that

made the juvenile system more child-cognizant and confidential, a key consideration in the McKeiver plurality decision. The Court went on to highlight that, while in 1982 juvenile proceedings were confidential, under the new laws the files were open to the public unless a judge ordered them to be closed for juveniles under the age of 14, and records for juveniles age 14 and over were subject to the same disclosure restrictions as for adults.

The Court found that such changes to the juvenile justice system had, indeed, "eroded the benevolent parens patriae character" that previously distinguished it from the adult criminal system. Such changes superseded the reasoning in McKeiver and Findlay and thus, those decisions were no longer binding precedent. With the Kansas juvenile justice system being more like the adult criminal prosecution, the Court held that juveniles have a constitutional right to a jury trial under the Sixth and Fourteenth Amendments, thus making K.S.A. 2006 Supp. 38-2344(d), and K.S.A. 2006 Supp. 38-2357, unconstitutional.

The Court also found the statutes unconstitutional under its State constitution. Under Kansas' constitution, the right to a jury trial goes to "all prosecutions", and the Court had previously interpreted the phrase "all prosecutions" to "mean all criminal prosecutions for violations of the laws of the state." Given that the new KJJC repeatedly refers to its proceedings as a prosecution and that such proceedings are based on allegations that juveniles have violated criminal laws, the Court ruled that the proceedings under the KJJC fit within the meaning of the phrase "all prosecutions" and juveniles have a right to a jury trial under the Kansas Constitution.

With the finding that juveniles had a right to a jury trial under the US and Kansas constitutions, the Court did not address the defendant's final argument that even if all juveniles are not entitled to a jury trial, he should have received a jury trial because he was subject to registering as a sex offender, an adult sanction. In conclusion, the Court stated that the right to a jury trial in juvenile offender proceedings was a new rule of procedure and would not operate retroactively, nor does it create a new class of convicted persons, but merely raises 'the possibility that someone convicted with use of the invalidated procedure might have been acquitted otherwise.'" Subsequently, the ruling was reversed and remanded to the district court for a new trial before a jury.

IN RE ANTONIO DE JESUS NUÑEZ, SUPER. CT. NO. 01ZF0021, COURT OF APPEAL OF CALIFORNIA, 4/30/2009

In one of the most recent rulings involving how youth are treated within the adult criminal justice system, Antonio de Jesus Nuñez filed a petition for habeas corpus in the California Supreme Court on grounds that his sentence of life in prison without parole (LWOP), stemming from a conviction at age 14 for kidnapping, constituted cruel and unusual punishment under the Eighth Amendment of the US Constitution and under Article I, Section 17, of the California Constitution.

In his arguments, Antonio contended that his LWOP sentence violated the state Constitution's proportionality requirement based on his youth, the lack of injury to any victim, and the circumstance that LWOP is not a sentencing option for kidnappers his age who — unlike him — murder their victims. The court agreed that the sentence imposed on Antonio was unconstitutional, yet it was not a ruling reached lightly.

After describing the actions that occurred in the alleged kidnapping of another drug dealer, the Court described a horrifying but classic history of Antonio's youth, which included immense poverty, minor brushes with the law, and getting severely injured in a random shooting at age 13 when riding his bicycle, where he witnessed his 14 year old brother shot and killed when coming over to help Antonio. Forced to return back to California a year later, Antonio experienced trauma symptoms when living near the previous shooting, including flashbacks, an urgent need to avoid the area, a heightened awareness of potential threats, and an intensified need to protect himself from real or perceived threats. There was also evidence that showed that Antonio was only involved in the incident on the second day, which included a car chase where he shot at an unmarked van driven by Hispanic police. A report attached to the petition from a psychiatrist stated that "Viewed in the context of post-traumatic stress disorder, Antonio's behavior is most accurately described as impulsive and self-protective."

The Court concluded that "a statutory regime that punishes the youngest juvenile offenders more harshly for kidnapping than for murder is not merely suspect, but shocks the conscience and violates human dignity."

In finding that the LWOP sentence did violate the state Constitution, the Court believed that both the nature of the offense and the nature of the offender factored into whether a sentence would be too excessive. Age was an important factor in assessing whether a severe punishment falls within constitutional bounds, especially given the fact that "the impetuousness and recklessness that may dominate in younger years can subside." More importantly, the Court acknowledged the fact that even in the most serious crime of premeditated murder, the statutes distinctly state that the death penalty only is allowed for those age 18 or older and LWOP is only allowed for those 16 and older. Citing the recent US Supreme Court ruling in Roper v. Simmons, the court held that "juvenile offenders cannot with reliability be classified among the worst offenders" given their lack of maturity and responsibility, the vulnerability to outside influences because they have less control over their surroundings, and a juvenile's character is not as fully formed as that of an adult.

The Court concluded that "a statutory regime that punishes the youngest juvenile offenders more harshly for kidnapping [with no harm] than for murder is not merely suspect, but shocks the conscience and violates human dignity." The sentence also did not reflect the goals of retribution, incapacitation, rehabilitation, and deterrence. The Court went on to find that by sentencing him to LWOP the state had "judged him irredeemable while at the same time extending hope of rehabilitation and parole to all juvenile kidnappers, including those significantly older than petitioner, who murder their victims." – a clear violation of the California Constitution.

Similar arguments with regard to Antonio's age, background and actual actions were made when addressing whether the sentence violated the 8th Amendment. With Antonio being the only known offender under age 15 around the world with an LWOP sentence for a non-homicide, no-injury offense, the Court found his severe sentence so "freakishly

THE PRETRIAL REPORTER

A BI-MONTHLY PUBLICATION OF THE PRETRIAL JUSTICE INSTITUTE WWW.PRETRIAL.ORG JULY 2009 SPECIAL EDITION

rare as to constitute arbitrary and capricious punishment violating the Eighth Amendment." The Court also reflected how LWOP is the harshest possible punishment for a juvenile offender, as shown in a past California ruling where LWOP for a 13-year-old was "denial of hope; it means that good behavior and character improvement are immaterial; it means that whatever the future might hold in store for the mind and spirit of [the defendant], he will remain in prison for the rest of his days." Habeas corpus was granted and the trial court was ruled to conduct a new sentencing hearing consistent with the opinion.

PTR is an electronic publication emailed to subscribers. To aid in delivery, please ensure PTR@pretrial.org and emails with attachments are not blocked by your system. Special accommodations are made for law libraries. To subscribe, please visit the Analysis and Research section of www.pretrial.org. The subscription rate is $225 for two years

Pretrial Justice Institute.
927 15th Street, NW, Suite 300,
Washington, DC 20005-2323
202.638.3080 F: 202.347.0493
E: ptr@pretrial.org • www.pretrial.org