



Correction:

South Dakota does permit the use of bail in juvenile cases. Therefore, aside from the change in the chart on p. 6 listing South Dakota as YES rather than NO, the following corrections should be made in the body of the report:

- 1) p. 2, second full paragraph should read "... a total of ~~19~~ 20 states have some provision.... The other ~~31~~ 30 states ..."
- 2) p. 4, second full paragraph should read "...of the ~~31~~ 30 states..."

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LEGISLATIVE TECHNICAL ASSISTANCE IN JUVENILE JUSTICE

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✓ BAIL FOR JUVENILES IN THE 50 STATES

This report examines one right accorded to adults charged with crimes, but often unavailable to juveniles - the right to bail. Similar to the right to a jury trial, the right to bail is one of the rights given to adults in criminal cases but not constitutionally required in a juvenile proceeding. As bail is available to juveniles who have been waived or certified to be processed in the adult system, this report responds solely to the question of whether juveniles who are to be handled in the juvenile justice system have a right to bail pending further court action.

History of Constitutional Rights for Juveniles

From the inception of the first juvenile court in Cook County, Illinois, in 1899, the trend in juvenile justice had been to divest court proceedings of all practices and vestiges of a criminal trial. The purpose of the juvenile court was to examine the problems of the child and provide protection based on that assessment, not to place the juvenile on trial for committing a criminal act, and to punish him upon conviction. The whole juvenile court proceeding, therefore, was viewed as nonadversary, more a civil than a criminal matter.

Certain practices accepted under the American system of justice were viewed as not only unnecessary, but also as detrimental, to the aims of the juvenile court. These include such fundamental protections accorded to a defendant in a criminal trial as the right to counsel, to confront and cross-examine witnesses, to written notice of the specific charges, and to a public trial by a jury.

The civil nature of the juvenile court came to an abrupt halt with the U.S. Supreme Court decision In re Gault, 387 U.S. 1 (1967). The Supreme Court recognized that regardless of the philosophy of the juvenile court as being protective of the child, children were often deprived of fundamental liberties without benefit of the most basic procedural rights. Gault held that juveniles were entitled to certain due process rights to secure the fundamental fairness of the proceeding. Many thought that Gault would open the door to the elimination of special procedures of the juvenile court and an eventual abolition of the court itself. Fuel was added to the fire when the



U.S. Supreme Court held in In re Winship, 397 U.S. 358 (1970), that the same standard of proof, beyond a reasonable doubt, required for conviction in a criminal trial was now to be required for a finding of delinquency. However, the Court in McKeiver v. Pennsylvania, 403 U.S. 528 (1971) held that the right to a jury trial, a constitutional guarantee to an adult in a criminal proceeding, was not a constitutional requirement in a juvenile proceeding. In effect the Supreme Court was legitimizing the juvenile court ideal about the special procedures the Court had established in treating juveniles. Only those rights necessary to insure fundamental fairness would be constitutionally required by the Supreme Court.

### General Overview of Bail for Juveniles

While the Supreme Court has not yet heard a case on a juvenile's right to bail, state courts have addressed the issue. Most state courts have decided that, without a statutory provision guaranteeing such a right, a juvenile is not entitled to bail (Re Castro, 243 Cal App. 2d 402 (1966); people ex rel. Wayburn v. Schupf, 365 N.Y.S.2d 235 (1975); Baker v. Smith (1971 Ky.) 447 SW2d 149). Two factors have worked against the provision of bail for juveniles, both in court cases and with state statutes. Because provisions for bail apply only to individuals arrested and charged with crimes, the practice is not applicable to juveniles who are treated within the civil jurisdiction of the juvenile court. This legal rationale might have been overruled years ago (as happened to similar positions presented by the counsel for the losing side of In re Gault), if there were not a second, more substantive, rationale for denying bail to juveniles. Unlike the adult system where, until the recent introduction of release on recognizance (ROR) programs, bail was the only means for gaining release pending further court action, the juvenile courts in all 50 states have always had special provisions for releasing juveniles. In practice, most juveniles brought before the juvenile court are released into the custody of their parents, or legal guardians, thereby reducing the necessity for juvenile bail provisions. With a new trend towards treating juveniles alleged to have committed crimes more like adults, state legislatures may wish to reevaluate the prohibition against the provision of bail in all juvenile cases within a particular state.

Legislatures have addressed the issue of juvenile bail in primarily four ways: guaranteeing juveniles the same right to bail as adults; giving the court with juvenile jurisdiction discretionary authority to set bail; affirmatively denying the right to bail; and remaining silent on the issue, implicitly denying bail to juveniles. Generally speaking a total of 19 states have some provision which permits the use of bail in juvenile cases. The other 31 states fall into the last two categories of either directly or indirectly denying bail to juveniles.

### Other Sources

Earlier surveys of this issue can be found in articles by James H. Smith, "Juvenile Right to Bail," 11 Journal of Family Law 81 (1971) and "The Right to Bail and the Pre-'Trial' Detention of Juveniles accused of 'Crime'" 18 Vanderbilt Law Review 2096 (1965). A brief discussion of the issues surrounding bail for juveniles and recent changes in some state statutes appears in Samuel M. Davis' Rights of Juveniles: The Juvenile Justice System (New York: Clark Boardman Company, Ltd., 1974).

## Methodology

Information on each state's approach to bail for juveniles was obtained either through phone interviews with key legislative and agency staff interested in juvenile justice or by researching state statutes on bail, detention and custody of juveniles inclusive of the 1979-80 supplements. The chart summarizes the information collected. Whenever a state code was silent on provision of juvenile bail, that silence will be reflected in the chart as a state not having bail for juveniles. The rationale for this decision was that very few state courts have ruled, in the absence of a statute making some reference to bail for juveniles, to extend that right to juveniles. One should also not assume that the mere existence of a statute permitting bail in juvenile cases insures wide application of such statute. The reader is therefore encouraged to investigate the actual practices in a state regarding juvenile bail prior to making any definitive statements about the use of bail for juveniles in a particular state.

## States Permitting Bail for Juveniles

The states permitting the use of bail are a widely divergent group. They are not in one geographic area nor could they be classified as either 'soft' or 'tough' on juvenile delinquents.

A few states guarantee the right to bail for juveniles. Arkansas is one such state: "Any juvenile...shall be...entitled to give bond..." (Ark. Stat. Ann. 45-420 (1975)). Oklahoma's statute reads: "Prior to entry of any order of adjudication, any child in custody shall have the same right to be released upon bail as would an adult under the same circumstances." (Okla. Stat. tit. 10, 1112(c), (Supp. 1979)).

It is more common for a state to give the court the discretion to order bail at a detention hearing, in lieu of simply releasing the juvenile into the custody of his/her parents. The law in Tennessee reflects this practice: "The court in its discretion may release the child on an appearance bond" (Tenn. Code Ann. 37-2317(e)(Supp. 1979)). However, in these states the discretion for denying bail to a juvenile is oftentimes much broader than would be legally permissible in the case of an adult. For all but the most serious of adult crimes, in most states, the court is instructed to base its bail decision only on the likelihood of the individual appearing at future court proceedings. In the case of a juvenile, the court is given more latitude and is encouraged to consider other factors including the child's welfare and the protection of society. Nebraska, which permits the court to set bail, guides the judge to deny bail if "further detention of such minor is a matter of immediate and urgent necessity for the protection of such minor or the person or property of another or if it appears that such minor is likely to flee the jurisdiction of the court" (Neb. Rev. Stat. 43.205.03).

In many states where bail is permitted, the impression of the individuals to whom we spoke was that the practice was not widespread. One notable exception, however, was Delaware. In an interview with the Chief Master of the Family Court, we learned that bail was set on juveniles not released to the custody of their parents upon their parents' verbal promise to appear at all future court proceedings.

In Illinois juveniles are eligible for bail, but for a limited number of offenses. The statute states that a juvenile charged with a misdemeanor punishable by imprisonment in a facility other than a penitentiary is permitted to have bail set on his/her case. (Ill. Rev. Stat. ch. 110A 553,

Sup. Ct. Rule 553).

One state which recently revised its procedure for juvenile bail is Washington. When the legislature completed a major revision of its juvenile code in 1977, it included a provision allowing bail to be set in cases of juveniles charged with crimes. This paralleled a change in legislative philosophy that juveniles accused of crimes should be handled in the court system more like adults than like children.

#### States Denying Bail to Juveniles

Of the 31 states not permitting bail statutorily, most opt for being silent on the issue. In those states the statutes pertaining to taking a juvenile into custody and requiring judicial determination of the need for detention give the police officer and the judge two options: release the juvenile to the juvenile's parents, or placement of the juvenile in a detention facility. The statutes of Alaska (Alaska Stat. 47.10.40), Maryland (Md. Ann. Code CJ 30814), New Jersey (N.J. Rev. Stat. Ann. 2A:4-56), Wyoming (Wyo. Stat. 14-6-206), and New York (N.Y. Judiciary-Family Court Act 724,727,728) are all of this type. In states where the statute is silent on the issue, the court usually has denied the motion for bail on the basis that another statute in the Code states that delinquency is not to be considered a crime and that juveniles are taken into custody and not arrested.

There are several states that explicitly deny bail to juveniles. Kentucky's statute reads: "the law relating to bail shall not be applicable to children" (Ky. Rev. Stat. 208.110(1)). Hawaii and Oregon have similar statutes.

Maine stands in contrast to Washington. Maine had allowed bail (Me. Rev. Stat. tit.15 2608,3203(8)) prior to April 1978, but repealed those sections in adopting a new Juvenile Code and now makes no reference to bail for juveniles.

# STATUTORY PROVISIONS FOR BAIL FOR JUVENILES

Do your state statutes have a provision for the setting of bail for a juvenile who has been taken into custody?

<u>STATE</u>	<u>YES/NO</u>	<u>STATE</u>	<u>YES/NO</u>
Alabama	NO	Montana	NO
Alaska	NO	Nebraska	YES
Arizona	NO	Nevada	YES
Arkansas	YES	New Hampshire	YES
California	NO	New Jersey	NO
Colorado	YES	New Mexico	NO
Connecticut	YES	New York	NO
Delaware	YES	North Carolina	NO
Florida	NO	North Dakota	NO
Georgia	YES	Ohio	NO
Hawaii	NO	Oklahoma	YES
Idaho	NO	Oregon	NO
Illinois	YES	Pennsylvania	NO
Indiana	NO	Rhode Island	NO
Iowa	NO	South Carolina	NO
Kansas	NO	South Dakota	NO
Kentucky	NO	Tennessee	YES
Louisiana	YES	Texas	NO
Maine	NO	Utah	YES
Maryland	NO	Vermont	YES
Massachusetts	YES	Virginia	YES
Michigan	YES	Washington	YES
Minnesota	NO	West Virginia	YES
Mississippi	NO	Wisconsin	NO
Missouri	NO	Wyoming	NO

For further explanation of the information contained in the chart or additional information on the report contact Warren N. Paul, Grant Manager or Helga Watt, Librarian & Researcher, Legislative Technical Assistance in Juvenile Justice.

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