ISSUE SPOTTING OVERVIEW IN 602 APPEALS
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ISSUE SPOTTING OVERVIEW IN 602 APPEALS

I. JUVENILE COURT JURISDICTION

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A. Dual Jurisdiction under Welfare and Institutions Code sections 602 and 300?

When a minor qualifies as a dependant and a ward of the juvenile court, the statute mandates that the minor cannot simultaneously be both, unless there is a jointly written protocol for dual jurisdiction. (Welf. & Inst. Code, § 241.1, subd. (d) & (e).) Prior to the 2005 amendment allowing for dual jurisdiction, it was expressly prohibited. (*In re Marcus G.* (1999) 73 Cal.App.4th 1008; *Los Angeles Co. Dep't. of Children & Family Services v. Superior Court (Jaime M.)* (2001) 87 Cal.App.4th 320, 324-326.)

When the issue of potential dual jurisdiction arises, there is a joint assessment procedure to be followed. (1) The probation department and child protective services, shall, pursuant to the developed written protocol, determine which status is appropriate for the minor (Welf. & Inst. Code, § 241.1, subd. (a)); (2) the recommendations of both departments shall be presented to the juvenile court with the later petition that is filed on behalf of the minor that creates the problem for dual jurisdiction (Welf. & Inst. Code, § 241.1, subd. (a); *In re Marcus G.*, *supra*, 73 Cal.App.4th 1008, 1013); (3) the court shall determine what status is appropriate for the minor (Welf. & Inst. Code, § 241.1, subd. (a)); (4) any other juvenile court having jurisdiction over the minor shall receive notice of the recommendations of the departments (Welf. & Inst. Code, § 241.1, subd. (a); see also Cal. Rules of Court, rule 5.512.)

The minor does not have a due process right to a full evidentiary hearing with a right of confrontation or a right to present additional evidence. (*In re Henry S.* (2006) 140 Cal.App.4th 248, 252.)

In *In re Marcus G.*, *supra*, 73 Cal.App.4th 1008, 1012-1013, the court found the juvenile court erred when it terminated a juvenile's dependency status and declared him a ward of the court after denying appellant's request for a joint recommendation from the probation and welfare departments as to which status would serve his interests as required by Welfare and Institutions Code section 241.1. A timely decision is important because it will determine whether the minor will be required to be housed with other dependent children or those who are detained as delinquents. (*Los Angeles Co. Dep't. of Children & Family Services v. Superior Court (Jaime M.)*, *supra*, 87 Cal.App.4th 320, 324-326.)

If the juvenile court relies solely upon information provided by the probation department in denying the minor's request for a referral to the Department of Social Services for a Welfare and Institutions Code section 241.1 assessment, appellate counsel should argue that the case must be reversed and remanded with directions that the juvenile court comply with the requirements of Welfare and Institutions Code section 241.1. Appellate counsel should also obtain assessments from both the county probation department and the county welfare department before determining whether delinquency or dependency status is most appropriate for the minor.

An appellate issue may also arise if the wrong court determines whether the child should be treated as a dependent child or delinquent child. The court in which the later petition is filed (usually the delinquency court) makes that determination. (*In re Marcus G.*, *supra*, 73 Cal.App.4th 1008, 1013.) The juvenile court's section 241.1 determination is properly appealable from the "final judgment" issued at the disposition hearing. (*In re Henry S.*, *supra*, 140 Cal.App.4th at 257.) This should not foreclose consideration of a writ of mandate or prohibition if it would be detrimental to the minor to await the delay of a direct appeal.

The dual jurisdiction provided by section 241.1, subdivision (e) is to ensure a seamless transition from wardship to dependency so that services are not disrupted. This requires a determination that there will be an "on-hold" system or a "lead court/lead agency" system to prevent duplicate management and conflicting orders.

B. Is the Minor Competent to Participate in a Fitness Hearing or Jurisdictional Hearing?

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The trend toward prosecution of younger children has raised concerns about juvenile incompetence to participate in juvenile proceedings. (See Burrell, Kendrick & Blalock, *Incompetent Youth in California Juvenile Justice* (2008) 19 Stan. L. & Policy Rev. 198.) The concern is analogous to whether an adult defendant is competent to assist in his own defense pursuant to Penal Code section 1368, with the additional concern about cognitive immaturity.

The standard for determining competency is whether the person has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and whether he has a rational and factual understanding of the proceedings against him. (*Dusky v. United States* (1960) 362 U.S. 402; *In re Ricky S.* (2008) 166 Cal.App.4th 232, 236.)

In September, 2010, Welfare and Institutions Code section 709 was passed as A.B. 2212. It codifies the two-pronged constitutional standard for competence to stand trial set forth in *Dusky v. United States*, *supra*, 362 U.S. 304 and *Drope v. Missouri* (1975) 420 U.S. 162, 171. If the court finds that substantial evidence raises a doubt as to competence,

the proceedings must be suspended. The court must appoint an expert to evaluate whether the minor suffers from a mental disorder, developmental disability, developmental immaturity, or other condition which impairs the minor's competency. The court must then determine the question of competence at a hearing. This codifies *In re Ricky S., supra,* 166 Cal.App.4th 232, 236.

Timothy J. v. Superior Court (2007) 150 Cal.App.4th 847, 852 held that the issue is not triggered solely by a mental disorder or developmental disability. The consolidated writ proceeding involved two minors, Dante and Timothy. Dante was an 11 year old who after psychological examination was found to have an adjustment disorder, developmental immaturity, and inability to think in abstract terms. As a result of his age, Dante had not reached the developmental stage where he could process information, make sense of it, and develop a preferred decision-making strategy. Timothy was a 12 year old with a learning disability related to attention, visual processing, and cognitive abilities. The records also showed he was not participating in any curriculum or academic classes because of significant learning delays due to his disabilities. Timothy's attorney asked the court to declare a doubt about his competency because Timothy did not appear to understand the gravity of his situation, the potential consequences of his actions, or the function of probation. In both cases, the juvenile court misperceived the burden as one of proving a mental disorder or developmental disability. Unlike adult defendants, a young child's developmental immaturity may result in trial incompetence despite the absence of any underlying mental or developmental abnormality. (*Id.* at p.860.) Writs were granted and the cases remanded for consideration under rule 5.645.

This is in contrast to Penal Code section 26, the determination made at the jurisdictional hearing. The competency inquiry under rule 5.645 is made before the jurisdictional hearing and the question is whether the minor is capable of understanding the proceedings and of cooperating with counsel. While some of the same factors may be relevant to both inquiries, the purpose and focus are different as are the time and procedures for determining them. (*Timothy J., supra,* 150 Cal.App.4th at p. 862.)

Tyrone B. v. Superior Court (2008) 164 Cal.App.4th 227 involved the juvenile court's refusal to consider competence until after there had been a hearing on the People's petition alleging the juvenile's unfitness for treatment by juvenile court under Welfare & Institutions Code section 707, subdivision (b). Because it involves due process and the right to counsel, the analysis of *Timothy J.* was applied to find that the juvenile was entitled to consideration of competency prior to a hearing on fitness. (*Tyrone B., supra,* 164 Cal.App.4th at p. 231-232.)

A post-disposition challenge to the competency finding in *In re Ricky S., supra,* 166 Cal.App.4th 232 resulted in a reversal. This was a case where the court granted a

hearing on competency. An expert's report concluded that he did not meet the legal criteria for being competent to stand trial. Facing allegations of attempted grand theft, attempted robbery and battery, the expert concluded he could not remember the charges against him; he was not able to learn the job of the prosecutor or others in the courtroom; and he did not have the verbal ability to cooperate with counsel in the conduct of a rational defense. His verbal comprehension was in the range of mentally retarded. The opinion he was equivalent to an eight year old in terms of competence resulted in some wrangling about whether it was inappropriate to consider the standard in Penal Code section 26. "[T]he court's statement that 'working with [the minor] over time … will lead him to be able to at least understand on a basic level what he's been accused of and whether he should admit to it or not' flies directly in the face of the second prong of the applicable standard, namely, that the minor 'presently' has a reasonable, factual understanding of the proceedings. In other words, the question is not can the minor become competent in the future with assistance; rather the question is whether he is presently competent, which the court impliedly found he was not." (*Id.*, at p. 236.) The competency finding was vacated and the ensuing jurisdictional findings were reversed.

C. Should Adult Prosecution be Transferred to Juvenile Court?

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Welfare & Institutions Code section 604, subdivision (a) provides that when criminal charges are pending and it is suggested or appears to the judge before whom the person is brought that the person charged was, on the date of the charged offense, under the age of 18 years, the judge shall immediately suspend all proceedings; examine into the age of the person, and, if appropriate, certify the case to the juvenile court. The burden of proving that the defendant was under the age of 18 at the time of the offense rests with the party seeking to establish that the defendant was a minor. (*People v. Quiroz* (2007) 155 Cal.App.4th 1420, 1427.) In *Quiroz*, the defendant was a minor at the time she entered a conspiracy. The court looked to federal cases in which courts have concluded that a defendant charged with conspiracy may be tried as an adult if the defendant participated in the conspiracy as an adult, even if the defendant was a minor when he or she first became involved in the conspiracy. (*Id.*, at pp. 1429-1430.)

D. Proper Transfer to Adult Court?

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Welfare and Institutions Code section 602, subdivision (a) sets forth the general rule that a minor who commits a crime falls within the juvenile court's jurisdiction. However, there are exceptions to this rule by which a minor can be tried in adult criminal court. When a minor has been tried as an adult, appellate counsel should determine if the court actually had jurisdiction.

Before the implementation of Proposition 21, there were two methods for transferring juveniles to adult court. The first permitted prosecutors to file charges in

adult court for crimes that were listed in Welfare and Institutions Code section 602, subdivision (b), if it could be proven that the charged crime was a qualifying crime, that the minor met the age requirement, and that s/he had a prior felony adjudication. The other method required a fitness hearing at which the court could determine whether or not a juvenile was "fit" for juvenile court. In this latter process, the prosecutor had the burden of presenting evidence warranting the transfer, and the minor could rebut the presumption of unfitness and argue for retention in the juvenile court system.

Effective March 7, 2000, Proposition 21 a three-tier system for transfer to adult court. The first tier of the system is known as "direct filing" and is found at Welfare and Institutions Code section 602, subdivision (b). It provides that if a minor is 14 years of age or older, and commits murder or certain enumerated sex offenses where the minor is the actual perpetrator, then s/he must be prosecuted in criminal adult court. The prosecution of juveniles under section 602, subdivision (b) may proceed either by grand jury indictment or by information. (*Guillory v. Superior* Court (2003) 31 Cal.4th 168.) [This is like the previous section 602 transfer method, except there is no longer a requirement that the minor have suffered a prior felony adjudication and now the minimum age for trial as an adult is 14, rather than 16.]

The second tier creates several categories of cases in which the prosecutor has the discretion to file the case in either juvenile or adult court. It is known as "discretionary direct filing" and applies under any of the following circumstances: (1) a minor 16 years of age or older is accused of committing one of the violent or serious offenses enumerated in Welfare and Institutions Code section 707, subdivision (b); (2) a minor 14 years of age or older is accused of committing certain serious offenses under specified circumstances; and (3) a minor 16 years of age or older is accused of committing specified offenses, and the minor previously has been adjudged a ward of the court because of the commission of any felony offense when he or she was 14 years of age or older. (Welf. & Inst. Code, § 707, subds. (d)(1), (2), and (3).)

In circumstances where section 707, subdivision (d) applies, the statute dispenses with a fitness hearing. The prosecutor now can choose to file charges directly in criminal court without a judicial determination of unfitness under the juvenile court law. (*Manduley v. Superior Court* (2002) 27 Cal.4th 537.) Where the prosecutor files directly in adult court, at the preliminary hearing the magistrate must determine whether "reasonable cause exists to believe that the minor comes within the provisions of the statute." (*Id*. at p. 550; Welf. & Inst. Code, § 707, subd. (d)(4).) If reasonable cause is not established, the case must be transferred back to juvenile court. (Welf. & Inst. Code, § 707, subd. (d)(4).)

Under Welfare and Institutions Code section 707, subdivision (d)(1), a minor aged

16 years can be directly prosecuted in adult court without first being found unfit to be dealt with as a juvenile, if he is charged with a crime listed in section 707, subdivision (b). However, if the minor is then convicted of an offense that is not listed in subdivision (b), the minor is subject to disposition under the juvenile court law unless the district attorney demonstrates that the minor is not fit to be dealt with under the juvenile system. In *People v. Villa* (2009) 178 Cal.App.4th 443 following convictions for the non-section 707, subdivision (b) offenses, the court sentenced the minor to state prison. Failure to conduct a fitness hearing pursuant to Penal Code section 1170.17, subdivision (c) was error, but the minor did not demonstrate that the error was prejudicial. He was not able to show that a fitness probation report or fitness hearing would have made any difference, so the error was harmless.

The third tier for transferring a minor to adult criminal court is commonly known as "judicial waiver." Under this transfer scheme, the juvenile court judge is the one who makes the fitness determination. This is essentially the same as the previous "fitness hearing" method, except Proposition 21 lowered the requisite age from 16 to 14. A minor charged with a crime triggering the presumption of unfitness has a statutory and constitutional right to demand a hearing where the prosecutor must establish a prima facie case that the minor committed the alleged offense. This hearing may be consolidated with the fitness hearing itself. Once the prosecutor establishes that the minor committed the charged offense, the burden shifts to the minor to prove by a preponderance of the evidence, that s/he is not unfit for treatment as a juvenile. (*Edsel P. v. Superior Court* (1985) 165 Cal.App.3d 763, 786-787.) Both the prima facie case and the determination of fitness must be based upon competent and relevant evidence. (*Marcus W. v. Superior Court* (2002) 98 Cal.App.4th 36, 45.) If a minor is declared unfit, the prosecutor may file charges in adult court.

A fitness determination finding cannot be challenged on direct appeal, rather it is reviewable only by an extraordinary writ. (Cal. Rules of Court, rule 5.770 (i); *People v. Superior Court (Jones)* (1998) 18 Cal.4th 667, 678.) The writ must be filed no later than 20 days from the first arraignment in adult court. (Cal. Rules of Court, rule 5.770 (i).) A continuance of the arraignment does not affect timeliness as the deadline for seeking extraordinary relief is the actual reading of the charges and entry of a plea. (*Rene C. v. Superior Court* (2006) 138 Cal.App.4th 1, 9.)

People v. Thomas (2005) 35 Cal.4th 635, 643 follows the statutory limit that a minor convicted of certain offenses cannot be committed to the DJJ if they have been "sentenced to incarceration for life, an indeterminate period to life, or a determinate period of years such that the maximum number of years of potential confinement when added to the minor's age would exceed 25 years." (Welf. & Inst. Code, § 1732.6, subd. (a).)

A previous finding of unfitness and an adult conviction does not require an automatic transfer to adult court on a subsequent charge. In *People v. Superior Court (Marcelina M.)* (2005) 133 Cal.App.4th 651, 657, the minor entered a plea to a non 707, subdivision (b) offense and the more serious charge under section 707, subdivision (d) that resulted in a finding of unfitness was dismissed. The failure of the People to sustain a violation that was the sole basis for the direct filing precluded application of section 707.01, subdivisions (a)(5) and (b). Any notion that she was unfit for juvenile proceedings because of the initiation of that earlier adult proceeding was essentially negated by the plea bargain.

E. Inter-County Transfers Go To Index

Inter-county transfer of juvenile cases is governed by Welfare and Institutions Code section 750 and by California Rules of Court, rules 5.610 (transfer out) and 5.612 (transfer in).

If a wardship petition is filed in a county other than that of the minor's residence, or if the person entitled to physical custody of the minor changes residence after a petition is filed, the case may be transferred to the juvenile court of the county where the minor or his/her custodian resides. However, the juvenile court shall not transfer the case unless it determines the transfer is in the child's best interest. Additionally, the transfer may be made only after the court has made factual findings upon which it has exercised jurisdiction over the minor. (*In re Brandon H*. (2002) 99 Cal.App.4th 1153, 1156.)

The receiving court must accept jurisdiction of the case. (Cal. Rules of Ct., rule 5.612 (a)(1).) There is no statutory provision to transfer a case back to the original court or for a shared or dual jurisdiction. If the receiving court disagrees with the transfer of the case because it thinks the juvenile does not reside within the county, the court's remedy is to appeal the order or to hold a transfer-out hearing to send the case to the appropriate county of jurisdiction. (*In re Carlos B.* (1999) 76 Cal.App.4th 50, 55.) The failure to conduct separate transfer-in and transfer-out hearings, and failure to consider at all whether the best interests of the child would be served by the retransfer was found to be plainly erroneous and an abuse of discretion in *In re R.D.* (2008) 163 Cal.App.4th 679, 685.

F. Informal Supervision (Diversion) Rather Than Wardship? Go To Index

The court can order either pre-petition or post-petition informal probation, known as diversion. (Welf. & Inst. Code, §§ 654, 654.2) Welfare and Institutions Code section 654.3 lists the eligibility criteria for both of these forms of diversion.

If the probation officer concludes that the minor is within the juvenile court's jurisdiction or likely soon will be, the officer can delineate a specific program of supervision for the minor for up to six months to try to adjust the situation that brings the minor within the juvenile court's jurisdiction. (Welf. & Inst. Code, § 654; *In re Adam R.* (1997) 57 Cal.App.4th 348.) This is known as pre-petition informal supervision, or diversion.

The discretion to initially determine whether to institute informal supervision against the minor rests with the probation officer and cannot be delegated to the prosecution. (*Charles S. v. Superior Court* (1982) 32 Cal.3d 741, 746.)

Once the minor successfully completes pre-petition diversion, the court has no choice but to dismiss the petition. (*In re Adam R., supra*, 57 Cal.App.4th 348, 352.)

If the probation officer determines informal supervision is not appropriate, the juvenile court should conduct a new hearing on the minor's suitability for post-petition informal supervision and shall exercise its independent discretion in making its decision. (Welf. & Inst. Code, § 654.2; *In re Armondo A.* (1992) 3 Cal.App.4th 1185, 1189-90.)

The court cannot require a minor to admit the truth of the petition before granting informal supervision. (*In re Ricky J.* (2005) 128 Cal.App.4th 783.) When ordering informal supervision, the juvenile court should not even make a true finding on the allegations in the petition. (*In re Omar R.* (2003) 105 Cal.App.4th 1434, 1437-1438.) *In re C.W.* (2007) 153 Cal.App.4th 468, 474 reiterated, for future guidance, that the juvenile court's acceptance of the minor's admission of the charge followed by her placement on informal probation under section 654.2 was improper. While the procedure might result in the court exceeding its jurisdiction, the minor would be estopped from complaining about the irregularity if it resulted in a benefit to the minor and there was no resulting prejudice. Likewise, *Kody P. v. Superior Court* (2006) 137 Cal.App.4th 1030, 1032 resulted in issuance of a writ of mandate after Butte County Probation Department considered Kody suitable to participate in a program of informal supervision but denied him the opportunity to participate in the program based solely on his refusal to admit the offense. Finding an abuse of discretion based on the probation department's policy and the juvenile court's acceptance and endorsement of that policy, the court was ordered to set aside the 602 petition and allow acceptance of informal supervision.

Since informal supervision pursuant to Welfare and Institutions Code section 654.2 is available pre-adjudication only, it is not a viable alternative at a dispositional hearing. (*In re Abdirahman S.* (1997) 58 Cal.App.4th 963, 968.)

An order of informal supervision under Welfare and Institutions Code section 654.2 is not an appealable judgment. (*In re Ricky J., supra*, 128 Cal.App.4th 783.)

G. Deferred Entry of Judgment (DEJ) rather than Wardship? Go To Index

Proposition 21 added a deferred entry of judgment procedure in juvenile court. (DEJ) The procedure is governed by Welfare and Institutions Code section 790, et. seq., and California Rules of Court, rule 5.800. The petition must allege at least one felony offense, and the minor must be found both eligible and suitable for DEJ. (See discussion of eligibility and suitability below.) The minor admits the petition allegations, waives time for entry of judgment, and undergoes probation for 12-36 months. If the minor successfully completes the period, the charges are dismissed and the minor's record is sealed. On the other hand, if the juvenile court is dissatisfied with the minor's performance on probation, it can lift the deferral and schedule a dispositional hearing. (Welf. & Inst. Code, § 793; Cal. Rules of Court, rule 8.500(h).)

An order of DEJ is not an appealable judgment or order after judgment. (*In re Mario C.* (2004) 124 Cal.App.4th 1303, 1307, 1308.) The procedure is a post-petition, preadjudication, program of informal supervision. It places the adjudicatory process on hold and successful completion of the program will avoid a judgment altogether. There is no judgment from which to appeal. (*Ricki J. v. Superior Court* (2005) 128 Cal.App.4th 783, 789.)

The juvenile court may order victim restitution even though the minor has not been declared a ward but is placed on DEJ. (*G.C. v. Superior Court* (2010) 183 Cal.App.4th 371, 377.)

1. Eligibility determination and notice

First, the minor must meet eligibility requirements. A minor who is 14 years or older, whose offense is not a section 707, subdivision (b) offense, has no prior felony adjudications, has not been previously committed to DJJ, has had no probation revocations, and meets the requirements for probation under Penal Code section 1203.06, is eligible for DEJ. (Welf. & Inst. Code, § 793; Cal. Rules of Court, rule 8.500(h).) There have been several cases addressing DEJ eligibility requirements in recent years.

The prosecuting attorney is mandated to review the file to determine eligibility before filing the petition or as soon as possible after the filing. If the prosecuting attorney's review reveals the child is eligible for deferred entry of judgment, the prosecuting attorney must file a Judicial Council Form JV-750, Determination of Eligibility-Juvenile. (Cal. Rules of Court, rule 5.800(b).) The duty of the prosecuting attorney to assess the eligibility of the minor for DEJ and furnish notice with the petition

is mandatory. (*In re Luis B.* (2006) 142 Cal.App.4th 1117, 1123.) The *Luis B.* court found error in the prosecutor's failure to follow the procedure, which then resulted in error in the court failing to conduct the necessary inquiry and exercise discretion. (*Ibid.*)

On the other hand, Welfare and Institution Code section 790, subdivision (b) provides that if the minor is found eligible, the prosecutor "shall file a declaration in writing *or state for the record the grounds upon which the determination is based*..." (Emphasis added.) Thus, under the statute, the notice requirements may be satisfied if the minor is informed of eligibility on the record. That was the result in an unpublished case, *In re B.C.*, F057940, decided 3/25/10.[1]

For purposes of DEJ eligibility, a finding that the minor has violated probation is not the equivalent of a revocation of probation. In *In re T.P.* (2009) 178 Cal.App.4th 1, the minor was declared a ward of the court and placed on formal probation. Thereafter, he admitted violating the terms of probation on two occasions and the court continued him on probation with modifications. A third petition for violation of probation was filed along with the prosecutor's declaration that the minor was ineligible for DEJ because he had previously been placed on probation and it had been revoked. (Welf. & Inst. Code, § 790, subd. (a)(4).) The appellate court agreed with the minor, and the Attorney General conceded, that a finding that minor violated probation, alone, is not the equivalent of actual revocation. (*People v. Coleman* (1975) 13 Cal.3d 867, 895, fn. 22.) Here, because the court did not expressly revoke the minor's probation, the minor was thus eligible for consideration of DEJ.

Juvenile misdemeanants are excluded from DEJ. *In re Spencer* (2009) 176 Cal.App.4th 1315, found the exclusion is not unconstitutional. In terms of the equal protection analysis, the appellate court assumed that juvenile felons and misdemeanants are similarly situated for purposes of the DEJ law. The court then found there is a rational basis in denying the juvenile misdemeanant the DEJ program. The purpose of Proposition 21 was to institute a get-tough approach for serious offenders. Thus, DEJ's benefits are rationally restricted to juvenile felons because of the severe consequences that now would otherwise be applicable to them but not to the misdemeanant. Furthermore, for the juvenile misdemeanant, other statutes are provided for sealing of juvenile records.

A juvenile is excluded from DEJ even if the petition alleged a felony, but the juvenile ultimately admitted a misdemeanor. In *In re R.C.* (2010) 182 Cal.App.4th 1437, the prosecution filed a petition alleging felony vandalism under Penal Code section 594,

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[1] California Rules of Court, rule 8.1115 provides that nonpublished decisions may not be cited or relied on by a court or a party in any other action with certain exceptions. Any reference to unpublished opinions in this article are for issue-spotting purposes only.

but the minor ultimately admitted a misdemeanor under that section and was adjudged a ward of the juvenile court. On appeal, minor contended that the court failed to exercise discretion to determine whether he was eligible for DEJ. The Court of Appeal, looking to the language of the statute and the purposes of the law, concluded that because minor did not admit a felony violation, DEJ procedures were no longer applicable.

In re A.I. (2009) involved a minor who was found DEJ eligible, but who wished to litigate a suppression motion. The parties stipulated that if the motion was denied, he would stipulate to use of the same testimony for the jurisdictional hearing. Following denial of the suppression motion, the minor indicated he wished to accept DEJ, but the prosecutor stated that it was "off the table." There is nothing in the statute requiring the minor to accept DEJ prior to the suppression hearing. Since the jurisdictional hearing had not yet commenced, the DEJ request was timely. The court cautioned that it would be prudent in such cases for counsel and the court to clarify that a stipulation does not equate to commencement of trial.

On the other hand, recent cases have held a minor is no longer eligible for DEJ if the prosecutor provided the required notice and the minor insisted on a jurisdictional hearing to contest the petition. "[T]he DEJ is clearly intended to provide an expedited mechanism for channeling certain first-time offenders away from the full panoply of a contested delinquency proceeding. That goal could not co-exist with a minor who insists on exercising every procedural protection offered." (*In re Usef S*. (2008) 160 Cal.App.4th 276, 286, citing *In re Kenneth J*. (2008) 158 Cal.App.4th 973, 979-980.)

In re T.J. (2010) 185 Cal.App.4th 1504 further held that if a minor elects to contest allegations, he is not eligible for DEJ. And if a minor proceeds to a jurisdictional hearing where the court finds an element that has not been proven, the DEJ scheme does not entitle the minor to DEJ in lieu of the hearing just conducted. Here, the initial petition rendered the minor ineligible for DEJ because the offenses were included in those enumerated in section 707, subdivision (b). Further, because the minor elected to contest the offenses, even if he had been offense-eligible, he was not DEJ eligible since he had not admitted the allegations in lieu of the jurisdictional hearing, as required by section 791, subdivision (a)(3), the notice provision of the DEJ scheme.

In re V.B. (2006) 141 Cal.App.4th 899, involved a minor who was too young to qualify for DEJ at the time he was placed in a deferred entry of judgment program pursuant to a plea bargain. The order was made in excess of the court's jurisdiction because he was age 11 and DEJ required that he be at least 14 years old. When this was discovered at a subsequent review, the court offered to reinstate the petition. When that was rejected, DEJ was vacated, he was placed at home on probation and jurisdiction was terminated. The minor appealed and argued that the court was estopped from terminating

DEJ which foreclosed a dismissal and automatic sealing of the arrest record. The initial order was made in excess of the court's authority and the court was not precluded form taking corrective action to cure the problem.

2. Suitability determination

Once the minor has been deemed statutorily eligible for DEJ, the juvenile court then decides whether to grant DEJ. The court exercises its discretion based upon the standard of whether the minor will derive benefit from the education, treatment, and rehabilitation rather than a more restrictive commitment. (*Martha C. v. Superior Court* (2003) 108 Cal.App.4th 556, 562; *In re Sergio R.* (2003) 106 Cal.App.4th 597, 607.")

There is a strong preference for utilizing DEJ in the case of first-time, non-violent offenders. (*Martha C. v. Superior Court, supra*, 108 Cal.App.4th at p. 561.) The stated reasons for denying DEJ must have to do with the minor's potential for rehabilitation. Thus, for example, it would be improper to deny DEJ in order to "send a message" to other potential juvenile offenders. (*Id*. at p. 562.) Just because the minor meets the statutory criteria for DEJ does not mean the court is required to grant it. The juvenile court has discretion to do so based on the "suitability" factors listed in rule 5.800. *In re Sergio R*. (2003) 106 Cal.App.4th 597, 605, 607.)

In re Damian M. (2010) 185 Cal.App.4th 1 found there is no abuse of discretion in denying DEJ to an otherwise eligible minor if it determines that DEJ is not suitable due to the level of criminal sophistication involved in the offense and the need for more intensive supervision. The minor was arrested at the California/Mexico border, attempting to smuggle 10.1 pounds of marijuana in his car to the U.S. The court denied his request for DEJ, despite the probation officer's recommendation. The trial court based its decision on the level of criminal sophistication involved in the offense. The appellate court affirmed, noting that Welfare and Institutions Code section 791, subdivision (b) empowers the court to grant DEJ to an eligible minor but does not mandate it if the court determines that the minor will not benefit from the less restrictive treatment provided under DEJ. Here, the judge weighed all the factors and reasonably concluded that the minor had engaged in sophisticated organized criminal activity that required more intensive treatment than that offered through DEJ.

H. Indian Child Welfare Act Go To Index

R.R. v. Superior Court (2009) 180 Cal.App.4th 185 broke new ground by holding that the Indian Child Welfare Act (ICWA), 25 U.S.C. § 1901 et seq., applies to juvenile delinquency proceedings where the minor is at risk of entering foster care or already in foster care. Petitioner, an Indian child made a court ward in a section 602 proceeding, was the subject of a petition to revoke probation. Petitioner contested the Sacramento County Superior Court's standing order finding that California law does not require the application of ICWA to 602 proceedings if the case plan does not involve the termination of parental rights. The Court of Appeal issued a writ of mandate finding that the order is inconsistent with California law. The court recognized that most juvenile delinquency proceedings are not covered under the federal ICWA because it has an exception for placements based on an act which would be deemed a crime if committed by an adult. However, under California law, specifically Welfare and Institutions Code section 224.3 and California Rules of Court, rules 5.481-5.484, delinquency proceedings do require ICWA compliance if the minor is at risk of being removed from the home and placed in foster care. The plain language of both the statute and the rules require this. Further, the federal statute does not preempt this requirement under California law because the former says it establishes minimum standards, and the latter simply gives more protections to Indian children and tribes and does not take away any rights under the federal law.

However, another case concluded the opposite of *R.R. v. Superior Court*, *supra*, 180 Cal.App.4th 899. *In re W.B.* (2010) formerly at 182 Cal.App.4th 126, held that any state law applying ICWA to delinquency cases is preempted by federal law. But the Supreme Court granted review on May 12, 2010 (S181638). The issue presented on review in *In re W.B.* is: Is Welfare and Institutions Code section 224.3, which requires tribal notification under the Indian Child Welfare Act (25 U.S.C. § 1901 et seq.) of a juvenile delinquency proceeding (Welf. & Inst. Code, § 602) when a juvenile is charged with an act that would be a crime if committed by an adult, preempted because it expands jurisdiction to proceedings expressly excluded from the Act?

I. Loss of Jurisdiction upon Dismissal of Petition Go To Index

A "nunc pro tunc" order cannot revive a dismissed petition. A finding that continued jurisdiction over a minor is no longer necessary extends to an earlier filed petition under the same case number. In a situation where two or more section 602 juvenile petitions charging a minor with criminal misconduct are filed under the same superior court case number, an order terminating jurisdiction issued by the judicial officer presiding over proceedings on two petitions requires proceedings on the other petition to cease. (*In re Kasaundra D*. (2004) 121 Cal.App.4th 533, 535.)

II. THE JURISDICTIONAL HEARING

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A. Did the court find that the minor knew the wrongfulness of his/her act?

Children under age 14 are not capable of committing the crime "in the absence of clear proof that at the time of committing the act charged against them, they knew of its wrongfulness." (Pen. Code, § 26.) The standard of proof for this capacity determination is "clear and convincing evidence" rather than "proof beyond a reasonable doubt." (*In re Manuel L.* (1994) 7 Cal.4th 229, 234.)

In determining whether the minor knew of the act's wrongfulness, the court must consider the child's age, experience, and understanding. Further, the minor's knowledge of the wrongfulness of the act may be inferred from the circumstances, such as the method of its commission or its concealment. (*In re Marven C.* (1995) 33 Cal.App.4th 482, 487; *In re James B.* (2003) 109 Cal.App.4th 862.) The standard of review for the determination that a minor understood the wrongfulness of his conduct is the substantial evidence test. (*In re Paul C.* (1990) 221 Cal.App.3d 43, 52.) Appellate review will consider the whole record in the light most favorable to the judgment and affirm the trial court's findings that the minor understood the wrongfulness of his conduct if they are supported by "substantial evidence – that is, evidence that is reasonable, credible, and of solid value – from which a reasonable trier of fact could have made the requisite finding under the governing standard of proof." (*In re James B., supra,* 109 Cal.App.4th at 872.) A capacity issue is especially compelling where a child less than 14 years of age is alleged to have committed a sex offense. (*In re Paul C., supra,* 221 Cal.App.3d 43.)

Note, there are no statutory restrictions on presenting psychiatric testimony on the issue of showing whether the child knew of the act's wrongfulness. (Pen. Code, § 21, subd. (b).)

B. Issues to look at when the minor admits petition allegations.

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1. Did the court follow the correct procedure?

A minor "admits" rather than "pleads" to an allegation.

Before the jurisdictional hearing begins, the court must tell the minor that s/he has the right to a hearing, the right to assert the privilege against self-incrimination, the right to confront and cross-examine witnesses, and the right to subpoena witnesses. (Cal. Rules of Court, rule 5.778(b); *In re Steven H.* (1982) 130 Cal.App.3d 449, 451-452; *In re Ronald E.* (1977) 19 Cal.3d 315 [incorporating *Boykin-Tahl* rules to juvenile court].)

After explaining these rights, the court must inquire whether the minor admits the

allegations, and if s/he does personally admit the allegations, the court must state the following findings: the minor understands the nature of the allegations and direct consequences of the admission, and waives the rights discussed above. (Cal. Rules of Court, rule 5.778(c).) This is true even when there is a procedure similar to *Bunnell v. Superior Court* (1975) 13 Cal.3d 592 and the jurisdictional decision is based on submission of a transcript or other documents in lieu of a full hearing. (*In re Steven H., supra,* 130 Cal.App.3d at 452-453.)

The minor must be advised of the possible consequences of the pending petition, including generally the possibility of aggregation, and specifically, the maximum period of physical confinement at some point before an admission is accepted or a contested jurisdictional hearing commences. (*In re Michael B.* (1980) 28 Cal.3d 548, 554; *In re Richard W.* (1979) 91 Cal.App.3d 960, 978.) However, for the lack of notice issue to be cognizable on appeal, one must prove not only deficient notice, but also prejudice from the deficient notice. (*In re Michael B., supra,* 28 Cal.3d at 555.)

The court must make the following findings and note them in the minutes: 1) notice has been given; 2) birth date and county of residence of minor; 3) the minor has knowingly and intelligently waived the *Boykin-Tahl* rights discussed above; 4) the minor understands nature of charges and consequences of plea; 5) the admission is free and voluntary; 6) a factual basis for the admission exists; 7) the admitted allegations are true; 8) the minor is described by Welfare and Institutions Code section 601 or 602; 9) the degree of the offense, and if the crime is a "wobbler," the court must state that it has considered whether the crime is a misdemeanor or a felony and state which one it is. (Cal. Rules of Court, rule 5778(f).)

2. <u>Was the minor's admission/waiver proper</u>?

A certificate of probable cause is not needed to reach these issues, as the notice of appeal is sufficient to perfect appellate review of alleged errors arising before or in the process of a minor's admission of allegations in a juvenile court petition. (*In re Joseph B.* (1983) 34 Cal.3d 952, 957.) However, just as in adult cases, guilt issues are waived by the admission.

If the minor submits the jurisdictional issue on the transcripts of detention (called a "slow plea"), the minor still must make a waiver of his/her constitutional rights. (*In re Mario G.* (1981) 125 Cal.App.3d 1060, 1062; *In re Steven H.* (1982) 130 Cal.App.3d 449.) A minor's signed written waiver form is insufficient; the minor must make an express, personal waiver of rights. (*In re Regina N.* (1981) 117 Cal.App.3d 577, 583-584.)

C. Issues to look at when there is a contested jurisdictional hearing.

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1. Did the prosecution present sufficient evidence of the crime?

The prosecution bears the burden of proving every element of the offense with which the minor is charged beyond a reasonable doubt. (*In re Winship* (1970) 397 U.S. 358, 368; see also Welf. & Inst. Code, § 701; *In re Steven C.* (1970) 9 Cal.App.3d 255, 262.)

The standard of appellate review in considering the sufficiency of evidence in a juvenile proceeding is the same as in an adult proceeding, i.e., the court must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence, such that a reasonable trier of fact could find the minor guilty beyond a reasonable doubt. (*In re Roderick P.* (1972) 7 Cal.3d 801, 808-809.) The trier of fact, not the appellate court, must be convinced of the minor's guilt, and if the circumstances and reasonable inferences justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also reasonably be reconciled with a contrary finding does not warrant reversal of the judgment. (*In re James B., supra,* 109 Cal.App.4th at 872.) The federal standard is identical and should be cited along with the California standard. (*In re Winship* (1970) 397 U.S. 358 [25 L.Ed.2d 368]; *Jackson v. Virginia* (1979) 443 U.S. 307, 319 [61 L.Ed.2d 560, 573].)

2. Was proper evidence used?

With some exceptions, the jurisdictional hearing follows the same evidentiary rules as an adult criminal trial. Hearsay rules apply, but accomplice testimony and *Aranda/Bruton* rules find relaxed application.

In *Crawford v. Washington* (2004) 541 U.S. 36, 68 [124 S.Ct. 1354, 1374; 158 L.Ed.2d 177, 203], the U.S. Supreme Court held that when the state offers "testimonial" hearsay evidence, the Confrontation Clause requires a showing of both unavailability and a prior opportunity for cross-examination.

Penal Code section 1111, providing that uncorroborated accomplice testimony is insufficient to uphold a criminal conviction, does not apply to delinquency proceedings. (*In re Mitchell P*. (1978) 22 Cal.3d 946, 949.) *In re E.L.B.* (1985) 172 Cal.App.3d 780, 785-786, applied *Mitchell P.*, as it was bound to do, but noted the folly of providing adult defendants in criminal court but not juveniles in delinquency court with the protections of the corroboration rule. *In re Christopher B.* (2007) 156 Cal.App.4th 1557, agreed with *E.L.B.* that in the years since *Mitchell P.* there has been an appreciable transformation of juvenile court jurisprudence both in terms of its purpose as well as the consequences attendant to a wardship adjudication which undermines the rationale of *Mitchell P.* Also, other state courts have extended the accomplice corroboration rule to juvenile

adjudications. (*In re Christopher B., supra,* 156 Cal.App.4th at 1567.) With the prevailing trend favoring its applicability, any adjudication which relies solely on accomplice testimony should raise the Penal Code section 1111 bar and advocate that *Mitchell P.* should be overturned.

Also see *In re Miguel L.* (1992) 32 Cal.3d 100, 109-110, in which the Supreme Court held that an accomplice's repudiated, unsworn statement was insufficient to connect the minor with the crime, and noted that if the defendant was an adult offender, he could not be convicted of an offense solely on the uncorroborated testimony or statements of an accomplice under Penal Code section 1111. *In re Christopher B., supra,* 156 Cal.App.4th at 1561 pointed to *Miguel L.* as logical support because where the accomplice is a minor, there may be great pressure to shift blame onto the accused minor.

The *Aranda*/*Bruton* rules (*People v. Aranda* (1965) 63 Cal.2d 518 (*Aranda*) and *Bruton v. United States* (1968) 391 U.S. 123 [88 S.Ct. 1620, 20 L.Ed.2d 476] (*Bruton*)) do not apply to bench trials, and therefore do not apply to jurisdictional hearings. To the extent that *Aranda* gave defendants protections beyond *Bruton*, it was abrogated by Proposition 8. (Cal. Const. art. I, § 28(d).) Therefore, minors do not have the right to have incriminating statements made by co-appellants severed from their jurisdictional hearings. (*In re Jose M.* (1994) 21 Cal.App.4th 1470, 1480.)

3. <u>Were the correct evidentiary privileges observed</u>?

There is no parent-child privilege that prevents the prosecution from discovering or eliciting statements made by the child to his or her parent. (*In re Terry W.* (1976) 59 Cal.App.3d 745.) However, if the parent is acting in a legal capacity for the child (e.g. guardian ad litem, an attorney), then the attorney-client privilege applies. (*De Los Santos v. Superior Court (Los Angeles)* (1980) 27 Cal.3d 677, 684.)

There is a limited probation officer-child privilege, but application depends on the context in which the child is speaking to the probation officer. If the minor's statement to the officer was made for a governmental purpose like rehabilitation or investigation, the privilege applies. (See *In re Wayne H.* (1979) 24 Cal.3d 595, 602 [error to admit minor's statements to probation officer where statements made during detention interview]; *Sheila O. v. Superior Court* (1981) 125 Cal.App.3d 812, 817 [minor's testimony at a fitness hearing is inadmissible at later proceedings to determine the minor's guilt or innocence].) However, if the minor is speaking with an employee of juvenile hall who has no investigative functions, statements made to that employee are not privileged because they were not made in response to an investigation or governmental purpose. (*People v. Claxton* (1982) 129 Cal.App.3d 638, 652.)

Statements made by the minor to a probation officer in investigations before the

fitness hearing (Welf. & Inst. Code, § 707) are inadmissible in the contested jurisdictional hearing, despite the "truth-in-evidence" provisions of Proposition 8 (Cal. Const. art. I, § 28(d)). (*Ramona R. v. Superior Court* (1985) 37 Cal.3d 802, 809-811 [upholding the privilege established in *Sheila O. v. Superior Court*, *supra*, 125 Cal.App.3d 812, against the passage of Proposition 8 because the proposition excluded from its application any preexisting evidentiary privileges].) Note, however, that while *Sheila O.* does not allow the prosecution to introduce privileged statements in their case in chief, the statements are allowed in for impeachment. (*Id.* at pp. 816-817.) The state Supreme Court has sanctioned this result. (*People v. Macias* (1997) 16 Cal.4th 739, 753; *People v. Pokovich* (2006) 39 Cal.4th 1240, 1257 [so long as no true coercion or compulsion is involved, an accused's statements are available to impeach him if he voluntarily testifies at the trial on criminal charges or allegations].)

The psychotherapist-patient privilege is inapplicable if the psychotherapist has reasonable cause to believe that the minor patient is in such a mental or emotional condition so as to be a danger to himself or another's person or property, and the disclosure is necessary to prevent the threatened danger. (Evid. Code, § 1024.) The Third District has held, under this code section, that in order to prevent threatened danger, a psychotherapist's testimony that the minor had told her he committed the arson was admissible, as he stated that he knew that people were inside the house when he set the fire and was fascinated by fire. The court also noted that the minor was not responding well to treatment and was suspected of later setting another fire. (*In re Kevin F.* (1989) 213 Cal.App.3d 178, 183.)

Additionally, the psychotherapist-patient privilege does not preclude a therapist from testifying at a section 777 hearing in regard to the minor's participation and progress in a court-ordered treatment program. (*In re Pedro M.* (2000) 81 Cal.App.4th 550, 553-555.) However, the fact that a minor is motivated to participate in therapy as a condition of probation does not waive the privilege for all purposes. (*Story v. Superior Court* (2003) 109 Cal.App.4th 1007.)

4. <u>Use of minors' confessions and admissions</u>.

Statements made by juvenile clients are the most damaging evidence in delinquency proceedings. Just as in adult cases, the prosecution must prove the voluntariness of the minor's confession by a preponderance of the evidence. (*In re Aven S.* (1991) 1 Cal.App.4th 69, 75 [rejecting minor's argument for application of proof-beyond-a-reasonable-doubt standard].) But, the prosecution's burden of proving voluntariness of a confession is greater in a juvenile case than in an adult case. (*In re Anthony J.* (1980) 107 Cal.App.3d 962, 971; *In re Abdul Y.* (1982) 130 Cal.App.3d 847, 862-863.)

Voluntariness is determined by a totality of the circumstances approach, so in cases involving minors, counsel should more closely examine the record when a minor is involved because "[t]hreats, promises, confinement, lack of food or sleep, are all likely to have a more coercive effect on a child than on an adult." (*In re Aven S., supra,* 1 Cal.App.4th 69, 75.) "[A] group of police officers rousing an adolescent out of bed in the middle of the night with the words 'we need to go and talk' presents no option but 'to go'" and would render a confession involuntary. (*Kaupp v. Texas* (2003) 538 U.S. 626, 631 [123 S.Ct. 1843, 155 L.Ed.2d 814].)

Miranda warnings are only necessary if the minor is in custody. *In re Kenneth S.* (2005) 133 Cal.App.4th 54, 64 looked to the same standard as for adults, examining all of the circumstances surrounding the interrogation to determine whether there was a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest. (See *Oregon v. Mathiason* (1977) 429 U.S. 492, 495 [50 L.Ed. 2d 714, 97 S.Ct. 711].) The trial court order suppressing Kenneth's statement was reversed. He was brought to the police station by his foster mother voluntarily. At the beginning of his interview, the detective thanked him for voluntarily appearing and told him that he was not under arrest and was free to leave at any time. The detective did not tell the minor that he was under arrest until after the interview. In fact, the detective told him that information suggesting he was involved in a robbery was not sufficient on its own to constitute custody. (*In re Kenneth S., supra,* 133 Cal.App.4th at 65.)

The U.S. Supreme Court has now definitively ruled on this issue in *J.D.B. v. North Carolina* (2011) __ U.S. __ [131 S. Ct. 2394; 180 L. Ed. 2d 310; 2011 U.S. LEXIS 4557]. The court held:

(a) Custodial police interrogation entails "inherently compelling pressures," *Miranda v. Arizona*, 384 U. S. 436, 467, that "can induce a frighteningly high percentage of people to confess to crimes they never committed," *Corley v. United States*, 556 U. S. ___, ___. Recent studies suggest that risk is all the more acute when the subject of custodial interrogation is a juvenile.

(b) In some circumstances, a child's age "would have affected how a reasonable person" in the suspect's position "would perceive his or her freedom to leave."

(c) Given a history "replete with laws and judicial recognition" that children cannot be viewed simply as miniature adults, *Eddings*, 455 U. S., at 115–116, there is no justification for taking a different course here. So long as the child's age was known to the officer at the time of the interview, or would have been objectively apparent to a reasonable officer . . . ."

(d) On remand, the state courts were to address the question of whether J. D. B. was in custody when he was interrogated, taking account of all of the relevant circumstances of the interrogation, including J. D. B.'s 13-year-old age at the time.

In re Shawn D. (1993) 20 Cal.App.4th 200 found an invalid *Miranda* waiver by a juvenile suspect. The juvenile's confession to burglary was involuntary because "the police repeatedly suggested that [the juvenile] would be treated more leniently if he confessed." (*Id.* at p. 214.) Shawn was told that his honesty would be noted in the police report; that he would receive more lenient treatment if he "explained" his role in the robbery; and, officers implied that if he confessed and helped recover the proceeds, they would intervene on his behalf with the prosecutor. (*Id.* at p. 215.) "The promise of leniency in exchange for a confession permeated the entire interrogation." (*Id.* at 216; see also *People v. Musselwhite* (1998) 17 Cal.4th 1216, 1236-1237.)

A confession obtained by the police from a minor after they denied his request to see his probation officer was not obtained in violation of the minor's *Miranda* rights, so his confession did not have to be suppressed. A probation officer, by virtue of his dual allegiance, was not the kind of person on whom a minor was entitled to rely, within the purpose of *Miranda*. (*Fare v. Michael C.* (1979) 442 U.S. 707 [99 S.Ct. 2560, 61 L.Ed.2d 197].)

A request to speak with parents no longer raises a presumption that a minor has invoked *Miranda* rights. (*People v. Lessie* (2010) 47 Cal.4th 1152, 1165-1166 overruling *People v. Burton* (1971) 6 Cal.3d 375.) Just as for adults, the standard is the totality of the circumstances, but with recognition that there are special problems in determining whether a minor who purports to waive the Fifth Amendment rights to silence and the assistance of counsel in the context of custodial interrogation does so knowingly and voluntarily, such that the evaluation requires special caution and special care in determining whether a minor's custodial confession is voluntary. (*People v. Lessie*, *supra*, 47 Cal.4th at 1166-1167.)

After *Lessie* was decided, the California Supreme Court granted review on a related issue. In *People v. Nelson*, unpublished opn., rev. granted 6/16/10, (S181611/G040151) the question before the court is: Did the 15-year-old defendant's request to speak with his mother while he was being questioned by police constitute a request to speak with an attorney that required the officer to cease the questioning immediately? This issue implicates the distinction between a criminal suspect's initial waiver of his Fifth Amendment rights and subsequent invocation of those rights and the related question whether a juvenile suspect's post-waiver invocation of his Fifth Amendment rights should be analyzed under the same standard of review as an adult.

Questioning by a high school principal is not a custodial interrogation and does not require *Miranda* warnings. (*In re Corey L.* (1988) 203 Cal.App.3d 1020, 1024.) A discussion of alleged criminal offenses in a school vice-principal's office may certainly convey a degree of coercion to a student, but it does not present the same intimidating,

restricted environment as a police station or vehicle following an arrest. (See *People v. Riva* (2003) 112 Cal.App.4th 981, 994.)

Similarly, since a caseworker at a juvenile facility is not a law enforcement officer for *Miranda* purposes, a minor's statements to that worker are admissible despite the absence of *Miranda* warnings. (*In re Paul P.* (1985) 170 Cal.App.3d 397, 401-402.) However, the concurring opinion in *People v. Claxton* (1982) 129 Cal.App.3d 638, 670-671 (conc. opn.of Franson, J.), and the opinion in *People v. Wright* (1967) 249 Cal.App.2d 692, 694-695, suggest that detention officers are "police agents" under *Miranda* because their primary mission as government employees is to enforce the law.

The issue of voluntariness of a confession may not be reviewed on appeal if the minor admits the petition. (*In re John B.* (1989) 215 Cal.App.3d 477, 483.) The issue of voluntariness is an irregularity going to the question of guilt and not to the jurisdiction or legality of the proceeding. The admission of a juvenile court petition is analogous to a guilty plea, for it constitutes an assent to all facts essential to a finding that the minor is a person described in section 602. (*Ricki J. v. Superior Court, supra,* 128 Cal.App.4th 783, 791.)

5. Motions to suppress evidence.

Motions to suppress evidence in the juvenile court are made under Welfare and Institutions Code section 700.1.

Welfare and Institutions Code section 700.1 is not as broad as Penal Code section 1538.5. Evidence suppressed for purposes of the contested jurisdictional hearing may be used at the dispositional hearing. (*In re Michael V.* (1986) 178 Cal.App.3d 159).

Juvenile court wards who are placed on probation are often required to submit to warrantless searches as a condition of probation. Historically, *In re Tyrell J.* (1994) 8 Cal.4th 68, had upheld the warrantless search of a juvenile probationer by an officer who lacked reasonable suspicion of any criminal activity and was unaware that the juvenile had consented to such a search as a condition of his probation. *In re Jaime P.* (2006) 40 Cal.4th 128, 130 considered the continued vitality of *Tyrell J.* and overruled it because of subsequent developments, including *People v. Sanders* (2003) 31 Cal.4th 318 [police must know of a parole search condition before conducting a "parole search" of a residence]; and the high court's decision in *Samson v. California* (2006) 547 U.S. 843 [noting "[u]nder California precedent, ... an officer would not act reasonably in conducting a suspicionless search absent knowledge that the person stopped for a search is a parolee"]. Now, an illegal search and seizure of a juvenile probationer cannot be

justified by the later discovery that the minor is on probation. Police must know of this beforehand. (*In re Jaime P.*, *supra*, 40 Cal.4th at p. 139.)

New Jersey v. T.L.O. (1985) 469 U.S. 325, 341 held searches on students by school officials were justified if reasonable, even if there was no search warrant or probable cause. There are competing interests. The Fourth Amendment applies to searches of students conducted by school officials but that protection must be balanced against the need to preserve order and the educational environment. *T.L.O.* held that the legality of a student search should depend on the reasonableness under all the surrounding circumstances.

There are some recent juvenile search cases worthy of note:

In re Antonio B. (2008) 166 Cal.App.4th 435, 438 resulted in suppression of evidence. Antonio was walking with a companion who was smoking a marijuana cigarette. The companion was arrested. Antonio was "detained" for investigation on the basis that marijuana is a communal drug. Handcuffing him under these circumstances constituted a de facto arrest without probable cause. His consent to the search was not voluntary, and the evidence discovered as a result of the search was suppressed.

In *In re H.M.* (2008) 167 Cal.App.4th 136, nervous, evasive behavior including jaywalking in a high crime area was found to be sufficient to raise police suspicion that the minor was involved in some criminal activity. While minor traffic offenses do not reasonably suggest the presence of weapons, the police here had reasonable suspicion to believe he might be fleeing from criminal activity involving a firearm. The pat search produced the suspected firearm. The motion to suppress was denied.

Safford Unified Sch. Dist. #1 v. Redding (2009) __ U.S.___, 129 S.Ct. 2633, 2638 involved a search that became constitutionally unreasonable when it extended to a search within the student's underwear for prescription-strength ibuprofen without any reason to suppose they might be secreted there. "[B]oth subjective and reasonable societal expectations of personal privacy support the treatment of such a search as categorically distinct, requiring distinct elements of justification on the part of school authorities for going beyond a search of outer clothing and belongings." (*Id.* at 129 S.Ct. 2641.) The deference that courts pay to an educator's professional judgment does not overcome the Fourth Amendment limits in such an intrusive search.

In *In re K.S.* (2010) 183 Cal.App.4th 72, the court applied the reasonableness standard to a search by a school official even though the school search was conducted based on information from police and in their presence. A confidential informant who was considered reliable gave an officer a tip about K.S., a high school student. The tip was passed on to the resource officer at the high school who then relayed the information

to the vice principal. The vice principal had two officers accompany her for her comfort and safety while she conducted a search of K.S's P.E. locker. The vice principal found suspected Ecstasy which became the subject of a delinquency petition. The court denied a motion to suppress the evidence, reasoning that the police officer's role was subordinate to that of the vice principal who made the decision whether or not to conduct the search. The law enforcement presence did not change the standard because it was the school official who made the decision to search and it was designed to protect the safety of the school.

In re D.C. (2010) 188 Cal.App.4th 978, held that a minor's parent may consent to a warrantless search of the minor's bedroom, even over the minor's objection. Police came to an apartment where the minor lived with his family to conduct a probation search involving his brother. Their mother gave police permission to search the apartment. When the minor tried to block access to the apartment, the mother told him to get out of the way. Police found contraband inside the minor's bedroom. He appealed the denial of his motion to suppress, alleging it occurred without his consent and over his objection. The appellate court affirmed and concluded the parent of a minor has authority to consent to a search of the minor's bedroom. The court noted a parent has legal rights and obligations that permit and even require him or her to exercise control of a minor child's bedroom. Parents have a legal duty and the corresponding right to direct, control, and supervise the activities of their minor children. Thus, the minor's objection does not override parental consent.

Welfare and Institutions Code section 800, subdivision (a) provides: "A ruling on a motion to suppress pursuant to Section 700.1 shall be reviewed on appeal even if the judgment is predicated upon an admission of the allegations of the petition." Welfare and Institutions Code section 800, subdivision (b)(1) provides: "An appeal may be taken by the people from . . . [a] ruling on a motion to suppress pursuant to Section 700.1 even if the judgment is a dismissal of the petition or any count or counts of the petition. However, no appeal by the people shall lie as to any count which, if the people are successful, will be the basis for further proceedings subjecting any persons to double jeopardy." If the People agreed to a suppression hearing concurrent with an adjudication hearing, double jeopardy prevents the People from appealing the granting of a suppression motion. (*In re Mitchell G.* (1990) 226 Cal.App.3d 66.)

6. Procedural concerns after witness testimony has been taken.

It is reversible error for the court to prevent defense counsel from making a closing statement. (*In re William F.* (1974) 11 Cal.3d 249.) However, this error does not implicate appellant's Sixth Amendment right to counsel. (*People v. Bonin* (1988) 46 Cal.3d 659, 695, fn. 4.)

The juvenile court judge is allowed to recall witnesses if it is not satisfied that the prosecution has made its case. (*In re Reginald C.* (1985) 171 Cal.App.3d 1072, 1078.)

The court is not allowed to read the probation report before the dispositional hearing. (Cal. Rules of Court, rule 5.780(c); *In re Gladys R.* (1970) 1 Cal.3d 855, 862.) However, if defense counsel fails to object, the issue is waived on appeal. (*In re Christopher S.* (1992) 10 Cal.App.4th 1337, 1344-1345.)

7. Special considerations that arise when minors are charged with specific offenses.

When the minor is charged with a sex offense, check to see whether the minor formed the requisite lewd intent. "Circumstances which have been considered relevant to proving intent to satisfy sexual desires include: the charged act, extrajudicial statements, the relationship of the parties, other acts of lewd conduct, coercion or deceit used to obtain the victim's cooperation, attempts to avoid detection, offering of a reward for cooperation, a stealthy approach to the victim, admonishment of the victim not to disclose the occurrence, physical evidence of sexual arousal and clandestine meetings." (*In re Jerry M.* (1997) 59 Cal.App.4th 289, 299.) Interestingly, the Fourth District Court of Appeal also stated: "The younger the minor the less likely his acts are with the specific intent of sexual arousal. At some age younger than 14 years, which we need not determine in this case, the minor cannot as a matter of law have the specific intent of sexual arousal." (*Id.* at p. 300.)

Likewise, a minor cannot be found to have committed a violation of Penal Code section 288, subdivision (c)(1) because the perpetrator must be at least 24 years old. Also, the qualifying offenses requiring sex offender registration pursuant to Penal Code section 290 are different for juveniles and adults. The registration requirement for juveniles adjudicated a ward of the court for specified offenses and sent to DJJ is contained in Penal Code section 290.008. *In re G.C.* (2007) 157 Cal.App.4th 405, 411 held the juvenile court does not have the discretion to exempt a minor from having to register as a sex offender after he has been committed to DJJ for engaging in sexual intercourse with a child under the age of 14. There was a challenge to the disposition as an abuse of discretion and the appellate court refused to analyze the issue so long as the

record supported a disposition of DJJ.

There are some offenses that minors cannot commit because of the nature of the offense. For example, a minor cannot be found to be a felon in possession of a firearm (Pen. Code, § 12021, subd. (a)) because a minor cannot have a prior felony conviction, only prior juvenile adjudications. However, Penal Code section 12021, subdivision (e), prohibits a juvenile who has committed any of the long list of enumerated offenses from possessing a firearm until age 30. (*In re David S.* (2005) 133 Cal.App.4th 1160, 1162-1163.) Further, a minor can be charged with firearm possession in violation of the terms and conditions of his probation. (Pen. Code, § 12021, subd. (d).)

8. Issues regarding lesser-included and lesser-related offenses.

The same rule that applies to adults, applies to juveniles: a minor may not be found guilty of a lesser, non-included offense or an offense that has not been expressly pleaded. (*In re Robert G.* (1982) 31 Cal.3d 437, 440-441 [applying *People v. Lohbauer* (1981) 29 Cal.3d 364, 368, to juvenile cases].) Also, where two crimes are based upon the commission of the same act, and one is a lesser and necessarily included offense of the other, the perpetrator may not be found guilty of both. (*In re Jose M.* (1994) 21 Cal.App.4th 1470, 1476; *In re Marcus T.* (2001) 89 Cal.App.4th 468, 471.)

Where the prosecution amended the 602 petition to allege a non-included offense at the close of its case to conform to the evidence, and the minor objects on the basis of lack of notice and time to prepare, but still puts on a defense to the amended petition, the minor's due process rights were violated, requiring reversal. (*In re Roy C.* (1985) 169 Cal.App.3d 912, 915.) Similarly, in *In re Johnny R.* (1995) 33 Cal.App.4th 1579, 1584, the Fourth District reversed a true finding because the juvenile court erred in allowing the prosecution to amend the petition during the prosecution's case in chief, so that at the beginning of the hearing the minor was not notified of the charge he was defending against.

Even where a minor fails to object, the court's true finding on a lesser-related offense that was not charged in the petition must be reversed if the minor had no warning or notice of the lesser-related offense. (*In re Alberto S.* (1991) 226 Cal.App.3d 1459, 1465.) However, the court may sustain a lesser-included offense even when the minor objects. (*People v. Barton* (1995) 12 Cal.4th 186, 195.)

III. PROBATION VIOLATION HEARINGS

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Proposition 21 made sweeping changes to supplemental petition hearings. Under amended section Welfare and Institutions Code section 777, it is now much easier to commit a minor to a more restrictive placement if the minor violates probation.

In contrast to contested jurisdictional hearings, Proposition 21 amended Welfare and Institutions Code section 777 to allow the prosecution to prove juvenile probation violations by only a preponderance of the evidence. (Welf. & Inst. Code, § 777, subd. (c); *In re Eddie M*. (2003) 31 Cal.4th 480.)

Simple notice of the supplemental petition now suffices instead of a formal supplemental petition to modify a previous disposition. The notice is not required to contain facts sufficient to support the conclusion that the previous disposition has not been effective in rehabilitating the minor. All that is required post-Prop. 21 is notice of facts sufficient to support the conclusion that the minor has violated an order of the court or a violation of probation that does not amount to a crime. (Welf. & Inst. Code, § 777, subd. (a).)

Conduct that is criminal can be alleged in a supplemental petition and proven in this less formal proceeding, as long as the conduct is not also formally alleged as a violation of a criminal offense. (*In re Eddie M*., *supra*, 31 Cal.4th 480.)

The rules governing the admissibility of hearsay in an adult probation revocation case now apply to juvenile probation violations. (Welf. & Inst. Code, § 777, subd. (c); *In re Kentron D*. (2002) 101 Cal.App.4th 1381.) However, Kentron's violation was reversed because due process compels a showing of unavailability or other good cause before hearsay in the form of prior testimony may be admitted. (*Id.* at pp.1389-1390.)

The new procedures for modifying disposition under section 777 do not violate ex post facto principles and may be applied to minors placed on probation prior to the enactment of Proposition 21 as long as the conduct that provides the basis for the alleged violation occurs post-enactment. (*John L. v. Superior Court* (2004) 33 Cal.4th 158.)

For additional information see "How Proposition 21 Amended Welfare and Institutions Section 777 and Changed Probation Revocation Procedures for Juvenile Wards," on FDAP's website.

IV. THE DISPOSITIONAL HEARING

Go To Index

A. General Overview of Dispositions.

Welfare and Institutions Code sections 701, 702, and 706 created a two-step proceeding. The first step is the determination of jurisdiction, and the second step is determination of the appropriate disposition and placement. The court may only consider the social study report in the second step, because the report may include legally incompetent material, inadmissible in the first step. (*In re Gladys R.*, *supra*, 1 Cal.3d at 859–860; *In re James B.* (2003) 109 Cal.App.4th 862, 874.)

At the dispositional hearing, the judge can: (1) dismiss the case (Welf. & Inst. Code, § 782); (2) place the minor on probation without wardship under the supervision of a county probation officer (Welf. & Inst. Code, § 725, subd. (a)); or (3) declare the minor a ward of the court (Welf. & Inst. Code, § 725, subd. (b)). If the minor is declared a ward of the court, he or she can be ordered to remain at home on probation or can be immediately removed from home and placed in another setting, such as a foster home, a group home, or, if the offense qualifies, the California Department of Corrections and Rehabilitation, Division of Juvenile Justice (DJJ), formerly called California Youth Authority (CYA).[2]

Welfare and Institutions Code section 202, subdivision (e) lists progressively restrictive sanctions for juvenile offenders: (1) paying a fine; (2) performing community service; (3) limiting liberty as a condition of probation or parole; (4) committing the minor to a local detention or treatment facility; and (5) committing the minor to DJJ. While "there is no absolute rule that a Youth Authority commitment should never be ordered unless less restrictive placements have been attempted" (*In re Ricky H.* (1981) 30 Cal.3d 176, 183), there must be *evidence* in the record that supports a determination that less restrictive alternatives are ineffective or inappropriate. (*In re Teofilio A.* (1989) 210 Cal.App.3d 571, 576.)

Welfare and Institutions Code section 782 permits the juvenile court to dismiss or set aside findings at any time before the minor reaches 21, if the court finds either: (1) the interests of justice and the welfare of the minor require such dismissal; or (2) the minor is not in need of treatment or rehabilitation. California Rules of Court, rule 5.790(a)(2)(A) mandates that in dismissing the petition, the court must state in the minutes the specific reason for the dismissal. It is not sufficient if only the reporter's transcript reflects the reasons for dismissal. (*In re Juan C.* (1993) 20 Cal.App.4th 748.) Moreover, a simple statement such as "the petition has been dismissed in the interests of justice" is insufficient. (*Id.* at pp. 751-752.)

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[2] Commencing July 1, 2005, any reference to the Department of the Youth Authority refers to the Department of Corrections and Rehabilitation, Division of Juvenile Facilities. (Welf. & Inst. Code, sec. 1000.) However, the CDCR refers to it as Division of Juvenile Justice. (See http://www.cdcr.ca.gov/Juvenile_Justice/index.html)

B. Formal Probation. Go To Index

There are two kinds of probation in the juvenile system: pre-wardship formal supervision (Welf. & Inst. Code, § 725), and post-wardship formal probation (see Welf. & Inst. Code, § 730, subd. (b)).

If the court finds that the minor committed an offense, the court can place the minor on probation for up to six months without declaring the minor a ward. (Welf. & Inst. Code, § 725, subd. (a).)

It is a due process violation to deny probation simply because the minor elected to go forward with a court trial. (*In re Edy D*. (2004) 120 Cal.App.4th 1199, 1202.)

Section 725 prohibits the imposition of confinement time as a condition of probation when the minor has not been adjudged a ward of the court. (*In re Trevor W*. (2001) 88 Cal.App.4th 833.) *In re Walter P*. (2009) 170 Cal. App. 4th 95, 100 found that home detention is not a proscribed type of confinement and there was no abuse of discretion in ordering the minor to remain in his home for 45 days except to attend school, court-ordered community service, work project; or other activities approved in advance by his probation officer, unless accompanied by a parent or guardian. Likewise, the order that he participate in a work program for eight days from 7:30 a.m. to 3:30 p.m. did not deprive his parents of physical custody and was also a valid juvenile probation condition.
(*Id.* at p.101.)

Once a minor has been placed on pre-wardship probation, if the court is dissatisfied with the minor's performance, the court may reinstitute wardship provisions, but it is error to deny the minor an evidentiary hearing to determine whether the minor actually violated probation and to present other suitable alternatives. (*In re Deon W.* (1998) 64 Cal.App.4th 143, 147.)

In *In re Matthew A*. (2008) 165 Cal.App.4th 537, 541, the court held it was error to set a maximum confinement time when a juvenile is sent home on probation. The Third District has said there's no reason to strike the theoretical max confinement time because it has no legal effect. (*In re Ali A*. (2006) 139 Cal.App.4th 569, 574, fn. 2.) But there is a recent unpublished case from the Fifth District where the court has stricken the term. "We agree with the People that striking of the MTPC is not strictly necessary, but we also believe that appellant is entitled to a dispositional order free of any directive that is 'of no legal effect.'" (*In re Charles R*., F054464, July 8, 2008; see also *In re E.S.*, B207159, March 5, 2009; *In re T.H.*, B199790, Nov. 20, 2008.)

C. Probation Conditions. Go To Index

When the minor is placed on probation, appellate issues frequently arise regarding the appropriateness of probation conditions.

The juvenile court may impose probation conditions that are reasonably designed to "enhance" "the reformation and rehabilitation of the ward." (Welf. & Inst. Code, § 730, subd. (b)); *In re Antonio C.* (2000) 83 Cal.App.4th 1029, 1033.) Generally, the conditions imposed on juveniles may be broader than criminal probation conditions. (*In re Antonio R*. (2000) 78 Cal.App.4th 937, 941.) In planning the conditions of a minor's supervision, the juvenile court considers not only the circumstances of the crime, but also the minor's entire social history. (*In re Binh L.* (1992) 5 Cal.App.4th 192, 203.)

The court's discretion is limited by the *Lent* test (as used in adult criminal cases). A probation condition is invalid if 1) it has no relationship to the crime of which the offender was convicted; 2) it forbids conduct that is not reasonably related to future criminality; and 3) relates to conduct that is not itself criminal. (*People v. Lent* (1975) 15 Cal.3d 481, 486; *In re Antonio C., supra*, 83 Cal.App.4th at p. 1034.) Conversely, when a probation condition "requires or forbids conduct which is not itself criminal," it is only valid if the conduct is "reasonably related to the crime which the defendant was convicted or to future criminality." (*Ibid*.)

If a probation condition infringes on constitutional rights, it must be tailored specifically to meet the needs of the juvenile. (*In re Binh L.* (1992) 5 Cal.App.4th 194, 203; *In re Michael D*. (1989) 214 Cal.App.3d 1610, 1616.) Probation conditions may also be void for vagueness or overbroad. "An order must be sufficiently precise for the probationer to know what is required of him, and for the court to determine whether the condition has been violated." (*People v. Reinerston* (1986) 178 Cal.App.3d 320, 324-325.)

Generally, the minor must object at the dispositional hearing to preserve a challenge to a probation condition for appeal. However, there is an exception for challenges asserting that a probation condition is vague or overbroad on its face. (*In re Sheena K*. (2007) 40 Cal.4th 875.)

For a full discussion of this topic, see "Probation Conditions Imposed On Juveniles" article found on FDAP's website, and "Update: Probation Conditions Imposed On Juveniles" an addendum article found on the CCAP website.

D. Dispositions Out of Home. Go To Index

A minor may not be removed from his or her home unless the court finds one of the following facts: (1) the parent cannot or has not provided proper maintenance,

training, and education for the child; (2) the minor had been on probation in the parents' custody and has failed to reform; or (3) the minor's welfare requires the removal of the minor. (Welf. & Inst. Code, § 726; Cal. Rules of Court, rule 5.790(d).)

These finding requirements have been weakened by court rulings that allowed the judge to simply read into the record the recommendations of the probation department where the judge states that he was going to follow them. (*In re Kenneth H.* (1983) 33 Cal.3d 616, 620-621; but see *In re Robert H.* (2002) 96 Cal.App.4th 1317, 1331.) However, express findings are necessary when the trial court does not expressly rely on the probation officer's report when making its order. (*In re John F.* (1983) 150 Cal.App.3d 182, 185; *In re Stephen P.* (1983) 145 Cal.App.3d 123.)

In addition to the presence of one of the three above factors (relating to removing a minor from his or her parents' home), the court must also find that continued presence in the parents' home would be detrimental to the minor. (*In re Cindy E.* (1978) 83 Cal.App.3d 393.) However, the failure to make this finding is harmless error if the record contains substantial evidence that there would not have been placement of the minor with the parents. (*In re Clyde H.* (1979) 92 Cal.App.3d 338.)

A dispositional order placing the minor home on probation, but requiring the minor to serve time in confinement as a condition of probation, in effect removes the minor from the home and thus must be preceded by the required findings. (*In re Jose H.* (2002) 77 Cal.App.4th 1090, 1100.)

When a minor is living in foster care prior to disposition, the minor is not in the custody of his or her parents so removal findings are not required. (*In re Raymond B.* (1981) 121 Cal.App.3d 785.)

When the minor has been placed in foster care (for example, the home of a relative, non-relative, or community care facility), counsel should check to make sure reunification services and/or a case plan are in place. Welfare and Institutions Code section 202, subdivision (a) refers to "family preservation and family reunification" as "appropriate goals" for delinquent juveniles where consistent with the best interests of the juvenile and the public. (Welf. & Inst. Code, § 202, subd. (a); *In re James R.* (2007) 153 Cal.App.4th 413, 432.)

Welfare and Institutions Code section 727.2 specifically provides that if the juvenile court orders placement under section 727, subdivision (a), reunification services shall be provided, or permanent placement of the minor shall be facilitated. Also, sections 727.3 and 727.4 provide that in the absence of a reunification plan the probation department must submit a case plan for the minor, and that plan must contain certain elements. For examples of how courts have applied these sections, see *In re Aaron K.*,

C049625, Feb. 28, 2006 [Third District remanded with directions to include previously omitted provision in the case plan as to who would make the child's educational decisions]; see also *In re Alex B.*, F048557, April 26, 2006 [Fifth District remanded to include previously omitted provision in the case plan as to who would make the child's educational decisions].)

For further discussion of this topic, see "FOSTER CARE AND EDUCATION IN 602 APPEALS: Is the Family Receiving Appropriate Services?" (http://www.capcentral.org/juveniles/delinquency/docs/delinqart04.pdf)

E. County Jail. Go To Index

County jail is not a disposition choice. *In re Ramon* (2009) 178 Cal.App.4th 665 involved a minor who was improperly committed to county jail based on a juvenile adjudication. After having been in and out of custody for various gang offense, Ramon at age 18 was detained in the county jail pending disposition by the juvenile court, and was subsequently committed to the county jail for 365 days. On appeal, Ramon argued that the court should have detained him in juvenile hall, and should have ordered him to serve the commitment in a juvenile facility rather than county jail. The appellate court agreed. Ramon was improperly taken to the county jail to await disposition because there was no order pursuant to Welfare and Institutions Code section 737 or 208.5. The court could not commit him directly to county jail for disposition as this was clearly in violation of the applicable statutes as interpreted by *In re Jose H.* (2000) 77 Cal.App.4th 1090, *In re Kenny A.* (2000) 79 Cal.App.4th 1, and *In re Charles G.* (2004) 115 Cal.App.4th 608. However, since Ramon had completed his county jail term, the issue was moot and the court dismissed this part of the appeal.

In re Charles G., supra, 115 Cal. App. 4th at 619 found Welfare & Institutions Code section 208.5, subdivision (a) allows the juvenile-now-turned-adult ward to be housed in a juvenile detention facility until the age of 19, at which time he or she must be delivered to a local adult facility unless the court orders continued detention in the juvenile facility. Such a disposition is faithful to both Welfare & Institutions Code section 202, subdivision (e)(4), and section 208.5.

F. Division of Juvenile Justice Commitments. Go To Index

The California Youth Authority (CYA) has been moved under the direction of the Department of Correction and is now referred to as the Department of Juvenile Justice (DJJ) or Department of Juvenile Facilities (DJF).

Welfare & Institutions Code section 731 was amended twice in 2007 in ways that limit commitments to DJJ. Currently section 731, subdivision (a)(4) provides that a ward may be committed to the DJJ if: (1) the ward has committed an offense described in subdivision (b) of section 707; and (2) is not otherwise ineligible for commitment to the

division under section 733. Section 733 prohibits the commitment of a ward under age 11, one suffering from a contagious, infectious, or other disease that would probably endanger the lives or health of the other wards, or the most recent offense alleged in any petition and admitted or found true is not a section 707, subdivision (b) offense, with the exception of sex offenses set forth in Penal Code section 290, subdivision (d)(3).

Presently, the California Supreme Court is reviewing a case involving the interpretation of section 733. In *In re C.H.*, unpub. opn., rev. granted 9/1/10, (S183737/B2147070) the questions presented are: Was minor ineligible for commitment to the California Department of Corrections and Rehabilitation, Division of Juvenile Justice, because he was not found to have committed an offense enumerated in Welfare and Institutions Code section 707, subdivision (b), although his offense was enumerated in Penal Code section 290.008, subdivision (c)? And assuming the juvenile court had the statutory authority to order such a commitment, did the court abuse its discretion in doing so on the ground there was no showing that minor would benefit from that commitment and because the court failed to adequately consider alternative placements?

The new limitations on DJJ commitments came with some safeguards for wards who were already at DJJ on non-707, subdivision (b) offenses and who would not have been committed under the new framework. Welfare & Institutions Code section 731.1 allows for the recall of a commitment upon the recommendation of the probation officer. *In re Carl N.* (2008) 160 Cal.App.4th 423 found the new restrictions on DJJ commitments were not retroactive and that section 731.1 was the mechanism to correct prior commitments. *In re Brandon G.* (2008) 160 Cal.App.4th 1076, 1081 likewise refused to apply amended sections 731 and 733 retroactively. The common law rule requiring application of statutes that mitigate punishment to all cases not yet final on their effective dates was found to be inapplicable in *In re N.D.* (2008) 167 Cal.App.4th 885, 888.

In re J.L. (2008) 168 Cal.App.4th 43 avoided the limitations on DJJ commitments. Within the context of a probation violation and admission of non-707, subdivision (b) violations in a new petition, the prosecutor sought dismissal of the non-707, subdivision (b) offenses "in the interest of justice." This allowed the DJJ commitment because the "most recent offense" was the prior petition which was not precluded by section 733.

In *V.C. v. Superior Court* (2009) 173 Cal.App.4th 1455, the limitations on DJJ commitment were enforced. In a first petition, V.C. admitted a DJJ-qualifying offense. In a second petition, there was a plea bargain approved by the court in which V.C. admitted a DJJ non-qualifying offense and the remainder of the petition, including a DJJ-qualifying offense, was dismissed with V.C. continued a ward of the court with a condition ordering him to complete sex offender treatment. However, a section 777 petition was filed alleging V.C. failed to participate in treatment. On motion of the

district attorney, the court dismissed the entire petition so as to make the most "recent" offense one from an earlier petition that made V.C. eligible for DJF. In a petition for writ of mandate, the appellate court ruled that this action was an abuse of discretion as it denied V.C. his due process rights to the benefits of his plea bargain and was contrary to the intent and legislative history of section 733 with its focus on the most "recent" offense.

In re M.B. (2009) 174 Cal.App.4th 1472 held a juvenile may be committed to DJJ for a probation violation found pursuant to section 777, subdivision (a)(2) where the offense for which the ward received probation is a DJJ-eligible offense. The minor was on probation for assault and participating in a criminal street gang. He was then charged in a pleading titled "Juvenile Wardship Petition Welf. & Inst. Code 602/777," in which a new criminal offense was alleged along with an allegation of a probation violation. The minor admitted a probation violation not amounting to a crime. (Welf. & Inst. Code, § 777, subd. (a)(2).) The court sustained the probation allegation, dismissed the new charge, and committed the minor to DJJ for the maximum confinement time previously imposed on the original offense. On appeal, the minor argued that his most recent offense alleged in a new petition was a violation of probation not amounting to a crime, and therefore the DJF commitment was unauthorized under Welfare and Institutions Code, section 733, subdivision (c). The appellate court rejected the argument and affirmed. The court recognized the probation violation was alleged in a petition, but found the probation violation was not an offense within the meaning of section 733. So the court found section 733 allows a juvenile court to commit a ward to DJJ for a violation found pursuant to section 777, subdivision (a)(2) where the offense for which the ward received probation is a DJJ-eligible offense under section 733, and no petition alleging a more recent non-DJJ-eligible offense has been sustained.

In re D.J. (2010) 185 Cal.App.4th 278 found allegations of probation violations were not contained in a "petition" within the meaning of Welfare & Institutions Code section 733, subdivision (c) and did not foreclose a commitment to DJJ. The minor was subject to juvenile court jurisdiction based on his admission to a petition alleging robbery, a serious felony. Subsequently the prosecution filed a 2006 version of JV-600, a Judicial Council form indicating a violation of section 602 and alleging that it was a supplemental petition pursuant to section 777, subdivision (a) based on the commission of a new offense, a burglary, which was a violation of the condition to obey all laws. There was an amended filing on the current version of JV-600 and labeled "First Amended Notice of W&I Section 777(a) Petition." Admission of those petitions did not supersede the DJJ-eligible robbery count. The court found that the Legislature's intent in section 733 could not be to force juvenile judges to order a DJJ-eligible minor to DJJ immediately or limit them to a grant of probation which would forfeit a DJJ commitment in the event of a probation violation. The court found the prosecution's intent was to charge only probation violations rather than new criminal offenses, despite the labeling

and reference to section 602.

A juvenile court's decision to commit a minor to the DJJ will be reversed only upon a showing of an abuse of discretion. (*In re Michael D.* (1987) 188 Cal.App.3d 1392, 1395.) To support a DJJ commitment, there must be evidence in the record demonstrating both a probable benefit to the minor by a DJJ commitment and the inappropriateness or ineffectiveness of less restrictive alternatives. (*In re Pedro M.* (2000) 81 Cal.App.4th 550, 555-556; *In re Angela M.* (2003) 111 Cal.App 4th 1392, 1396; *In re Teofilio A.* (1989) 210 Cal.App.3d 571, 576.)

As to the probable-benefit-to-minor prong, the California Supreme Court has listed three examples of inappropriate cases for DJJ commitment: (1) youths who are dependent or primarily placement problems; (2) unsophisticated, mildly delinquent youths; and (3) mentally retarded or mentally disturbed youths. (*In re Aline D.* (1975) 14 Cal.3d 557, 564-565; see also *In re Michael D*., *supra*, 188 Cal.App.3d at p. 1396..)

There is no requirement that the court find exactly how a minor will benefit from being committed to DJJ. The court is only required to find if it is probable a minor will benefit from being committed. (*In re Jonathan T.* (2008) 166 Cal.App.4th 474, 486)

Jonathan T. cited to independent and government reports that have concluded wards at DJJ do not receive adequate rehabilitative care. The minor argued that the poor care and subpar programs provided by DJJ would not support a finding of probable benefit. The reviewing court found there would be benefit because of the secure environment. In other words, it is not merely the programs at DJJ which provide a benefit to minors, but the secure setting as well. (*In re Jonathan T.*, *supra*, 166 Cal.App.4th at 486.) There has been a consent decree in *Farrell v. Harper*, a lawsuit over DJJ conditions. (http://www.prisonlaw.com/pdfs/farrellcd.pdf) The consent decree and Special Master's report on compliance can be found on the website of the Prison Law Office. (http://www.prisonlaw.com/events.php) Senate Bill 81, which became law in August 2007, made sweeping changes to California's juvenile justice system by imposing strict eligibility requirements for commitment to state juvenile facilities and channeling resources into county juvenile systems.

As to the alternatives prong, there must be evidence in the record that supports a determination that less restrictive alternatives are ineffective or inappropriate. (*In re Teofilio A.*, *supra*, 210 Cal.App.3d at p. 576.) Look to see whether the probation department's and the court's conclusions rested on actual evidence, or simply recited the probation officer's conclusions without having any evidentiary support. (*Id.* at p. 578 ["The recited conclusions are grounded in supposition and speculation, not upon solid evidence"].) There is no absolute requirement that lesser alternatives be tried before imposing a DJJ commitment (*In re Ricky H.* (1981) 30 Cal.3d 176, 182-183), but

appellate counsel should check to see whether the record reflects other placements were at least considered.

However, appellate counsel should acknowledge that the 1984 amendments to Welfare and Institutions Code section 202, shifted the juvenile system from less restrictive alternatives aimed at benefitting the minor to the protection of the public. (*In re Michael D.*, *supra*, 188 Cal.App.3d 1392, 1396.) Note, though, that the *Michael D.* also stated that a DJJ commitment cannot be based "solely on retribution grounds" and requires the juvenile court to consider less restrictive alternatives and probable benefit to the minor in applying the amended statute. (*Ibid*; see also Welf. & Inst. Code, § 202, subd. (e)(5).)

For those committed to DJJ for non-707(b) offenses, DJJ generally retains jurisdiction over the ward until the ward reaches the age of 21. However, Welfare and Institutions Code section 1769 provides that if a ward commits an offense listed in section 707, subdivision (b), DJJ can maintain jurisdiction over the minor until the age of 25. Additionally, Welfare and Institutions Code section 1800 allows extension of a juvenile commitment upon finding that a minor's mental deficiency, disorder, or abnormality causes serious difficulty in controlling his dangerous behavior.

For additional advice, see "Challenging a CYA Commitment on Appeal," an article on FDAP's website.

G. Other Required Findings. Go To Index

1. Classification of offense.

When the court finds that a minor has committed an offense which would be, in the case of an adult, punishable alternatively as a felony or misdemeanor (a "wobbler"), the juvenile court is required to declare whether the offense is a misdemeanor or felony. (Welf. & Inst. Code, § 702.) The California Supreme Court has held this requirement to be "obligatory." (*In re Manzy W.* (1997) 14 Cal.4th 1199, 1204.)

When the record shows that the juvenile court failed to perform its duty to specify the offense as either a felony or misdemeanor, the appellate court must look at the record to determine "whether the record as a whole establishes that the juvenile court was aware of its discretion to treat the offense as a misdemeanor and to state a misdemeanor-length confinement limit." (*In re Manzy W.*, *supra*, 14 Cal.4th 1199, 1209.) Absent the juvenile court's oral pronouncement on the record making the classification, or the court's use of some language demonstrating an awareness of it's discretion, the matter must be remanded to allow the court to exercise its discretion. (*In re Eduardo D.* (2000) 81 Cal.App.4th 545, 548-549, overruled on other grounds in *In re Jesus O.* (2007) 40 Cal.4th

859, 867; *In re Manzy W.*, *supra*, 14 Cal.4th 1199, 1211 [remedy is remand for an express determination of whether the offense is a felony or misdemeanor and for possible recalculation of the maximum confinement time].)

If the probation report refers to the offense as a felony, without alerting the court that the offense could be a misdemeanor, the California Supreme Court described this as "[s]ignificant[]" in finding that the juvenile court was not aware of its discretion. (*In re Manzy W.*, *supra*, 14 Cal.4th 1199, 1210.) The prosecution and defense's failure to mention the court's discretion is also relevant to determine whether the court's failure to declare the offense a felony or misdemeanor was harmless. (*Ibid.* at p. 1199, 1210.)

Even prior to *Manzy W.*, the fact that the juvenile petition filed by the prosecution stated the offense was a felony was insufficient. "[T]he preparation of a petition is in the hands of the prosecutor, not the court. The mere specification in the petition of an alternative felony/misdemeanor offense as a felony has been held insufficient to show that the court made the decision and finding required by section 702." (*In re Ricky H.* (1981) 30 Cal.3d 176, 191, citing *In re Jeffery M.* (1980) 110 Cal.App.3d 983, 985.)

Even if the court itself states a felony-length maximum confinement time, "the setting of a felony-length maximum term period of confinement, by itself, does not eliminate the need for remand when the statute has been violated." (*In re Manzy W.*, *supra*, 14 Cal.4th 1199, 1209, approving *In re Dennis C.* (1980) 104 Cal.App.3d 16, 23.)

Some of the more common crimes juveniles commit that are "wobblers" (i.e. can be sentenced as either a felony or misdemeanor) include assault (Pen. Code, § 245), terrorist threats (Pen. Code, § 422), and second-degree burglary (Pen. Code, § 461). The penalty provisions may state a separate felony or misdemeanor sentence or the typical provision is that the offense is punishable by imprisonment in state prison or county jail. (See Pen. Code, § 17.) The Proposition 21 provision for gang penalties under Penal Code section 186.22, subdivision (d) is an alternate penalty which applies to misdemeanors. (*Robert L. v. Superior Court* (2003) 30 Cal.4th 894, 909.) *In re Damien V.* (2008) 163 Cal.App 4th 16, 26 held that the more severe gang penalties in section 186.22, subdivision (d) apply to juveniles.

Unpublished opinions reveal a split of authority (at least between the Fifth and the Third districts) on whether the court can reach back to earlier adjudications for *Manzy W.* error. (Compare two unpublished opinions: *In re Timothy W.*, Feb. 8, 2005, C045178 [rejecting respondent's assertion that juvenile court lacked authority to make the finding to a previously sustained petition]; and *In re Ricardo V.*, Mar. 24, 2005, F045193 [the present court may not revisit the issue].)

More recently, in *In re Ramon M.*, *supra*, 178 Cal.App.4th 665, the minor argued

that *Manzy W*. error from the previous dispositional order was tantamount to an unauthorized sentence. The Attorney General argued the claim should be time-barred for failure to raise the issue in a timely appeal from that prior disposition. Finding "the California Supreme Court's recent ruling on the use of juvenile adjudications as strikes" significant, Division Three of the Fourth District agreed with the minor. But the court deemed the issue to be a "purely technical one." Although the juvenile court's the court's intent to treat the prior adjudications as felonies was clear from the minute orders on each petition, *In re Ricky H*. (1981) 30 Cal.3d 176, 191-192, holds that minute orders are insufficient when the court fails to state on the record whether the offense should be treated as a felony or misdemeanor. Since the court was bound by this Supreme Court precedent, the appellate court remanded to the juvenile court for the limited purpose of making an express *Manzy W*. determination.

Numerous unpublished cases have ordered recalculation of the maximum term of confinement should the offense be declared a misdemeanor on remand.

The failure to make the felony/misdemeanor finding may have other ramifications in a case. *In re Nancy C.* (2005) 133 Cal.App.4th 508, 512 found that if the court on remand declared the minor's offense to be a misdemeanor, it should strike its order requiring the minor to provide physical body samples pursuant to Penal Code section 296, subdivision(a)(1). Further, it noted that if such samples have already been collected, the minor might seek relief pursuant to the expungement procedure provided by Penal Code section 299.

2. Strike consequences of juvenile adjudications.

A prior juvenile adjudication of a criminal offense in California can subject a defendant to the provisions of the Three Strikes law (Pen. Code, §§ 667, subds. (b)-(i), 1170.12) although there is no right to a jury trial in juvenile wardship proceedings in this state. *People v. Nguyen* (2009) 46 Cal.4th 1007 involved a challenge to use of the prior juvenile adjudication in which there had not been a right to a jury trial on the prior offense. It was argued as a violation of *Apprendi v. New Jersey* (2000) 530 U.S. 466. The California Supreme Court held that nothing in *Apprendi* interferes with the sentencing court's traditional authority to impose increased punishment on the basis of recidivism evidenced by a constitutionally valid prior adjudication. The Three Strikes law explicitly defines a juvenile adjudication as a prior conviction for enhancement purposes when four conditions are met: (1) the prior offense was committed when the juvenile was 16 years old or older; (2) the offense is listed in Welfare and Institutions Code section 707, subdivision (b), or as a violent felony in Penal Code section 667.5 or as a serious felony in Penal Code section 1192.7; (3) the juvenile was found to be a "fit and proper subject" for the juvenile court system (§ 707, subd. (a)(2)(E)); and (4) the juvenile was adjudged a ward of the juvenile court pursuant to section 602 because he or she committed an

offense listed in section 707, subdivision (b). (Pen. Code, §§ 667, subd. (d)(3), 1170.12, subd. (b)(3.)

Proposition 21 listed new offenses that qualify as 707, subdivision (b) offenses. But, in order for these new strike priors to apply, the present crime must have been committed on or after March 8, 2000, the effective date of Proposition 21. (See Pen. Code, §§ 667.1 & 1170.125 [Prop. 21 itself says that the new crime has to occur on or after the effective date of the proposition].) If the trial court has found one of these new strike priors to be true, but the present crime was committed before March 8, 2000, an ex post facto argument must be made. (See *People v. Smith* (1983) 34 Cal.3d 251, 259-260 [discussing ex post facto principles and stating that Proposition 8, if construed to apply to crimes committed before its adoption, may amount to an ex post facto law]; *People v. d'A Philippo* (1934) 220 Cal. 620, 623-624 [where defendant's present crime was committed after a change in the habitual offender law that made a forgery prior into a qualifying prior, a forgery prior could not be used to increase defendant's sentence under the habitual offender law without violating ex post facto principles].)

3. Calculating the maximum period of confinement.

Three steps are involved in computing the maximum period of confinement: (1) computing the term to be imposed on the new petition; (2) determining the effect of any prior declarations of wardship; and (3) subtracting any time credits.

First, one must compute the term to be imposed on the new petition. Previously, this was done by determining the upper term of imprisonment for the most serious offense charged, adding any consecutive time imposed for any proven enhancements, and adding any consecutive time imposed for the other counts. However, the calculation has now changed for DJJ commitments. Welfare and Institutions Code section 731, operative January 1, 2004, requires the juvenile court to exercise its discretion to determine the maximum term of a minor's confinement at DJJ based on the facts and circumstances of the minor's case and not simply to calculate the maximum term that could be imposed on an adult. (*In re Carlos E.* (2005) 127 Cal.App.4th 1529; *In re Sean W.* (2005) 127 Cal.App.4th 1177.)

The maximum confinement time cannot exceed the time that can be imposed on an adult offender convicted of the same offense. (*In re Randy J.* (1994) 22 Cal.App.4th 1497.) Where a minor commits more than one offense, any offense may serve as a measurement for the minor's physical confinement. The maximum length of confinement may be measured by the most serious offense, even if the most serious offense is a previous offense. (*In re Adrian R.* (2000) 85 Cal.App.4th 448, 455.) The discretion to set the maximum confinement time at less than the lengthiest term an adult would serve for the same offense does not allow for the imposition of a term less than the minimum

adult term. (*In re Joseph M.* (2007) 150 Cal. App. 4th 889, 896.)

The courts construe Welfare and Institutions Code section 731, subdivision (c) to confer on the court the discretion not only to impose a theoretical maximum term of physical confinement equal to an adult's maximum period of imprisonment (the DSL's aggravated term) for the identical offense – without requiring the court to follow the DSL's requirements for the imposition of the middle term in the absence of circumstances in aggravation or circumstances in mitigation—but also to impose a shorter theoretical maximum term of physical confinement on the basis of the facts and circumstances of the case. This broad scope of that discretion allows for protection of the public and the rehabilitation of the minor. (*In re Alex U.* (2007) 158 Cal.App.4th 259, 264-266; *In re Christian G.* (2007) 153 Cal.App.4th 708, 715.)

The California Supreme Court in *In re Julian R.* (2009) 47 Cal. 4th 487, 492, considered two issues involving the maximum confinement time. The juvenile court must set the maximum period of physical confinement at the dispositional hearing, but a written notation on the commitment form signed by the judge is sufficient. Further, on a silent record, as it was in Julian's case, the presumption will apply that the juvenile court performed its statutory duty and considered the facts and circumstances of the particular case in setting the maximum commitment term. It is presumed that the written order complied with section 731, subdivision (c), by considering imposition of a confinement period—shorter than the adult maximum—that might be justified by the "facts and circumstances" of the crime or crimes committed by the juvenile.

In re R. O. (2009) 176 Cal.App.4th 1493 involved a sustained petition of first degree murder and use of a firearm with a commitment to DJJ. Believing that it had no discretion in setting the term at anything less than the indeterminate sentence applicable to an adult convicted of the same offense, the trial court set the maximum period at 35 years. Interpreting section 731, subdivision (c), which states that the term of confinement is set by the court based upon the facts and circumstances of the matter that brought the juvenile to the jurisdiction of the court, the court found that although the maximum term may not exceed the maximum term of the adult offender, the juvenile court has the discretion to set a lesser term "based upon the facts and circumstances of the matter," and remanded for a new disposition hearing.

Any unused confinement time from prior declarations of wardship can be aggregated to the confinement time on the new petition. (Welf. & Inst. Code, §726; *In re Aaron N.* (1977) 70 Cal.App.3d 931, 941.) But, in order to do this, the 602 petition must contain notice of the intent to rely on previous sustained petitions under section 602. (*In re Michael B.* (1980) 28 Cal.3d 548, 554; *In re Richard W.* (1979) 91 Cal.App.3d 960,

977-978.) Check the current petition to see whether the minor was given notice of intent to aggregate petitions.

A juvenile court may not aggregate confinement times from wardships that have been terminated. (*In re Dana G.* (1983) 139 Cal.App.3d 678.)

In re Eddie (2009) 175 Cal.App.4th 809 held that Welfare and Institutions Code, section 726, subdivision (c) does not require the juvenile court to make a discretionary determination regarding a minor's maximum confinement period when a minor is not committed to DJJ. In this case, the juvenile court declared Eddie as a ward of the court and committing him to the Boys Ranch. The plain meaning of section 726, subdivision (c) requires the juvenile court to set the maximum term for a minor not committed to DJJ by taking the upper term for the offense, adding any consecutive terms, imposing stays pursuant to Penal Code section 654, adding terms for any enhancements to calculate the equivalent adult maximum term. Because section 731, which deals with minors committed to DJJ, has been amended to confer discretion on juvenile courts to impose a maximum confinement period, and section 726, subdivision (c) was not similarly amended, it can be inferred that the Legislature did not intend to change the way a maximum period of confinement is set in the latter class of cases.

The final step in calculating the maximum period of confinement is to subtract any time credits. Minors are entitled to have their maximum period of confinement reduced by any predispositional time spent in physical confinement. (*In re Eric J.* (1979) 25 Cal.3d 522, 533; *In re Stephon L.* (2010) 181 Cal.App.4th 1227.)

4. Credits.

Time spent in "physical confinement," defined as "placement in a juvenile hall, ranch, camp, forestry camp, or secure juvenile home pursuant to section 730, or in any institution operated by the Youth Authority" (Welf. & Inst. Code, § 726, subd. (c)), qualifies as credit against the maximum period of confinement. (*In re Harm R.* (1979) 88 Cal.App.3d 438, 441-445.) Time spent in a nonsecure placement does not count. (*Id.* at p. 442.) A minor is entitled to credit against his or her maximum term of confinement for the time spent in custody before the disposition hearing. It is the juvenile court's duty to calculate the number of days earned, and the court may not delegate that duty. (*In re Emilio C.* (2004) 116 Cal.App.4th 1058, 1067.)

In re Randy J. (1994) 22 Cal.App.4th 1497, 1505 held that a claim of entitlement to credit for time spent on home arrest, at Pride House, and in the Rite of Passage program failed due to the nature of the entitlement to custody credit since those do not fit

within the definition of secure confinement. Home detention, even spent in an electronic monitoring program at his residence, does not qualify for custody credit. (*In re Lorenzo L*. (2008) 163 Cal.App.4th 1076, 1080.)

Juveniles committed to DJJ are not entitled to pre-commitment conduct credits (*In re Ricky H.* (1981) 30 Cal.3d 176), nor are persons committed to DJJ by criminal courts. (*People v. Austin* (1981) 30 Cal.3d 155.) There is no denial of equal protection to deny conduct credits for custody time at DJJ since the commitment is for rehabilitative purposes and the term is indeterminate. (*Ibid.*)

5. Penal Code section 654's application to juvenile cases.

The California Supreme Court has held that section 654 applies to juvenile cases, when the court "sentences" consecutively. (*In re Michael B.* (1980) 28 Cal.3d 548, 556, fn. 3.) Similar to criminal convictions, Penal Code section 654 does not bar the imposition of separate punishments for separate crimes of violence committed against separate victims. (*In re Asean D.*(1993) 14 Cal.App.4th 467, 475.) However, section 654 has no application to juvenile confinement designed for rehabilitation where the court elects to sentence concurrently, absent a showing the *length* of the juvenile's term is increased by such disposition. (*In re Billy M.* (1983) 139 Cal.App.3d 973, 978-979.)

If the minor enters an agreed-upon disposition which specifies confinement time, any section 654 issues are waived. (*In re Giovanni M*. (2000) 81 Cal.App.4th 1061, 1066.)

6. Registration requirements.

Health and Safety Code section 11359, the narcotics offender registration statute, is not triggered by a juvenile adjudication, even if the juvenile is committed to the DJJ, because such a juvenile is not '"convicted" of the specified offense. (*In re Luisa Z.* (2000) 78 Cal.App.4th 978, 985.) Moreover, "a review of the statutory scheme behind the registration requirement reveals that it completely excludes juveniles from its provisions." (*Id*. at p. 988.)

In contrast, Penal Code section 457.1, subdivision (b)(3) expressly provides that juveniles who have been adjudicated on certain arson-related offense and committed to the DJJ, must register as an arson offender upon release from DJJ and until attaining the age of 25.

The gang registration requirement applies to any juvenile who has had a petition

sustained for the offense of active participation in a criminal street gang, any offense in which the criminal street gang enhancement has been found to be true, or any crime that the court finds is gang-related, meaning related to a criminal street gang, at the time of disposition. (Pen. Code, § 186.30, subd. (b); see also *In re Jorge G*. (2004) 117 Cal.App.4th 931.) However, there must be substantial evidence to support a finding that a crime is gang-related. Mere connection with a gang and having a gang tattoo is insufficient to show crime was gang-related for purposes of imposing gang registration requirement. (*In re Eduardo C*. (2001) 90 Cal.App.4th 937, 941-943.)

Finally, the requirement that a juvenile register for a sex offense is triggered only if the juvenile is committed to DJJ. (Pen. Code, § 290.008 [formerly 290, subd. (d)(1)]; *In re Bernardino S*. (1992) 4 Cal.App.4th 613, 619-620.) *In re Derrick B.* (2006) 39 Cal.4th 535, took a restrictive view of section 290, subdivision (a)(2)(E) and found the juvenile court was not authorized to order a ward to register as a sex offender for committing an offense not listed in section 290, subdivision (d)(1). This is of course qualified and limited by the subsequent amendments to the sex offender registration law.

In re J.P. (2009) 170 Cal. App. 4th 1292, 1293-1294 followed *People v. Hofsheier* (2006) 37 Cal.4th 1185 and applied equal protection principles to juveniles who are subject to sex offender registration. J.P. was ordered to register based on an allegation of nonforcible oral copulation with a person under 18 years of age in violation of Penal Code section 288a, subdivision (b)(1). He made a motion to be relieved of the requirement that he register as a sex offender under sections 290 and 290.008. The court agreed that mandatory registration would deny J.P. equal protection under the law because there is no such requirement for similarly situated offenders convicted or adjudicated of committing unlawful intercourse with a person under 18 under section 261.5, subdivision (a).

H. Unauthorized Dispositions and Extensions.

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Welfare and Institutions Code section 202, subdivision (e), provides a list of dispositional alternatives for a minor who is adjudged a ward of the court. A direct commitment to the county jail is not included in dispositional alternatives under section 202 subdivision (e). (*In re Jose H*. (2000) 77 Cal.App.4th 1090, 1096-1100; *In re Kenny A*. (2000) 79 Cal.App.4th 1, 4-8.) However, Welfare and Institutions Code section 208.5 does allow a ward to be housed at county jail under some circumstances which authorize placement by a probation officer. (*In re Charles G*. (2004) 115 Cal.App.4th 608, 615.) Further, Welfare and Institutions Code sections 207.1 and 707.1 allow detention in a jail in certain circumstances and based on specific findings on the record. (Welf. & Inst. Code § 207.6.)

A DJJ commitment involves parole, but precludes the imposition of probation conditions. (*In re Allen N*. (2000) 84 Cal.App.4th 513, 516.)

Extension of DJJ commitments under Welfare and Institutions Code section 1800 requires a finding that the potential committee's mental disorder causes serious difficulty in controlling his or her behavior, resulting in a serious and well-founded risk of re-offense. (*In re Howard N*. (2005) 35 Cal.4th 117.) This requirement must not only be alleged in the petition, but also demonstrated at the probable cause hearing and trial. (*In re Michael H*. (2005) 128 Cal.App.4th 1074.) In *Michael H*., the case was remanded to juvenile court because the petition seeking to extend the minor's commitment did not contain the necessary allegations. At the trial, the juvenile has a right not to testify. *(In re Luis C.* (2004) 116 Cal.App.4th 1397.) The standard of beyond a reasonable doubt and principles of double jeopardy apply. (*In re Anthony C.* (2006) 138 Cal.App.4th 1493.) The commitment scheme withstood due process and equal protection challenges in *In re Lemanuel C.* (2007) 41 Cal.4th 33, 38.

Pursuant to the reverse transfer provisions of Penal Code section 1170.19, subdivision (a), a court has discretion to order a juvenile disposition on a discretionary direct file without the prosecutor's consent. (*People v. Thomas* (2005) 35 Cal.4th 635, 639, 642 [statutory provision requiring prosecution consent is a violation of separation of powers].) But, the trial court's discretion under Penal Code section 1170.19, subdivision (a) to commit a minor to the Youth Authority applies only when the minor otherwise meets the eligibility requirements of Welfare and Institutions Code section 1732.6. (*Id*. at p. 642.)

Can the juvenile court order a minimum period of confinement at a camp? Apparently, these orders are not all that unusual. (See, e.g., *In re Jose Z.* (2004) 116 Cal.App.4th 953, 957; *In re Sheena K*. (2004) 116 Cal.App.4th 436, 438.) Although a minimum period of confinement in camp is not expressly authorized by statute, the Second District has held that such an order is authorized by the broad discretion afforded to juvenile courts to make dispositional orders and impose conditions under Welfare and Institutions Code section 730. (*In re Ronny P*. (2004) 117 Cal.App.4th 1204.)

I. Restitution. Go To Index

Any victim of a Welfare and Institutions Code section 602 offense who incurs any economic loss as a result of the minor's conduct is entitled to restitution. (Welf. & Inst. Code, § 730.6, subd. (a).) Restitution under this statute is not limited to out-of-pocket expenses. The statute specifically states that "economic losses," not monies expended is

the test. (*In re Johnny M*. (2002) 100 Cal.App.4th 1128, 1131-1132.) Additionally, the court does not need to consider the minor's ability to pay when making a restitution order. (*In re Brian S*. (1982) 130 Cal.App.3d 523, 532.) Thus, this may be a potential adverse consequence to watch for in a juvenile appeal.

In re Brittany L. (2002) 99 Cal.App.4th 1381, 1391-1392 held the court may use any rational method of fixing the amount of restitution, provided it is reasonably calculated to make the victim whole and is consistent with the purpose of rehabilitation. In doing so there is virtually unlimited discretion as to the kind of information that may be considered and the source of that information, so long as the juvenile has an opportunity to challenge the finding and offer evidence consistent with due process. *In re Anthony M*. (2007) 156 Cal.App.4th 1010, 1019 found error when the juvenile court imposed a restitution order for the amount billed by the medical provider rather than the smaller amount paid by Medi-Cal. Because there was the likely need for further medical care, the court was unable to determine the total cost of the medical expenses so the reversal included remand for further proceedings to determine the total amount paid by Medi-Cal. *In re Dina V*. (2007) 151 Cal.App.4th 486, 489 found no abuse of discretion in an order for restitution sufficient to pay the costs of repair of the victim's vehicle even if that amount exceeded the estimated cost of replacement since replacement would place a further burden on the victim.

In re M.W. (2008) 169 Cal.App.4th 1, 6 held that victims of crimes often need the services of a mental health professional in order to resume normal life activities. Mental health service fees are direct costs to the victim and are recoverable under the statutory authority providing for full recovery of all economic losses. The cost of mental health services is recoverable even though not specifically enumerated in section 730.6, subdivision (h).

Restitution as a condition of probation was addressed in *In re Tommy A.* (2005) 131 Cal.App.4th 1580, 1587. The juvenile court has broad discretionary power to impose terms and conditions of probation to achieve justice and enhance the reformation and rehabilitation of a ward. *In re G.V.* (2008) 167 Cal.App.4th 1244, 1250 held that probation conditions requiring both the payment of restitution and the performance of community service were not prohibited or limited by statute. The juvenile court is expressly authorized to require a minor to participate in community service or graffiti cleanup irrespective of the nature of his or her offense and other conditions.

Other issues to consider are:

Was restitution imposed joint and severally with other defendants? If so, consider

arguing that the court abused its discretion in ordering such restitution, where the facts show minimal culpability on the minor's part. (See *In re Brian S.* (1982) 130 Cal.App.3d 523, 533-534 [the juvenile court should take into account other culpable parties in imposing a restitution, but there are no rigid guidelines for apportionment].) But see *In re S.S.* (1995) 37 Cal.App.4th 543, 549, where the First District Court of Appeal ruled that *Brian S.* stands only for the proposition that the juvenile court has the discretion to apportion restitution, but apportionment is not required, so joint and several liability is also permissible.

Was the minor improperly required to pay restitution for a crime that he did not commit? There appears to be a split of authority on whether the juvenile court can order a minor to pay restitution for another person's conduct. The Second District has held that a minor's restitution orders are limited to the loss for which the minor was convicted. In *In re Maxwell C.* (1984) 159 Cal.App.3d 263, the minor was convicted only of receiving part of the stolen property, so he could not be required to pay restitution for the entire loss. But in *In re I.M.* (2005) 125 Cal.App.4th 1195, the First District required a minor who was convicted of accessory after the fact to a murder to pay restitution for the victim's funeral expenses even though he was not personally and immediately responsible for the victim's loss.

In *In re T.C.* (2009) 173 Cal.App.4th 837, no error was found in an order for restitution on a count dismissed without a *Harvey* waiver. (*People v. Harvey* (1979) 25 Cal.3d 754.) The appellate court rejected the *Harvey* waiver argument, holding that no such waiver was required. The juvenile court has broad discretion to impose any reasonable condition of probation for the purposes of rehabilitation. *Harvey* is inapplicable to juvenile court proceedings. Here, the restitution order was reasonably related to future criminality and comported with the policies of juvenile court law.

In *In re A. M.* (2009) 173 Cal.App.4th 668, the juvenile court found that the minor's conduct was a substantial cause of loss. The minor admitted one count of misdemeanor driving without a valid license (Veh. Code, sec. 12500, subd. (a)), with a factual finding by the court that she hit a pedestrian who died of his injuries. While the pedestrian's conduct and dark clothing contributed to the accident, the minor's driving was a substantial factor. She was ordered as a condition of probation to pay restitution for burial or cremation costs. Welfare and Institutions Code section 730.6, subdivision (a) holds that a victim shall receive restitution from a minor whose conduct has resulted in the victim's loss, but it does not require the conduct to be the sole cause of loss. Here, the trial court's finding that minor's conduct was a substantial factor in victim's death justified the restitution order.

In *In re K.F.* (2009) 173 Cal.App.4th 655, the court held that if the victim was found to have "incurred" a loss such that he or she will become liable or subject to costs resulting from the juvenile's conduct, then restitution is allowed for the specified cost. Restitution for assault with great bodily injury was based on a letter from Healthcare Recoveries, acting for Kaiser Hospital, which listed the medical services provided to the victim and the costs, with a total balance due. Despite Kaiser's status as a health maintenance organization that provides medical services to its members with no creditor-debtor relationship to its patients, it was uncontested that the document on its face indicated that the victim was "billed" for the service. Being billed for the service, the victim "incurred" a loss for which the restitution order was authorized. (Welf. & Inst. Code, sec. 730.6, subd. (h).) Kaiser documents for other services showed there was no amount due and did not support a restitution order. The trial court's order for restitution for the victim's use of his sick leave - as the depletion represented a loss - was affirmed.

In re Eric S. (2010) 183 Cal.App.4th 1560 held that victim restitution orders in delinquency proceedings may include amounts billed by an HMO for medical services, even when the victim is an HMO member not required to pay for those services. The victim, a Kaiser subscriber, received medical treatment at Kaiser for injuries caused by the minor. Over objection that restitution should be limited to the victim's out of pocket expenses, the juvenile court's restitution order included the cost of the victim's medical treatment by Kaiser. Considering the purposes of the juvenile restitution statute (Welf. & Inst. Code, § 730.6) which are rehabilitation, deterrence, and making the victim whole, the court concluded a restitution order should fully compensate the victim regardless of potential third-party reimbursement. The court agreed with *People v. Duong* (2010) 180 Cal.App.4th 1533, that a defendant should not be shielded from paying restitution because a victim fortuitously purchased membership in an HMO.

Did the court delegate its authority to determine the amount of restitution? While there has been a split of authority in the past over delegation, *In re Karen A.* (2004) 115 Cal.App.4th 504 interpreted the 2000 revisions of Welfare & Institutions Code section 730.6, subdivision (h) as allowing the juvenile court to direct the probation officer to set the amount of restitution.

An order of restitution does not foreclose the possibility of community service as well. The statutory Graffiti Removal and Damage Recovery Program does not limit the broad discretion of the juvenile court and its authority to impose restitution and to order community service as a probation condition for minors found to have committed acts of vandalism. It simply made mandatory certain restitution provisions where a minor has committed acts of vandalism or graffiti. (See Welf & Inst. Code, § 742.16, subd. (a); *In re G.V.* (2008) 167 Cal.App.4th 1244, 1249-1250.)

G.C. v. Superior Court (2010) 183 Cal.App.4th 371 found that a juvenile court must consider ability to pay under Welfare and Institutions Code section 742.16 when ordering restitution for graffiti abatement, even where a delinquent minor has been granted deferred entry of judgment (DEJ) for an offense of felony vandalism by graffiti. A young tagger was alleged to have committed a single felony count of vandalism by graffiti and there was a request for restitution by the City of San Jose for $516 to clean up the graffiti. He was granted DEJ which included community service, participation in the graffiti abatement program, and payment of $516, noting his mother was jointly and severally liable for the amount. He satisfied all conditions except the restitution, made a showing that he and his parents lacked ability to pay, and sought a modification. The prosecution opposed and argued that section 742.16 only applies, by its terms, to a minor found to be a person described by section 602 and adjudicated a ward of the court. The trial court found it lacked jurisdiction to make such an order. A writ of mandate issued for it to rule on the merits of the motion and in consideration of the ability to pay. The appellate court reasoned that the general restitution statute applicable in section 602 cases require the juvenile court to order restitution to victims, unless there is an compelling and extraordinary reason for not doing so, and the inability to pay is not considered a compelling or extraordinary reason. (Welf. & Inst. Code, sec. 730.6, subd. (h).) However, there is a more specific provision when the property defaced by the minor's graffiti has been repaired or replaced by a public entity. The court is to determine the total cost incurred by the public entity and order the minor or his estate to pay those costs to the extent the court determines the minor or his estate has the ability to pay. There are other provisions providing for the minor to repair, replace, or clean up damaged property. The court found that DEJ is in lieu of jurisdictional and dispositional findings, and provides that the minor "may" also be required to pay restitution to the victim or victims. (Welf. & Inst. Code, sec. 794.) The ability to pay provisions of section 742.16 may be relied on by the juvenile court in ordering victim restitution in a DEJ case.

J. Fines. Go To Index

Fines are governed by Welfare and Institutions Code sections 730.5 and 730.6. Section 730.5 allows the court to levy a fine on the minor in the amount that could be imposed on an adult for the same offense if the minor has the ability to pay. Further, penalty assessments, pursuant to Penal Code section 1464, can also be levied on this fine, if the minor has the ability to pay. This can be an issue on appeal if the court has found the minor has no ability to pay, and yet imposes this fine anyway. (*In re Steven F.* (1994) 21 Cal.App.4th 1070, 1073.)

Section 730.6 requires a restitution fine between $100 and $1000, regardless of

ability to pay, if the minor is found to be a person described by section 602 by reason of commission of one of more felony offenses. (Welf. & Inst. Code, § 730.6, subd. (a)(1)(A)(b)(1).) If the minor is a ward for a misdemeanor offense, the fine shall not exceed $100. (Welf. & Inst. Code, § 730.6, subd. (a)(1)(A)(b)(2).)

If an objection has not been made below, to get around waiver problems, appellate counsel may argue that the sentence was unauthorized because the court did not make the required ability to pay finding (*People v. Scott* (1994) 9 Cal.4th 331, 354), or as a fallback, may make an ineffective assistance of counsel argument.

A security fee pursuant to Penal Code section 1465.8 cannot be imposed for juvenile adjudications of wardship because they are not "criminal convictions." (*Egar v. Superior Court* (2004) 120 Cal.App.4th 1306, 1308-1309.)

K. Findings Regarding Special Educational Needs Go To Index

Federal law requires that children with disabilities receive special programs no matter where they are housed. (20 U.S.C., § 1400, et. seq. [Individuals with Disabilities Act (IDEA)]; 42 U.S.C., § 12101 [Americans with Disabilities Act]; 29 U.S.C, § 794 [Rehabilitation Act of 1974].) There is a state law framework for implementation. (Ed. Code § 56031.) *In re Angela M*. (2003) 111 Cal.App.4th 1392 remanded to the juvenile court to determine whether or not the minor had special educational needs before finding her a ward of the court under Welfare and Institutions Code section 602. The record showed she suffered from bipolar disorder, and possibly from ADHD, and a doctor recommended she be evaluated for special educational needs, thus putting the trial court on notice the minor might have special needs. The rules of court relied on in the *Angela M.* decision have changed. However California Rules of Court, rule 5.651(b)(2) provides that at the disposition hearing, and at all subsequent hearings, "the juvenile court must address and determine the child's general and special education needs, identify a plan for meeting those needs, and provide a clear, written statement" on Judicial Council form JV-535. (See also Cal. Stds. Jud. Admin., 5.40(g)-(h).)

If a judge commits a minor to DJJ, the judge must be fully satisfied that "the mental and physical condition and the qualifications of the ward are such as to render it probable that he will be benefitted by the reformatory educational discipline or other treatment provided by the Youth Authority." (Welf. & Inst. Code, § 734.) When the juvenile court commits a person identified as an individual with exceptional needs (Ed. Code, § 56026) to DJJ, the child cannot be physically transferred there until his or her individualized education plan (IEP) has been furnished to DJJ.

V. PETITIONS FOR MODIFICATION

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Welfare and Institutions Code section 775 provides the juvenile court with continuing jurisdiction over its wards. Under this section, the juvenile court judge has the power to change, modify, or set aside any prior order, including a dispositional order. The juvenile court has jurisdiction to modify any prior order, including an order declaring wardship, even though an appeal is pending from that order. (*In re Corey* (1964) 230 Cal.App.2d 8113, 819.)

The procedures for filing a petition to modify a previous order are found in Welfare and Institutions Code section 778 and 779. Section 778 states that the ward, probation officer, or "any...person having an interest" in the ward may petition the juvenile court to modify an existing order. Section 779 specifies that the "order" sought to be modified may be a commitment to the DJJ.

The standard for deciding whether a petition should be granted is whether "changed circumstances" or "new evidence" warrant the modification of the existing order. (Cal. Rules of Ct., rule 5.570(e); *In re Corey* (1964) 230 Cal.App.2d 813, 831.)

Thus, if appellate counsel becomes aware of facts occurring subsequent to the disposition that amount to a "change in circumstances" (e.g. if the minor has not been receiving the treatment intended by the juvenile court), counsel should consider the possibility of a petition to modify.

VI. POST-DISPOSITION ISSUES

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A. Motions for Travel Costs

A minor who is declared a ward under section 602 and placed in a residential treatment facility may be several hundred miles away from his home or as far away as Iowa. In *In re L.M.* (2009) 177 Cal.App.4th 645, the appellate court upheld the juvenile court's denial of father's motion for travel costs to visit his delinquent 12-year-old minor. The goal of his case plan was reunification with his father, and monthly visitation was ordered. The minor filed a motion to compel the probation department to pay for his father's transportation costs to the monthly visits. The appellate court concluded that a juvenile court may order an agency to assist the parent of a delinquent child with travel costs for visitation. Here however, the motion was unaccompanied by any declaration or other competent evidence to provide details about father's financial circumstances or the likely cost of travel. The appellate court noted that nothing in its decision precluded the minor or father from bringing a new motion for travel costs based on additional information.

B. DJJ Release Issues.

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Despite the wealth of issues relating to maximum confinement, appellate attorneys may have questions from clients about the significance of those calculations or other, more significant, calculations made by DJJ. Each ward who is committed to DJJ appears before the Youthful Offender Parole Board (YOPB) shortly after they arrive in DJJ. At that time, an initial hearing is conducted where the YOPB reviews the case and orders the type of program the offender must complete. In addition, the YOPB indicates the date the offender can be considered for release to parole. (Cal. Code of Regs., tit.15, secs. 4950-4951.) The parole consideration date (PCD) may be modified at subsequent annual reviews depending on how well or how poorly the ward is doing. A ward may be considered for parole prior to the parole consideration date if the treatment team believes that the parole consideration date should be modified. (Cal. Code of Regs., tit.15, secs. 4621.) Institutional program credits are subject to administrative changes which are to take effect in Spring, 2009.

This is a hybrid system with characteristics similar to the adult system for those committed to life in prison for an indeterminate term and the calculation of release dates for those with determinate terms. If the ward behaves well in the institution and successfully completes all program goals that were ordered by the YOPB, s/he can be considered for release to parole. Wards are generally not considered for release to parole, however, until they have served a set amount of time.

During the month the ward is scheduled to appear before the YOPB for his or her parole consideration hearing, the DJJ ward can be recommended for release to parole if s/he has successfully completed all of his or her program goals. At the parole consideration hearing, the offender meets with the YOPB to discuss the progress. It is the responsibility of the YOPB to determine the ward's readiness for parole. If the offender is to be released to parole, the YOPB may impose "special conditions" of parole, in addition to establishing the standard rules which include paying restitution, maintaining contact with their parole agent, submitting to searches, and not leaving the state without permission. Special conditions of parole are specifically ordered according to the individual needs of the case and may include participating in counseling or substance abuse treatment, testing for possible substance abuse, not associating with negative peers, and earning a high school diploma or equivalent.

C. DJJ Parole Violations.

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The administrative handling of parole violations will not be within the scope of the direct appeal for a minor. *L.H. v. Schwarzenegger* (E.D. Cal. 2007) 519 F.Supp.2d 1072 is a class action involving the rights of DJJ wards at parole violation hearings. It was based on allegations that in the vast majority of revocations, DJJ denied juveniles the right to have witnesses testify on their behalf, to present evidence to defend or mitigate the charges, or to have an attorney. Some of the issues were resolved by summary judgment in the published opinion, but others were the result of a settlement in 2008. The terms are outlined on the website of the Youth Law Center at: http://www.ylc.org/viewDetails.php?id=69

The conditions include: attorneys will be appointed for every juvenile parolee who has been charged with a violation of parole within 8 business days of the parole hold; juveniles will receive a preliminary probable cause hearing within 13 business days of the parole hold; if there is probable cause to hold the youth, the juveniles will receive a full revocation hearing within 35 calendar days of the parole hold; juveniles will have the right to present evidence and witnesses at their probable cause and revocation hearings; and, clear policies will be developed that spell out which behavior warrants revocation of parole or a return to a DJJ facility. It further provides that youths who are not revoked will be released promptly and DJJ will end a policy of "temporary detention" for youth continued on parole; as the result of a violation, juveniles cannot be returned to DJJ for more than a year, and a revocation cannot be extended beyond a year, except for cases of serious in-custody misconduct. There will be accommodations for mental and physical disabilities and for effective communications, including language translation for non-English speakers, at all stages of the parole revocation process. Youths will no longer be

automatically shackled during revocation proceedings and policies will be developed to govern when and how youths are restrained. A prompt administrative appeal system that includes the appointment of attorneys will be in place.

VII. APPEAL

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A. Dual Counsel at the trial level and on appeal?

The juvenile cases present a unique counsel relationship. Effective July 1, 2004, California Rules of Court, rule 5.663 clarified existing rules governing the responsibilities of delinquency defense counsel, including during a case's post-dispositional period. This includes advocating after disposition that the youth receive care, treatment and guidance consistent with his or her best interest. This presents the situation where both counsel may be responsible for pursuing a course of action, and the danger that neither will act based on an assumption. Clear lines of communication will help counsel determine who is responsible and whether there should be motions to modify probation conditions or modify a disposition to the Division of Juvenile Justice (DJJ). (See Welf. & Inst. Code, §§ 778 and 779.)

Also, the DJJ has the responsibility of making annual review reports to the court and probation department on the ward's treatment or program goals, overall adjustment, disciplinary history, and an estimated time of completion of his or her treatment plan. (See Welf. & Inst. Code, § 1720, subds. (e) and (f).) One crucial part of this is that DJJ offer treatment in a timely manner "designed to meet the parole consideration date set for the ward." (Welf. & Inst. Code, § 1720, subd. (e).) The statute does not provide for service of the annual report on the attorney or the ward. Appellate counsel's awareness of the DJJ structure and differences from the Department of Corrections Adult Division will help in communication with the ward. (See Division of Juvenile Justice, infra.)

B. The *Wende* Brief.

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When appointed appellate counsel is unable to find an arguable issue, the last resort is the filing of a "no issues" brief pursuant to *People v. Wende* (1979) 25 Cal.3d 436, 441–442. While this has been the presumed practice for many years, it was called into question for delinquency cases in light of the examination of the procedure for dependency cases in *In re Sade C.* (1996) 13 Cal.4th 952, 973. *In re Kevin S.* (2003) 113 Cal.App.4th 97, 99, held that a delinquency proceeding is sufficiently similar in substance and import to a criminal prosecution that indigent juveniles, like criminal defendants, are entitled pursuant to the Fourteenth Amendment of the United States Constitution to appointed counsel on a first appeal as of right. Consequently, a *Wende*

brief is properly filed in a delinquency case and invokes the requirement that the appellate court conduct an independent evaluation of the record for error. The slightly different procedure outlined in *Anders v. California* (1967) 386 U.S. 738, 742–745 [18 L.Ed.2d 493, 87 S.Ct. 1396] is satisfied by California's adaptations. (See *Smith v. Robbins* (2000) 528 U.S. 259, 264 [145 L.Ed.2d 756, 120 S.Ct. 746].)

When appointed appellate counsel finds no arguable issues, the justices must review the entire record to determine whether the appeal is in fact frivolous. (*People v. Wende, supra*, 25 Cal.3d at pp. 441–442.) The California Supreme Court held that appointed appellate counsel need not request to withdraw so long as two conditions are satisfied. First, appointed appellate counsel may not describe the appeal as frivolous. Second, the client must be advised of the right to request that appointed appellate counsel be relieved. (*Id.* at p. 442.) These are the procedures to be followed in delinquency cases. (*In re Kevin S., supra,* 113 Cal.App.4th at 103.) Examples can be found on the CCAP website.