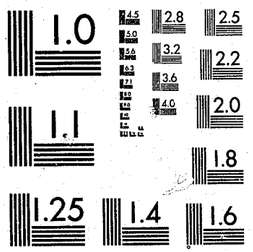

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LEGAL PROTECTIONS IN DIVERSION OF JUVENILES

BY

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April, 1979

Diversion from juvenile justice processing has been advocated as more humane, more effective, less costly, and less troublesome both for the children and the state. It is usually characterized as an informal alternative to court action: that is, an alternative to arrest, to court intake, or to court proceedings. Police may refer juveniles to social programs or services inside or outside the formal system instead of arrest; court workers at intake conferences may do the same with or without filing a petition; prosecutors may also divert juveniles without releasing them from charges. In any of these situations, records of the fact of arrest, referral, or petition may be retained; the option to resume processing is usually retained. If the diverted juvenile completes a diversion program or course of services or responsibilities satisfactorily, charges against him may be dropped or the case dismissed. If he does not complete the program or is ejected from it, he may be returned to normal processing.

The elements in diversion that raise legal questions are: the possibility and legal presumption that the juvenile is innocent; restrictions that may be imposed upon his behavior without court proceedings or the opportunity for judicial review; and the possibility that administrative decisions may be substituted for procedures that would be protected if handled as court proceedings.

Deprivation of liberty may be found in any significant intervention or restriction that has not been justified by protected proceedings. Where voluntary acceptance is the basis of the intervention, the voluntary nature of the acceptance should be established. A determination

of need for intervention should be made, since harmful aftereffects of intervention could prejudice the future life or future processing of the juvenile.

What procedural rights a diverted person may be entitled to have been outlined by others:

> Inherent in the diversion process are a number of potential violations of individual rights. Some of the questions that must be answered are these: How shall the diverted person waive his right to speedy trial? How can due process and equal protection best be guaranteed in selection for diversion or in termination of unsuccessful participants? Can a formal guilty plea be required before a defendant is eligible for diversion? Does an individual have the right to confidentiality of program records? Is the protection against double jeopardy violated in any way by court processing subsequent to diversion programming?[2] How long can prosecution be suspended, or how long can a person be retained under program control without trial? At what point does the diversion candidate or participant have the right to be represented by counsel? Some of these questions have been dealt with in recent standards and in existing program policy; others will probably have to be tested in the courts.[3]

Policies on these issues in existing programs are to some extent a function of the source of the diversion initiative. Diversion programs and procedures can be created by statute, by court rule, or by administrative practice. Different procedures have required different protections. The first section of the paper discusses these differences as developed in cases of adult diversion in order to consider the likelihood of their applicability to juvenile diversion. The second section of the paper discusses specific procedural protections which have been found to apply to juveniles in regular court processing in order to examine their potential application to juvenile diversion.

Adult Diversion and Procedural Protections

Case law on diversion deals with adult diversion programs. The same principles should apply to diversion of juveniles. In McKeiver v. Pennsylvania,[4] the Supreme Court dealt with what distinguishes juvenile from adult criminal proceedings. The court approached the need for due process protections as one to be balanced against the benefits of informal processing, recognizing both the possible effectiveness of the protection in question and the effect it would have on the process. It avoided a flat holding that all rights constitutionally assured for the adult accused are to be imposed upon the state juvenile proceeding."[5]

> There is a possibility, at least, that the jury trial [the protection in question], if required as a matter of constitutional precept, will remake the juvenile proceeding into a fully adversary process and will put an effective end to what has been the idealistic prospect of an intimate, informal protective proceeding.[6]

The court stated the purpose of this informality as: "What should distinguish the juvenile from the criminal courts is greater emphasis on rehabilitation, [but] not exclusive preoccupation with it."[7] McKeiver envisioned a balance between requirements for due process protections and easy access to rehabilitative services.

Diversion has been created for both adults and juveniles to serve the purposes described in McKeiver for the juvenile court. In the absence of a Supreme Court decision directly on the matter, the same principle of balancing the need for protection against the benefit of informal action should be followed. This principle has been followed in its essentials by those cases which treat diversion as the state's disposition of the individual. Other cases--treating diversion as

a conditional or delayed release from prosecution--have deemphasized the need for protection but have at least looked into a need for protection against abuse of the prosecutor's discretion. [The juvenile court was originally created as a diversion proceeding and program; the competing factors enunciated by McKeiver should apply to any further experiment in informal criminal procedure.]

Explain ?

Diversion As An Exercise of Prosecutorial Discretion

The decision to divert criminal defendants has frequently been considered a matter of prosecutor's discretion not subject to judicial supervision: "A prosecutor's discretion in charging, deferring, or requesting dismissal is limited by pragmatic factors, but not by judical intervention."[8] "The decision to divert or to prosecute remains a discretionary one and....that discretion ordinarily will not be set aside."[9]

The purpose of the doctrine of prosecutor's discretion is to allow sufficient latitude for his decision to prosecute to be based on the facts involved in the individual case, such as the quality of the prosecution's case, whether there are mitigating factors, and administrative needs.[10] The prosecutor's decision depends upon the perceived importance and potential success of prosecution.[11] Diversion in this context is seen as an alternative available to the prosecutor; the prosecutor decides whether to bring the case, dismiss it, or divert the defendant. Diversion is merely a mechanism for deferring prosecution in order to dismiss the case at a later time.

Cases challenging diversion as the prosecutor's decision have argued that the prosecutor's discretion to make the decision should be reviewable; that defendants have a right to be released if they would have been in the absence of the diversion alternative; that eligibility requirements set by prosecutors may violate due process; and that the possibility of diversion may have a deterrent effect on the defendant's preparation of a defense.

Review of prosecutorial discretion for abuse may be available to defendants who pursue it despite language to the contrary in some opinions. In Thompson v. State,[12] an alcoholic who had been convicted of attempted murder appealed the prosecutor's denial of diversion. In a decision relying on the unreviewability of prosecutorial discretion, the Supreme Court of Wisconsin reviewed the evidence in the case:

> Under the facts of this case, where it is conceded by the defendant that the evidence was sufficient, not only to charge but to convict, the prosecutor did not abuse his discretion or violate the ethics of the legal profession by bringing a charge of attempted first degree murder. By so holding, we do not conclude, however, that the diversion of this defendant to a noncriminal mode of treatment might not have been a reasonable course to follow.[13]
>
> In the instant case, inasmuch as there was substantial evidence of probable cause and that evidence resulted in a conviction, we conclude that there was no abuse of discretion in the charging process.[14]

The crime charged was attempted murder of a police officer with a knife. The defendant would not have been eligible for diversion under the common first-offender, minor-offense statutes or rules. In the absence of statutory or other written eligibility criteria, the court

allotted the power to determine ineligibility to the prosecutor. Its review of the evidence left unclear whether it would have decided a case involving a minor offense in the same way.

Where eligibility requirements are at the prosecutor's discretion, certain abuses have been noted by the courts. Eligibility requirements have included prohibitions against raising a defense against the charge before the diversion has ended and normal processing begun. This leaves the defendant with the choice of accepting diversion in spite of a desire to contest the charge or refusing diversion in order to contest the charge. The California Supreme Court concluded that this was impermissible. "Diversion could evolve into a procedural device for the prevention of release of defendants who are charged solely upon illegally seized evidence."[15]

In Morse v. Municipal Court,[16] the defendant had been advised of his eligibility for diversion to a drug rehabilitation program but elected to plead not guilty and moved to suppress evidence on the ground that it resulted from an illegal search. This motion failed. The lower court then denied diversion on the ground that the defendant had chosen to use the court system rather than accept diversion from it. The higher court reversed:

> . . .the People's insistence upon a deferral of suppression motions requires that a defendant choose between potential diversion and the possibility of an immediate dismissal of charges. His opportunity to test the strength of the evidence against him at the outset of the case is entirely lost if he elects diversion. Although no loss of constitutional rights thereby occurs in a view of the defendant's ability to move to suppress at any later resumption of criminal proceedings. . .such a consideration may tend to discourage defendants from consenting to consideration for diversion.[17]

The court saw this possibility as against legislative policy, whose "overriding purpose was to facilitate its broader aim of conducting an unusually liberal experiment in rehabilitation by encouraging the broadest possible participation in the drug treatment programs."[18]

As noted by the California Court, diversion at prosecutor's discretion envisions no loss of the right to present a defense. This view was also taken in a District of Columbia case, U.S. v. Smith.[19] In Smith defendants were required to forego the right to file pretrial motions in order to be eligible for diversion. The lower court treated this policy as an impermissible classification of defendants, similar to racial discrimination. The court on appeal ruled that this eligibility requirement did not raise an equal protection problem. It reasoned that a defendant would have full procedural rights to prepare a defense if the case went to court. This court also considered the possibility that the policy of exclusion might deter individuals from free exercise of their rights. It held that a person diverted under this policy cannot argue that he has been deterred from defending himself since "the government has done away with any reason for him to do so."[20] The court concluded that since it had not been the intention of the policy to deter a defense and since it had not in fact done so, it had no chilling effect on the right to prepare a defense. The court did not consider the possibility raised by the California court, that an individual might need a defense against being diverted.

Dangers may be inherent in the view of diversion as a discretionary option belonging to the prosecutor. If no review of his

decision is available, diversion could be used as an optional depository for cases that he would not have prosecuted or would have lost. Diversion may be similar to plea-bargaining in that it offers a lesser deprivation of liberty in return for not invoking the trial privilege. But plea-bargaining is a protected procedure with rights to representation, to scrutiny of the voluntariness of the defendant's acceptance of the deal, and to review. If in the case of diversion any important deprivation of liberty is involved, the same protections probably should be required. Although courts have found that a plea-bargaining offer presents no unlawful deterrent effect on preparation of a proper defense[21] the Supreme Court has ruled that defendants need protection from vindictive exercise of the prosecutor's discretion.[22]

The right to review of wrongful exercise of the prosecutor's discretion would require the existence of a record to be reviewed. Court decisions that diversion is wholly within prosecutor's discretion have not required that this record be kept. In Matter of Cys,[23] the defendant argued for dismissal of a charge of unlawful entry of the White House grounds to speak for peace on the basis that he had been excluded from a diversion program. The prosecutor maintained that admission to the program was exclusively within prosecutor's discretion and refused to give reasons for excluding the defendant. The trial court cited the prosecutor for contempt. The Court of Appeals, relying on U.S. v. Smith, above, ruled that the decision to divert was a matter of selection for enforcement belonging to the prosecutor and that the defendant must bear the burden of proof of discrimination.

Since the Smith Court had reached a conclusion without benefit of the prosecutor's response, prosecutors were not held to be required to state reasons for excluding defendants from diversion programs, even on appeal of the decision.

Finally, People v. District Court[24] reasoned that the separation of powers doctrine prevented the court from requiring a statement of the prosecutor's reasons for refusal.

The import of these decisions is that if a statement of reasons for exclusion from diversion cannot be required, an effective appeal of that decision cannot be made. No standards or procedures for the decision can be enforced.

In cases involving juveniles, the question of need for a statement of the prosecutor's reasons has arisen in connection with the decision to transfer a juvenile to adult court. Where statutory standards for the decision and procedure exist, courts have required obedience to them.[25] But where standards have not been legislated, courts have been reluctant to require procedural rights or review.[26]

The same distinction is likely to be found in diversion. For example, in a New York case involving a juvenile the court overruled the prosecutor's objections in favor of the release policies of the probation department.[27] The case reached court only because the child failed to appear at the first intake conference. The probation department testified that it would have recommended release at either intake or disposition. The court found the fact that the child's situation fit the probation department's policies on adjustment (release) persuasive.

> Probation is a hallmark of the juvenile justice system. Its purpose is to screen from the Court those youngsters who, because of age, lack of prior record, good adjustment at home and in the community, or other factors, could derive no benefit from court involvement and, indeed, might be damaged by it...The benefits of diversion, in a proper case, to child and community alike, are unquestioned.[28]

Here, where standards for diversion existed, the juvenile had the right to challenge the discretion of the prosecutor in refusing to divert him.

Thus, if diversion is viewed as a matter exclusively or substantially within the discretion of the prosecutor, it is not likely that due process or equal protection rights will apply. It is not clear that appeal would be available. A right to the application of standards and procedures probably could not be enforced. Individual rights would probably be limited to rights against invidious discrimination or abuse of discretion. Courts have held the doctrine of prosecutor's discretion to be both broad and unreviewable.[29]

Diversion Based on Rules

Courts in California, Pennsylvania, and New Jersey have evolved a different approach to diversion. The California Supreme Court decided a series of cases occasioned by an adult diversion statute. Conflict arose from the fact that the statute provided that the diversion decision rest with the court but required concurrence by the prosecutor. The court handled this conflict by developing a theory of the nature of the diversion decision as essentially judicial, thus striking down the requirement of prosecutorial consent and the concept of prosecutorial discretion as unreviewable. The Supreme Court of New Jersey agreed with this theory and held it applicable to diversion based not on

statute but on rules of court procedure. Both courts required a judicial hearing on the decision to divert. The Pennsylvania Supreme Court disagreed but nevertheless required a judicial review of the prosecutor's decision to divert.

In order to be eligible for the diversion program in California an individual must be charged only with certain minor offenses (drug offenses) and must have no criminal or violent action associated with the offense charged, no prior convictions, and no probation or parole violations. The statute established a three-step decision making process: 1) the prosecutor makes a preliminary determination of eligibility; 2) the probation department investigates suitability and makes a recommendation to the court; and 3) the court decides whether to divert the defendant. Progress reports to the court are required. Conviction of a new offense leads to resumption of criminal proceedings; successful performance in the program leads to dismissal of charges.

The Supreme Court of California separated these three steps as belonging either to prosecutorial or judicial functions based on the factors involved in the decision. In Sledge v. Superior Court,[30] the court decided that preliminary screening for diversion could be done only by the prosecutor because the factual information involved includes elements not admissible in court until after trial, such as prior record and evidence of other offenses. The court characterized the decision to divert a defendant as essentially judicial because it is based on evidence of the benefits to the defendant from diversion.

The court elaborated on the elements of the judicial function

in People v. Superior Court (On Tai Ho).[31] It noted that the evidence brought to court on the defendant's suitability for diversion is developed by the probation department rather than by the prosecutor's office, and that it is reported as findings and recommendations to the court. The court drew an analogy to sentencing. "The case is 'before the court' for disposition, and disposition is a function of the judicial power no matter what the outcome."[32]

In these decisions the court explicitly rejected the prosecutor's discretion theory of diversion. The court argued for a theory of diversion as a third judicial option in disposing of a case, equal to sentencing or acquittal. The court relied upon a series of cases which held unconstitutional a requirement that the prosecutor concur in decisions involving handling of defendants in ways other than bringing charges.[33] On this basis the court overruled the diversion statute's requirement of prosecutor's concurrence in the decision to divert. The court rejected the idea that refusing to divert a defendant results only in bringing him to trial and is, therefore, merely an alternative to bringing charges. The court concluded that the diversion decision was by its nature a judicial function and, by the doctrine of separation of powers, a judicial function only.[34]

Courts in two other states have considered whether the decision to divert defendants is judicial in nature. The Supreme Court of Pennsylvania created the Accelerated Rehabilitative Disposition (ARD) Program. The selection process governing admission to the program provides for the district attorney to name the case for consideration

for ARD. A court hearing is then held on whether the defendant agrees to the conditions of diversion and whether the judge will grant the motion to divert. Upon satisfactory completion of the program, c rges are dismissed; if the defendant fails to complete the program, prosecution may be resumed.

In Commonwealth v. Kindness[35] the Pennsylvania Supreme Court ruled that the prosecutor has authority to veto diversion because of his traditional power to decide which cases to prosecute.

> The authorities are virtually unanimous that the historical power to "nol pros" [decide not to prosecute] belonged at common law solely to the Attorney General and remains an exclusive prosecutorial power in the absence of a state constitutional or statutory provision to the contrary.[36]

The court ruled that the power to decide whether to prosecute controlled the diversion decision in the Pennsylvania program.

> The prosecutor's authority to veto a proposed diversion stems from his general power, originating at common law and not taken away by the legislature, to decide that a particular case shall proceed to trial.[37]

The Pennsylvania court characterized the California decision as one required by statute, even though the California court had based its opinion on an interpretation of the factors involved. Both the Pennsylvania and California procedures leave initiative with the prosecutor: in Pennsylvania the prosecutor submits a motion to divert; in California, the prosecutor makes a preliminary screening report. Both procedures established a judicial hearing on whether to divert. The California court had seen it constitutionally necessary to separate the judicial and prosecutorial powers; the Pennsylvania court did not. "We have grave doubts about the logic of elevating a conflict between

statutory provisions to a constitutional level in this manner."[38] The only constitutional issue was separation of powers. Both courts in fact separated them.

One of the judges in the Pennsylvania decision (Kindness) wrote a lengthy dissent citing several types of prosecutor's decisions requiring confirmation by the court: a plea bargain must be supervised by the court; a nol pros decision must be assented to by the court; formal charges can be dismissed only by the court. He argued that diversion should require more than simple confirmation.

> Here, the prosecutor has already exercised his discretion, with the result that appellant was arrested and charged, and thereafter indicted. The possibility of accelerated rehabilitative disposition (ARD) does not arise until a defendant has been "held for court" . . .or "after an information or indictment" . . .when either of these events has occurred, the case has left the prosecutor's realm, and has entered the court's. From the moment of such entry, it is the court's discretion, not the prosecutor's, that controls the ultimate disposition of the case.[39]

The judge relied on On Tai Ho above, and a recent supportive New Jersey Supreme Court case which was not even mentioned by the majority.[40]

The New Jersey Court found two deficiencies in the court-established pretrial intervention program there: an equal protection problem in the diversity of programs and their availability, and:

> virtually untrammeled discretion which has been vested in prosecutors associated with the PTI (Pre-Trial Intervention) programs. . . Although we foresee a continued exercise of discretion by prosecutors, we cannot sanction a decisional process which might yield ad hoc or arbitrary determinations. A decisional process of that sort defeats the formal guidelines which the PTI programs attempt to place on prosecutorial discretion.[41]

The court rejected the theory that denial of diversion means only continuation of regular processing:

> This sort of reasoning would negate the potential value which PTI serves in seeking the rehabilitation of defendants. Furthermore, we regard defendant's interest in achieving diversion without plea or trial to be so important, that we are unwilling to overlook the advantages of participating in a PTI program.[42]

The argument relies on the theory that access to privileges extended by government should be equally available to all.

The court rule establishing the New Jersey program provided that a defendant first be accepted by the program; next be recommended for diversion by the court administrator, probation department, or program director; and then be approved by the prosecutor. Finally, the defendant himself must consent. Further proceedings then would be postponed by the judge for a defined period of time at the end of which charges would be dismissed if so recommended by program officials. The court established several new court rules based on the finding that the California theory of diversion applied:

> pretrial intervention is a judicial function, in spite of the fact that the California PTI programs, unlike those in New Jersey, are legislative in origin.[43]

Like the California court, this court also found the possibility of prosecutorial veto a violation of judicial power. Its remedy for arbitrariness in prosecutor's recommendations was to establish an informal judicial hearing:

> . . .at every stage of a defendant's association with a PTI project at which his admission, rejection or continuation in the program is put in question . . . defendant shall be accorded the procedural protection of a statement of reasons after each determination of his admission, rejection or continuation in a PTI program.[44]

Appeal of these decisions was also available. This decision was unanimously reaffirmed by the same court the following year.[45]

Discussion

The previous section has examined cases involving diversion for standards of procedure which might apply to any person who is diverted as a result of different kinds of diversion decisions. The issue addressed in these cases is whether diversion should be viewed as a prosecutorial or judicial function. If the only consequence of diversion were in fact a delay in prosecution or in dropping charges, then diversion should have the same legal consequence as release. The state would have no basis for coercion or behavioral requirements; no waivers of rights could be required; no reports from the program could be brought to court. The sole difference would be that prosecution could be reopened if the individual's performance in the program was inadequate.

If diversion is a judicial disposition, the individual would have procedural rights in a judicial or quasi-judicial hearing. What type of hearing would be required for the decision to divert was discussed in the cases which dealt with diversion based on rules. The California statute establishes a hearing procedure following a recommendation from the prosecutor with evidence presented by the probation department on whether to divert the individual. The New Jersey decision in Leonardis ruled that the decision is to be made first by the program director and prosecutor, then reviewed by the court. The court hearing is limited to review of the prosecutor's decision and defendant's acceptance and is intended to be perfunctory.

> . . .Judge should explain to the defendant that he is waiving his right to a speedy trial. In order to assure that the defendant consents to PTI (Pre-Trial Intervention) in a knowing and intelligent manner the trial judge should explain to him that he may be prosecuted at the end of the intervention period if his rehabilitation

> has not been satisfactory, or continued in the program for an additional period, at which time he is still subject to prosecution; that his participation in the program may be terminated prior to the normal period if there is a cause; and that any delay in going to trial may have the effect of reducing his ability to obtain witnesses in his behalf.[46]

This type of hearing assumes, with no procedure for insuring it, that charges would have been pressed. If a defendant wishes to challenge a decision not to offer diversion to him, "the challenge is to be based upon alleged arbitrary or capricious action and the defendant has the burden of showing that the program director or prosecutor abused his discretion in processing the application."[47] The defendant must have proved his admissibility to the program director in order to establish that rejection might be an abuse of discretion. In other words, the diversion decision is made by the program director with the concurrence of the prosecutor. Judicial action is only for explaining diversion to the defendant, checking the voluntariness of his acceptance, and establishing the potential for appeal.

The hearing required by the majority in Kindness follows this model. The prosecutor makes the motion to divert and a hearing is held to establish whether the defendant agrees to the conditions of the diversion program. The dissent in this case follows the California model, advocating statement and promulgation of criteria for eligibility, an orderly procedure to determine whether criteria are met, and a judicial hearing to decide whether to accept or reject the defendant's request for diversion.

Thus, even if a judicial proceeding is required, it may be limited to a review of the diversion decision made by some combination of

prosecutor, defendant, program administrator, and probation department. The doctrine of prosecutor's discretion appears to control the perception of the diversion initiative even where courts have ruled against a requirement that the prosecutor concur in the decision. The reasoning seems to be that a small amount of supervision along with a possibility of appeal is enough to insure fair decisions. This was also the approach recommended by the National Advisory Commission on Criminal Justice Standards and Goals.

> If diversion programs are to perform as they are intended, then the decisions of those referring to those programs must be subject to review and evaluation. . .Simply requiring written statements for each decision forces the process to become more open while it also permits administrative or judical review.[48]

If the decision to divert is a judicial function, then it would require a hearing on questions of fact or of law. These could include standards of eligibility, standards related to the strength of the case against the accused, procedural rights in the defendant's decision to accept diversion, and standards related to content or likely effectiveness of the program. If the judicial component is restricted to review for abuse, and appeal places the burden of action or proof on the defendant, many unfair selection processes may be overlooked. In order to insure an impartial review of each case, the decision probably must originate in the judicial sphere. One commentator has noted the advantages of diversion based on formal criteria and decision:

> Proponents of PTI [Pre-Trial Intervention] programs view them as superior to traditional diversion practices. The low visibility of informal diversion increases the likelihood of decisions that deny due process because they are arbitrary or based on unacceptable criteria and inducements. . .Pretrial intervention seeks to impart some degree of uniformity, predictability, and evenhandedness

to an area of the law where there is perceived to exist an excess of unchecked discretion and unequal application.[49]

In general it can be said that the greater the court's influence or part in the decision to divert, the more protection there is available to the individual. It is also clear that legislative or administrative mandate is necessary to establish a strong role for the court.

Procedural Protections in Juvenile Court Processing

This section examines specific preadjudicatory rights of juveniles in the context of diversion. The potentially available rights include probable cause hearings, the privilege against self-incrimination, expungement of records, and the right to representation by counsel.

Probable Cause Hearing

Probable cause for arrest exists when facts and circumstances within the arresting officer's knowledge are sufficient for a man of reasonable caution to believe that the individual had committed or was committing an offense. The right to a hearing on probable cause for arrest is granted to adults by the Fourth Amendment as interpreted in Gerstein Pugh.[50] The need for this hearing is not based on the possibility of mistake alone, but on the possibility of mistake leading to restraint of liberty.

> Whatever procedure a state may adopt, it must provide a fair and reliable determination of probable cause as a condition for any significant pretrial restraint of liberty, and this determination must be made by a judicial officer either before or promptly after arrest.[51]

The Supreme Court called for informal, nonadversary procedures which would not require counsel, confrontation, or cross-examination. They were to be no more formal than the probable cause standard for arrest requires, since "the Fourth Amendment probable cause determination is in fact only the first stage of an elaborate system, unique in jurisprudence, designed to safeguard the rights of those accused of criminal conduct."[52]

The Court recognized the existence of diversion but did not decide what would be required in that circumstance.

> Because the probable cause determination is not a constitutional prerequisite to the charging decision, it is required only for those suspects who suffer restraints on liberty other than the condition that they appear for trial. There are many kinds of pretrial release and many degrees of conditional liberty. We cannot define specifically those that would require a prior probable cause determination, but the key factor is significant restraint on liberty.[53]

In deciding Gerstein, the Court cited a juvenile case, Cooley v. Stone, which held that custody and detention of a juvenile alleged to be delinquent required a hearing as a constitutional right. The Court's decision in Gerstein reversed a lower court's which also had cited a juvenile case, Brown v. Fauntleroy.[51] Brown had held that even though a juvenile had been released to his mother's custody pending trial he had a constitutional right to a hearing to determine whether the arrest was legal. The difference between Gerstein and Brown is in the purpose of the hearing. In Gerstein the Court ruled that its purpose was to determine justification for pretrial custody only.

> In holding that the prosecutor's assessment of probable cause is not sufficient alone to justify restraint of liberty pending trial, we do not imply that the accused is entitled to judicial oversight or review of the decision to prosecute.[56]

The Court distinguished this type of hearing from a preliminary hearing for the purpose of determining whether the evidence justified charging an individual. The latter sort of hearing is precisely what is envisioned in Brown. "The [Fourth] Amendment [protection against unreasonable seizure] applies to everyone arrested for conduct defined as a crime and for which he remains subject to answer to the law."[57] This protection would be the purpose served by a probable cause hearing before diversion. Without such a hearing, a juvenile who is arrested and diverted, placed in a program which restricts his behavior, on whom records and surveillance are maintained until the end of his participation or longer, and who remains subject to trial throughout this period, is unable to inquire into the sufficiency of the state's case against him. Without such a hearing, legal resolution of the case is delayed with no right to determine that the case would have been brought.[58] A juvenile's decision to accept diversion may depend on a threat of prosecution; some right to determine the truth or falsity of that threat should be available to him.

Privilege Against Self-Incrimination

Diversion may occur instead of arrest, at the point of arrest, at intake into court proceedings, or during the pretrial period. At any of these times the juvenile may make incriminating statements or be encouraged to make them. If these can be used in court, a high standard of scrutiny as to their admissibility is required, especially for juveniles.[59] In Schneckloth v. Bustamonte[60] the Supreme Court listed

factors to be used in determining admissibility of a confession in court. These included the age, educational attainment, and intelligence level of the accused; whether he was advised of his rights; and the circumstances of the interrogation.

> In all of these cases, the Court determined the factual circumstances surrounding the confession, assessed the psychological impact on the abused, and evaluated the legal significance of how the accused reacted.[61]

A confession cannot be used in court unless it was given voluntarily.

The issue in discussing confessions is what standard of voluntariness should apply. In Schneckloth, the Court distinguished two standards: 1) a voluntariness that consists only in an absence of coercion, and 2) a voluntariness that requires knowledge of rights possessed and knowledge of the consequences of waiving those rights. The second standard was advocated in Schneckloth.

> The guarantees afforded a criminal defendant at trial also protect him at certain stages before the actual trial, and any alleged waiver must meet the strict standard of an intentional relinquishment of a "known" right. . .The "trial" guarantees that have been applied to the "pretrial" stage of the criminal process are similarly designed to protect the fairness of the trial itself.[62]

The standard has been applied directly to juvenile proceedings.

> While Gault deals with the adjudicatory stage of juvenile proceedings, the court's broad language concerning a juvenile's privilege against self-incrimination can be applied to the preadjudicatory, investigation stage. . .We conclude that the constitutional privilege against self-incrimination is applicable in the case of juveniles as it is with respect to adults.[63]

The state's burden in showing that a waiver of rights is genuine has been held to be greater for juveniles than for adults.

> Although a confession is not inadmissible merely because the person making it is a minor. . .to be admissible it must have been voluntary, and the age of the person confessing is an additional factor to be considered in determining voluntariness. The fact that the present proceeding is not an ordinary criminal prosecution but is a juvenile proceeding. . .does not lessen but should actually increase the burden upon the state to see the child's rights were protected.[64]

Confessions made in the course of diversion should be subject to the same "waiver of known rights" test of voluntariness as any confession which can reach the court.

The law on confessions is complicated in its application to diversion by the fact that sometimes eligibility for diversion requires that the juvenile admit guilt or admit to the facts in the delinquency petition. If the admission can be used in court, it is the same as a plea of guilty. The standard of voluntariness for a plea of guilty was decided in Boykin v. Alabama.[65]

> A plea of guilty is more than a confession which admits that the accused did various acts; it is itself a conviction; nothing remains but to give judgment and determine punishment. . .The requirement that the prosecution spread on the record the prerequisites of a valid waiver is no constitutional innovation. . .ignorance, incomprehension, coercion, terror, inducements, subtle or blatant threats might be a perfect cover-up of unconstitutionality.[66]

A plea must be made knowingly, intelligently, and voluntarily. Counsel must be available. The court must leave a record of investigation into the voluntariness of the plea. These requirements have been applied in juvenile court.

> . . .because an admission in a juvenile proceeding operates as a waiver of the constitutional rights of cross-examination, confrontation, and freedom from self-incrimination inherent in the right to a trial, we hold it is equivalent to a plea of guilty, and, consequently, that due process requires that the record clearly reflect that the juvenile was adequately advised of the consequences of his admission.[67]

A plea cannot be considered voluntary unless it is an "intentional relinquishment of a known right."[68] Courts have directed inquiry into the voluntariness of an admission at the circumstances of the case, the age, education and intelligence of the child,[69] and whether there was effective representation by counsel[70] and admonishment by the court.[71] The existence of a plea-bargain has been held an important element in whether a juvenile's admission can be considered voluntary.[72] Diversion in return for a formal admission of guilt would be a plea-bargain.

Whether required for eligibility or only recorded, if a juvenile's confession or admission of his offense can reach court, it carries with it a strict set of requirements for examination and protection. Especially where prosecution and defense of the case may be delayed for a long time, as in diversion, it is important to surround incriminating statements with constitutional safeguards.

Where incriminating statements are not used in court, they probably do not call for this level of protection: this is a clear conclusion in three cases involving confessions at intake. In J. I. v. State[73] a juvenile made a statement at a preliminary conference on the promise that it would not be used. This was not held sufficient reason to dismiss the petition only because the court record showed that the promise had in fact been honored. In re H.[74] concluded that intake was not a critical stage of proceedings needing protection. In so concluding, the court relied on the statutory inadmissibility of confessions made at intake. In re S.[75] cited McKeiver's prohibition against disturbing the informality of juvenile procedure to reach the

same result. This case also relied on the statutory exclusion of confessions made at intake.

Confessions and admissions which will not be, or cannot be, used in court are not considered to need safeguards. Incriminating statements made in the course of diversion which are excluded from court will probably not be protected. If records can be kept of these statements, however, they can be used to increase a sentence for a later offense.[76] Incriminating statements which can be used in any way to deprive a juvenile of liberty call for strict scrutiny of whether they were voluntary.

Expungement of Records

Diversion programs often keep records of the juvenile's selection, involvement, and progress. These records may include the fact of arrest, the circumstances of the decision to divert, indications of guilt of the charged offense or other offenses, reports of social investigations and treatment, and the outcome of the juvenile's participation in the program. The question discussed here is whether the juvenile's record should be cleared after diversion.

Cases brought for the purpose of obtaining an order of expungement of arrest records have argued that their existence may be harmful to the juvenile.

> In accordance with the principles of fundamental fairness implicit in our institutions of juvenile justice, it is my best judgment that information relating to arrests not leading to the conviction of a juvenile may not be released under any circumstances to prospective employers or nonrehabilitative educational institutions. . .[77]

When the juvenile is not adjudicated delinquent, public access to the record is unjustified.

Courts have also recognized a possible benefit to the public in keeping records.

> . . .when an arrest fails to terminate with an adjudication for reasons other than complete innocence, expunction might be inappropriate.[78]

> One of the facts which the court should have available is the prior involvement of the juvenile with alleged acts of violation of the law. That proof comes from the arrest record. . .Without it the court is denied information which could have a substantial influence on its effort--not to punish, but to aid and rehabilitate the offender. The compelling interest of the state in the availability of arrest records of juveniles is perfectly obvious.[79]

> We believe. . .that the retention of the records of even the innocent juvenile serves certain salutary purposes. . .A legitimate and substantial interest supports the policy of permitting juvenile court personnel to retain information about a juvenile's detention even when such detention does not result in a wardship proceeding. In such a case the retention of the record of detention still rests upon a rehabilitative purpose. . .the detention record will assist the court's personnel in assessing any later conduct by the juvenile. A single incident may not reveal a pattern of behavior which would require action by the juvenile court.[80]

Thus, whether the juvenile was guilty, presumed innocent, or innocent, courts have been able to find a reason to retain records. Aside from the uses noted in the opinion above, courts have allowed arrest records to be used by courts in sentencing for later offenses[81] and by police in planning surveillance.

Since a great proportion of juveniles arrested are released, one court has argued that release is not necessarily an indicator of probable innocence.[82] Where a juvenile is not released as innocent, the court is within its discretion to weigh the benefits to the public from maintaining the arrest record.

Cases that allow the record to be kept rely upon confidentiality. T.N.G. v. Superior Court[83] distinguished between assuring confidentiality by avoiding disclosure of having been arrested and assuring confidentiality by having the record sealed. The court allowed the first remedy since the arrest had been justified by further proceedings; it denied the second on the ground that juvenile records must be kept confidential by statute anyway. St. Louis v. Drolet,[84] however, concluded that confidentiality was not assured simply because a statute required it.

> The State contends that there is no need for the remedy granted in the instant case due to the fact that juvenile records are statutorily required to be kept confidential. . .The above provisions do not, however, serve as a guarantee that a minor's identification records will not be disseminated. . .Also, there is always a possibility that the confidentiality provisions of the Juvenile Court Act will either be circumvented or abused.[85]

At least one case has documented that confidentiality is not officially assured by a statute:

> ". . .we further hold that upon remand the court may properly consider defendant's prior juvenile record. . .in the aggravation and mitigation hearing [on criminal sentence]."[86]

A juvenile who has been diverted without an admission of guilt is still presumed innocent. Upon satisfactory termination from a diversion program, he is released from further processing still presumed innocent. Moreover, he has been given some kind of corrective or rehabilitative treatment in the program. Although he has completed a rehabilitation program the initiating arrest may never have been justified. The potential harm from maintaining records is clear.

> The prejudice and hardship resulting from these records has been well documented. The records may prevent, hinder, or delay the consideration of the arrested person for employment referred by employment agencies, acceptance into colleges and apprenticeship programs, public housing, the armed forces, and obtaining a license. These records may also be used to determine whether to make a subsequent arrest, to deny release prior to trial or an appeal and to determine sentence.[87]

A special public interest may be found in maintaining records on diverted juveniles. If records of prior diversions were available, the number allowed any one individual could be limited. This might then make the program available to more juveniles. Also, if records of prior diversions were available, the results of the program would be obvious. This then could insure against a juvenile's repeating an ineffective experience.

Representation by Counsel

The right to representation by counsel in a proceeding which may result in loss of freedom was guaranteed to juveniles by Gault.[88] Gault was careful to restrict the holding to the adjudicatory hearing, but most courts have expanded the ruling to cover critical stages in the preadjudicatory period.

> The law requires that an accused juvenile and his parents be advised of his right to the assistance of counsel and of his right to remain silent at every stage of the proceedings.[89]

> . . .the same rights now afforded ordinary citizens throughout all "critical" stages of the criminal process must be afforded to children in any particular stage of a juvenile delinquency process if the results of any particular stage can have a direct effect on the final determination and the final determination may result in a restraint on a child's freedom. For example, if the result of the adjudicatory stage of a delinquency proceeding can be made a foregone conclusion by the results of an earlier stage, then proper protection at the earlier stage is crucial. Of prime importance in determining whether a stage is "critical" is whether information to be elicited from one at that stage will be used or is sought to be used against him at the adjudicatory stage.[90]

A critical stage must have some direct relation to loss of liberty to require adversary procedure.

In re Appeal No. 544[91] lists preadjudicatory procedures in which juveniles are entitled to counsel: signing answers to delinquency petitions, waiver of representation by counsel, waiver of other rights associated with a hearing, signing a confession, admission to the petition, consenting to a finding of delinquency, and agreeing to sentence. All of these actions are actions which might be required of the juvenile in order to be diverted. Any of them which might be used to circumvent full adjudicatory proceedings would require representation by counsel. If a juvenile's statements could be used against him, counsel would be required.

> . . .a juvenile's statement or confession cannot be used against him at a subsequent trial or hearing unless both he and his parents or guardian were informed of his rights to an attorney, and to remain silent.[92]

If an admission or guilty plea were required for eligibility for diversion and could reach the court, counsel would be required.[93]

If the juvenile has procedural rights in the diversion decision he may need to be represented by counsel to assert those rights. If a right to a probable cause hearing were granted prior to diversion, counsel would be required.

> A delinquency respondent has the same basic rights in a probable cause hearing as an adult alleged offender does in a preliminary examination, i.e., to cross-examine government witnesses and introduce evidence on his own behalf on the question of probable cause.[94]

Counsel could also protect against detrimental retention of records.[95] The presence of counsel would be seen as ensuring regularity of the procedure. For instance, in one case,[96] a plea-bargain had led to a confession and recommended diversion of the juvenile, which was then

rejected by the trial judge. The court on appeal decided that the confession had been voluntary because the juvenile had been continuously represented by counsel.

Where proceedings cannot result in commitment of the juvenile, courts have not seen a need for representation. In re Walker[97] ruled that since a statute prohibited incarcerating juveniles on the charge of being "undisciplined," a hearing on that issue did not require representation. Similarly, New York courts[98] have examined the right to counsel at an informal intake conference, a preliminary procedure created for the purpose of dismissing cases wherever possible. The courts ruled counsel unnecessary because the juvenile could be deprived of liberty only after a complete judicial proceeding.

Thus the right to counsel has been granted to juveniles at preadjudicatory stages for the purpose of defending against the coercive power of the state. Diversion programs are not generally considered an exercise of coercive power by the state. Yet they may restrict the freedom of juveniles who would otherwise be free of restraint and they may make future restrictions more likely. If the juvenile is faced with making a choice between entering a program and formal court processing, he may be induced to waive rights or to make a bargain in order to be eligible for the program. Counsel should be available to him to advise him of his rights and the possible consequences of diversion.

Conclusion

Diversion from juvenile justice processing raises important questions of fairness. Selection for diversion may be arbitrary or biased;

solicitation for participation may include a false threat; procedural rights may be overlooked or ignored; eligibility requirements may violate due process; long-term effects may be destructive of the juvenile's return to society. It is important for those law-makers, policy-makers, and citizens who are involved in the field of juvenile justice to be aware both of what protections are needed in diversion and of how they can be made available.

Cases involving diversion of adults show a significant controversy in the law on diversion. One approach to diversion is that it is totally within the prosecutor's discretionary decision as to whether to bring charges against a defendant. This theory perceives diversion as having no more legal consequence than release from prosecution. The other approach to diversion is that it involves factors that can only properly be decided by a judge. This theory perceives diversion as a temporary disposition, after the charging decision, which may eventually result in release from prosecution. Proponents of the latter view argue that the prosecutor's decision needs supervision: because he may divert defendants he would not have prosecuted; because he may prosecute defendants he should have diverted; and because in reality the decision may have after-effects.

A review of cases involving diversion suggests that where no rules exist to the contrary the prosecutor's discretion theory of diversion tends to govern. Where rules exist but are not explicitly to the contrary, the prosecutor's discretion theory at least influences the court's perception of what issues can be raised on appeal. Only where rules

explicitly require court action in diversion decisions will courts dispense with prosecutor's discretion. Thus in order to ensure that full protections and review are available to individuals in diversion processing, the decision probably must be a judicial function.

The diversion cases discussed deal with the question of who should make the diversion decision. These opinions are based on precedent, on rules, and on a theory of what kinds of factors go into the decision. The basic question involved is not discussed in the cases: the question of how much coercion is actually applied in diversion and how the answer to that should influence the perceived need for protections. The amount of social control applied can range from voluntary acceptance of a referral with no consequences to placement in an alternative treatment program with custodial features. The best solution may be to create categories of degree of restraint on liberty based on the practical facts of the programs available. Minor restraints could be tolerated without review of the prosecutor's discretion; greater restraints should require some kind of judicial proceeding. The latter could be further divided into those requiring judicial review of administrative decision, those requiring pretrial judicial decision, and those requiring the full protection of a trial. The greater the restraints found in the program, the more similar it is to a disposition and the more a judicial decision should be required.

The same type of answer might be applied to the other basic question in diversion: what factors enter into the defendant's decision to accept diversion and what are the relative weights on those factors. The

more the conditions of the decision make it likely that the defendant will accept diversion uncritically, the more important safeguards are. The defendant's decision might be weighted in favor of acceptance of the diversion offer if his perception of the potential result of prosecution were much more severe, if he were not sufficiently informed of the conditions of the program, or if he were not sufficiently informed of his chances for avoiding conviction. The greater the inducement to choose diversion the more the decision should require legal advice and judicial review.

If the full protections of a court proceeding are not available in diversion of juveniles, what specific protections can be applied? Under the theory of diversion as essentially a dispositional alternative (a judicial decision), some ability to determine that a case would have been brought would be desirable. Under the theory of diversion as within prosecutor's discretion, some right to distinguish the case from a case that would not have been brought should exist. Under both theories, then, a probable cause hearing should be held before a diversion decision is made.

Under the prosecutor's discretion theory of diversion, the lasting effects of a prosecution cannot be allowed. Thus records of diversion may be kept because arrest records can be kept; admissions and confessions, however, should be ignored. Under the judicial decision theory of diversion, lasting effects must be monitored and protected. The analogy to disposition cannot override the fact that this is a preadjudicatory proceeding. Records are no more than arrest records,

even after the diversion hearing. Admissions and confessions made during diversion processing can reach the trial court only if protected and voluntary.

The degree-of-restraint standard outlined above might also be applied to these specific protections. Where there are more restraints involved in the diversion program, legal advice, protection against self-incrimination, and the procedural protection of a hearing on the validity of the arrest should be afforded to the defendant. Where the defendant's decision is heavily weighted in favor of accepting diversion, a probable cause hearing should be allowed at least on request. To establish this procedure, counsel should be provided. Counsel probably should be required to advise defendants in their consideration of all but the most voluntary and minimally restraining restrictive programs.

McKeiver required balancing the need for due process protection against the benefits of informal processing. In the absence of clear knowledge of the benefits to be derived from informal processing, perhaps its opposite should continue to rule: the greater the damage that can be done, the more formal and adversary procedures should be required. This is the basis for the degree-of-restraint standard suggested. A sliding scale of protections required for given amounts of restraints applied to juveniles should allow informal processing to benefit those it does not harm. Diversion of juveniles into voluntary or minimally restrictive programs could be done under the doctrine of prosecutorial discretion (instead of intake, for instance); diversion

into longer-term programs involving greater state supervision should require: proof that the offender would have undergone court proceedings, the protections that would have been offered in court proceedings, and a pretrial court proceeding to protect those rights.

FOOTNOTES

1. President's Commission on Law Enforcement and Administration of Justice, Task Force Report: Juvenile Delinquency and Youth Crime. (Washington, D.C.: U.S. Government Printing Office, 1967), p. X.

2. This question has since been clearly answered in the negative by Breed v. Jones 421 U.S. 519 (1975), which held that a juvenile was not in jeopardy until adjudication. Also see State in Interest of J.J., 334 A.2d 80 (1975) which held a formal hearing following an informal hearing which had resulted in probation not to be in violation.

3. Nora Klapmuts, "Diversion from the Justice System," Crime and Delinquency Literature, Volume (March 1974), p. 129. Other writers on the subject have questioned: whether diversion from juvenile court is in fact a new procedure (see Paul Nejelski, "Diversion: The Promise and the Danger," Crime and Delinquency, Volume 22, No. 4 (October 1976) p. 394); whether the clientele has in fact changed (see "Pre-trial Diversion: The Threat of Expanding Social Control," Harvard Civil Rights-Civil Liberties Law Review, V. 10 (1975), p. 182); and whether the outcome is in fact different (see "Pre-trial Diversion From the Criminal Process," Yale Law Journal, V. 83 (1974), p. 847-8). In general, see Kenneth Culp Davis, Discretionary Justice, (1969) p. 170: "The power to be lenient is the power to discriminate."

4. 403 U.S. 528 (1970).

5. 403 U.S. 545, 1.

6. 403 U.S. 545, 2.

7. Task Force Report 9, cited at 403 U.S. 546, 3. 6.

8. People v. District Court, 527 P. 2d 50, 52 (Colorado, 1974).

9. Thompson v. State, 212 N.W. 2d 109, 112 (Wisconsin, 1973).

10. Juvenile court decisions have also relied on prosecutorial discretion. See for example, Moore v. State, 180 N.W. 2d 917 (Nebraska, 1970).

11. See for example U.S. v. Falk, 472 F. 2d 1101 (7th Cir., 1972).

12. 212 N.W. 2d 109 (Wisconsin, 1973).

13. Id., at 112, emphases added.

14. Id., at 112.

15. Morse v. Municipal Court, 118 Cal. Rptr. 14, 19, n.6. (1974) Morse was joined on appeal by the Public Defenders of the state as amicus curiae, because of their fear of "a vast loophole in the exclusionary rule." Id., at 17.

16. Id.,

17. Id., at 19.

18. Id., at 19.

19. 354 A. 2d 510 (D.C. Ct. App. 1976). The program described was for adult, nonviolent, first offender misdemeanants. This case was cited in a juvenile case, In re I.Q.S.' Welfare, 244 N.W. 2d 30 (Minnesota, 1976).

20. Id., at 514.

21. Scott v. U.S., 419 F. 2d 264 (D.C. Cir., 1969).

22. Blackledge v. Perry, 417 U.S. 21 (1974). Bordenkircher v. Hayes, 46 Law Week 4089, January 18, 1978.

23. 362 A. 2d 726 (D.C. Ct. App. 1976). The program in this case was operated by the U.S. Attorney's Office for defendants accused of nonviolent misdemeanors.

24. 527 P. 2d 50 (Colo., 1974). In contrast, the California Supreme Court held that the availability of appeal was dependent on the existence of an adequate record of reasons for denial. Sledge v. Superior Court, 113 Cal. Rptr. 28 (1974). The California diversion procedure is a court proceeding by statute.

25. The most famous case is Kent v. U.S., 383 U.S. 541 (1966). Also see, for a long discussion, In re I.Q.S. ' Welfare, 244 N.W. 2d 30 (Minnesota, 1976).

26. E.g., U.S. v. Bland, 472 F. 2d 1329 (1973).

27. In re Charles C., 371 N.Y.S. 2d 582 (1975). In this case the word "diversion" is used to mean diversion out of the process.

28. Id., at 585.

29. E.g., Oyler v. Boles, 368 U.S. 448; U.S. v. Cox, 342 F. 2d 167; Hutcherson v. U.S., 345 F. 2d 969; Newman v. U.S., 382 F. 2d 479.

30. Sledge v. Superior Court, 113 Cal. Rptr. 28 (1974).

31. People v. Superior Court (On Tai Ho), 113 Cal. Rptr. 21 (1974).

32. Id., at 26.

33. People v. Tenorio, 89 Cal. Rptr 249 (1970), holding that the court can stike prior convictions; Esteybar v. Municipal Ct., 95 Cal. Rptr. 524 (1971), holding that the court can decide whether to try a defendant on felony or misdemeanor charges; People v. Navarro, 102 Cal. Rptr. 137 (1972), holding that the court can civilly commit a defendant to a narcotics program; People v. Clay, 96 Cal. Rptr. 213 (1972),

33. holding that the court can grant probation. The last two cases are close to diversionary decisions and are not prescribed by statute. The court in On Tai Ho recognized the similarity: "diversion may be viewed as a specialized form of probation." 113 Cal. Rptr. 21, 21, (1974).

34. The court has reiterated this theory in several later opinions. ". . .requiring the consent of the prosecutor before a trial court may order diversion violates the constitutional doctrine of separation of powers." Shuford v. Superior Court, 114 Cal. Rptr. 600, 601 (1974). Also see Scott v. Municipal Court, 523 P. 2d 640 (California, 1974). "certain statutes which, because they require participation by the prosecutor in judicial acts, have to that extent been found unconstitutional. The decisions have uniformly struck down as violative of the constitutional doctrine of separation of powers, provisions in statutes which require consent of the prosecutor for a court to exercise judicial powers. People v. Adams, 117 Cal. Rptr. 905, 911 (1975). Also see State v. Park, 525 P. 2d 586 (Hawaii, 1974); People v. Phillips, 362 N.E. 2d 1037 (Illinois, 1977).

35. Commonwealth v. Kindness, 371 A. 2d 1346 (1977). This program is based on court procedural rules.

36. Commonwealth v. Kindness, supra, at 1349.

37. Id., at 1349.

38. Id., at 1348-9, n.3.

39. Id., at 1355.

40. State v. Leonardis (I), 363 A. 2d 321 (N.J., 1976).

41. Id., at 340.

42. Id., at 338.

43. Id., at 334.

44. Id., at 340-341.

45. State v. Leonardis (II), 375 A. 2d 607 (N.J., 1977).

46. State v. Leonardis (II), supra, at 619, n. 12.

47. Id., at 618.

48. Cited in State v. Leonardis (I), 363 A. 2d 321, 336.

49. Note, "Pretrial Intervention Programs," 28 Rutgers Law Review 1203, 1206-7 (1975).

50. 420 U.S. 103 (1974).

51. Id., at 124-125 (notes omitted).

52. Id., at 125, note 27.

53. Id., at 125, note 26.

54. 414 F. 2d, 1213 (U.S. App. D.C., 1969). Also see Moss v. Weaver, 525 F. 2d 1258 (C.A. Fla., 1976).

55. 442 F. 2d 838 (D.C. Cir., 1971).

56. Id., at 118-119.

57. Brown Fauntleroy at 841 (note omitted). Brown was apparently the leading case requiring a constitutional right to probable cause determination before Gerstein. Cox v. Turley cites Brown:

> The fact that a juvenile who was arrested was not deprived of his freedom but was left in the custody of his mother did not remove him from the protection of the Fourth Amendment, and he was entitled to a hearing to determine if there was probable cause to hold him for trial. The right to be free of a seizure of one's person made without probable cuase does not depend on the character of the subsequent custody. 506 F. 2d 1347, 1353 (6th Cir., 1974).

See also Black Bonnet v. State of South Dakota, 357 F. Supp. 889 (1973); Mayer v. Moeykens, 494 F. 2d 855 (2d Cir., 1974) cert. den. 94 S. Ct. 2633 (1974). But see M.A.P. v. Ryan, 285 A. 2d 310 (D.C. Ct. App., 1971): after a lengthy history of jurisdictional changes such that this court concluded it was not bound by Brown, it disagreed: "We have looked elsewhere and find that the overwhelming weight of authority, both federal and state, is such that there is no constitutional right to a probable cause hearing." Id., at 313 (note omitted). This ruling, however, was made prior to Gerstein. The Brown reasoning has also been applied to mental commitments. In one such case, the due process requirements for probable cause hearing were set forth as notice, retained or appointed counsel, adversary procedures, and a judicial decision. Lynch v. Baxley, 386 F. Supp. 378 (M.D. Ala., 1974). See also In re Barnard, 455 F. 2d 1370 (D.C. Cir., 1971).

58. A New York case suggests a reason why a probable cause hearing has not been considered necessary for this purpose up to now:

> The reason, without doubt, that no critical constitutional issue has ever developed with respect to adult criminal proceedings is that in this state, and just about everywhere else in the country, statutes mandate either a preliminary hearing or action by a grand jury, shortly after arrest to establish probable cause, or even more, a prima facie case for holding an adult for full trial. Moreover, the speedy trial provisions of statute or constitution prevent undue delays thereafter.

55. People ex rel Guggenheim v. Mucci, 344 N.Y.S. 2d 944, 946 (1973). This was a juvenile case decided before Gerstein which cited Brown but did not reach the constitutional issue because statute required a speedy hearing.

59. Gallegos v. Colorado, 370 U.S. 49 (1962).

60. . . .the court has assessed the totality of all the surrounding circumstances--both the characteristics of the accused and the details of the interrogation. Some of the factors taken into account have included the youth of the accused, e.g., Haley v. Ohio, 332 U.S. 596; his lack of education, e.g., Payne v. Arkansas, 356 U.S. 560; or his low intelligence, e.g., Fikes v. Alabama, 352 U.S. 191; the lack of any advice to the accused of his constitutional rights, e.g., Davis v. North Carolina,, 384 U.S. 737; the length of detention, e.g., Chambers v. Florida, supra; the repeated and prolonged nature of the questioning, e.g., Ashcraft v. Tennessee, 322 U.S. 143; and the use of physical punishment such as the deprivation of food or sleep, e.g., Reck v. Pate, 367 U.S. 433. In all of these cases, the Court determined the factual circumstances surrounding the confession, assessed the psychological impact on the accused, and evaluated the legal significance of how the accused reacted. Schneckloth v. Bustamante, 412 U.S. 218, 227 (1973).

This summary of factors affecting the voluntariness of a confession was held to apply to juveniles in Interest of Thompson. 241 N.W. 2d 2 (Iowa, 1976).

61. Schneckloth, supra at 227.

62. Id., at 238-239.

63. Forest v. State, 455 P. 2d 368, 369-370 (Wash., 1969). Also see In re Creek, 243 A. 2d 49 (D.C. Ct. App., 1968); Leach v. State, 428 S.W. 2d 817 (Tex. Civ. App., 1968); In re R.A.H., 314 A. 2d 133 (D.C. App., 1974).

64. In re Meyers, 214 S.E. 2d, 268, 270 (N.C., 1975). Also see Shioutakon v. D.C. , 236 F. 2d 666 (U.S. App. D.C., 1956); McBride v. Jacobs, 247 F. 2d 595 (U.S. App. D.C., 1957); U.S. ex rel. B. v. Shelly, 430 F. 2d 215 (2nd Cir., 1970); Matter of F.D.P., 352 A. 2d 378 (D.C. App., 1976).

65. 395 U.S. 238 (1969). Boykin has been held applicable to juvenile proceedings in People v. McAnal, 554 P. 2d 1100 (Colo., 1976); Matter of Chavis, 230 S.E. 2d 198 (N.C. App., 1976): Matter of Johnson, 232 S.E. 2nd 486 (N.C. App., 1977); In Interest of Burke, 347 N.E. 2d 23 (1976); In re Appeal No. 544, 322 A. 2d 680 (Md. App., 1975).

66. Boykin, supra, at 242-243.

67. In Interest of Chatman, 343 N.E. 2d 569 (Ill. App., 1976). Cf. In Interest of Beasley, 342 N.E. 2d 803 (Ill. App., 1976), in which the court found that greater discretion in the juvenile dispositional hearing made protection of admission of guilt unnecessary. The court held that this hearing was a separate fact finding proceeding in which sentencing must be found to be in the best interest of the child, a sort of trial de novo, making sentencing a decision not based on guilt. The Chatman court did not find this case when deciding that the question presented was new to Illinois, but unquestionably reversed its decision as have cases in other states.

68. Boykin, at 243. Interest of Chatman, at 571.

69. E.g., In re Mellott, 217 S.E. 2d 745 (1975); M.K.H. v. State 218 S.E. 2d 284 (1975); State in Interest of Holifield, 319 So. 2d 471 (La. App., 1975); Interest of Stiff, 336 N.E. 2d 619 (1975).

70. Most cases require either counsel or other advisor or valid waiver of counsel: R.L.R. v. State, 487 P. 2d 27 (Alaska, 1971); In re Appeal No. 544, 332 A. 2d 680 (Md. App., 1975).

71. E.g., Matter of F.D.P., 352 A. 2d 378 (D.C. App., 1976); Matter of Joseph G., 383 N.Y.S. 2d 85 (1976); In re M.. 96 Cal. Rptr. 887 (1970).

72. State ex rel. Juv. Dept. of Coos County v. Welch, 507 P. 2d 401 (Or. App., 1973). Also see In Interest of Sturdivant, 358 N.E. 2d 80 (Ill. App., 1976), where a juvenile had pled on the promise of a specific program and the promise was not kept, the appellate court remanded for performance of the promise or the opportunity to withdraw the guilty plea.

73. 268 So. 2d 185 (Fla. App., 1972).

74. 337 N.Y.S. 2d 118 (1972).

75. 341 N.Y.S. 2d 11 (1973).

76. In Interest of Sturdivant, supra, rejected the argument that appeal was mooted because the sentence had already been served, reasoning that the record could be used in sentencing in the future.

77. Monroe v. Tielsch, 525 P. 2d 250, 255-256 (Wash., 1974) from a section of a separate opinion adopted by the majority opinion.

78. S. v. City of New York, 347 N.Y.S. 2d 54,6 (1973).

79. Monroe v. Tielsch, supra, at 251.

80. T.N.G. v. Superior Court, 484 P. 2d 981, 992 (Cal., 1971).

81. This is the only use allowed for prior records of adults. Smith v. U.S. 238 F. 2d 925 (5th Cir., 1956); 96 A.L.R. 2d 768.

82. Monroe v. Tielsch, supra. See In re Wilson, 40 Ill. App. 3d 619 (1976) which held that station adjustments could be considered at the dispositional hearing.

83. T.N.G. v. Superior Court, 484 P. 2d 981 (Cal. 1971).

84. 364 N.E. 2d 61,62 (Ill., 1977).

85. Id., at 62.

86. People v. Powell, 292 N.E. 2d 409, 417 (Ill., 1973) cited in Sturdivant, supra, on the need for a juvenile's record to be cleared.

87. In re J., 353 N.Y.S. 2d 695 (1974).

88. In re Gault, 387 U.S. 1 (1967).

89. Bridges v. State, 299 N.E. 2d 616, 618 (Ind., 1973).

90. Freeman v. Wilcox, 167 S.E. 2d 163, 166 (Ga., 1969).

91. 332 A. 2d 680 (Md. App., 1975).

92. Lewis v. State, 288 N.E. 2d 138, 142 (Ind., 1972). Also see: I. v. State, 268 So. 2d 185 (Fla. App., 1972) in which a broken promise not to bring an incriminating statement to court did not result in dismissal of the petition since investigation of the record showed that the statement had not been used to reach the result; Interest of Thompson, 241 N.W. 2d 2 (Iowa, 1976), in which voluntariness of a confession was held very difficult to find in absence of counsel.

93. In re Appeal No. 544, supra, holding waiver of a juvenile's right to counsel in pleading guilty "only under the standard applicable to waiver of consitutional rights. . ." at 689.

94. Matter of R.D.S., 359 A. 2d 136, 139 (D.C. App., 1976) holding that although the purpose of an adult proceeding is different from the purpose of a probable cause hearing for juveniles, the issues and procedures are the same.

FOOTNOTES (continued)

95. In re J., 353 N.Y.S. 2d 695 (1974).

96. State ex rel. Juv. Dept. of Coos County v. Welch, 507 P. 2d 401 (Or. App., 1973).

97. 191 S.E. 2d 702 (N.C., 1972).

98. In re H., 337 N.Y.S. 2d 118 (1972); In re S., 341 N.Y.S. 2d 11 (1973).

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