The 48-Hour Rule and Overdetention in California Juvenile Proceedings

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Introduction

A fundamental rule of our constitutional system is that a person may not be subjected to extended detention absent a judicial determination of probable cause that he or she committed a crime. In *Gerstein v. Pugh*,[1] the Supreme Court recognized the Fourth Amendment right of criminal defendants to a prompt determination of probable cause in cases involving warrantless arrest. In *County of Riverside v. McLaughlin*,[2] the court clarified that, generally speaking, a determination of probable cause made within 48 hours of arrest would meet the requirement of promptness (hereafter referred to as "the 48-hour rule").

In 1994, after *County of Riverside v. McLaughlin* was decided, the California Supreme Court reviewed California's statutory scheme for probable cause determinations in juvenile delinquency cases in the context of a challenge to the Los Angeles Superior Court's protocol on the issue. A plurality of the court in *Alfredo A. v Superior Court*,[3] agreed that juveniles are entitled to a prompt probable cause determination, but disagreed that it must occur within 48 hours. Instead, the plurality viewed 72 hours as sufficiently prompt for children, based on a narrowing interpretation of California's statutes, which on their face allow additional time for weekends and holidays. In the more than 20 years since the *Alfredo A.* opinion was released, a series of cases from other jurisdictions have held that 48 hours means just that, and the reasoning of the case is increasingly difficult to support. In the meantime, young people in California juvenile proceedings are routinely held for 3 to 7 days without a judicial determination that there is probable cause to hold them.

This article explores the 48-hour rule in the juvenile context, with a particular focus on California. It summarizes California statutory law, provides a chart of the implications of current law on days of detention, and presents the results of a statewide survey on actual practice in the counties. The article explains the importance of probable cause determinations, and the compelling reasons to minimize detention of juveniles. The article explains why the *Alfredo A.* decision was wrongly decided then and should be disapproved now. It goes on to urge that California should amend its statutory scheme to require probable cause determinations within 48 hours, and hold the initial detention hearing at the same time.

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[1] Gerstein v. Pugh, 420 U.S. 103, 124-25 (1975).

[2] County of Riverside v. McLaughlin, 500 U.S. 44, 56 (1991).

[3] Alfredo A. v Superior Court, 6 Cal. 4th 1212, 1231 (1994).

I. Probable Cause Determinations Serve Important Individual and Societal Interests

A. Freedom from Unreasonable Arrest

The right to a judicial determination of probable cause goes to the very heart of the constitutional right to be free from unreasonable search and seizure. The Fourth Amendment in the Bill of Rights provides that, "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."[4]

Although the issue has deep historic roots, we are regularly reminded on the evening news of the critical need for review of arrests by a neutral and detached judicial officer. The Department of Justice report on racial profiling and policing in Ferguson, Missouri, found that arrests were routinely made without probable cause, and for conduct that plainly did not meet the elements of the cited offense. In a November 2013 incident, for example, an officer approached five African-American youths listening to music in a car. Claiming to have smelled marijuana, the officer placed them under arrest for disorderly conduct based on their "gathering in a group for the purposes of committing illegal activity." The youths were detained and charged—some taken to jail, others delivered to their parents—despite the officer finding no marijuana, even after conducting an inventory search of the car.[5]

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[4] U.S. CONST. amend. IV. The Fourth Amendment is applicable to the states through the due process clause of the Fourteenth Amendment. Wolf v. Colo., 338 U.S. 25, 27-28 (1949), *overruled on other grounds*, Mapp v. Ohio, 367 U.S. 643, 643-660 (1961).

[5] *See*, *e.g.*, U.S. DEPT. OF JUSTICE, CIVIL RIGHTS DIV., INVESTIGATION OF THE FERGUSON POLICE DEPT. 18 (2015), http://www.justice.gov/sites/default/files/opa/pressreleases/attachments/2015/03/04/ferguson_police_department_report.pdf. This was not the first such set of factual findings. In the late 1990's, the Department of Justice found that police in Columbus, Ohio, arrest people who are ". . . carrying out some ordinary, routine daily activity (either not violating the law or committing some minor infraction). Misconduct often is triggered by the officer's perception that the victim in some way disrespected the officer, although often the victim's conduct in fact is relatively or completely innocuous. On other occasions, the misconduct stems from some emotional turmoil experienced by the officer resulting from some unrelated, prior occurrence, or involves other misconduct. Often, victims are arrested and charged with such crimes as disorderly conduct, resisting arrest, and/or obstruction of official business, but the charges then are dismissed or the victim is found not guilty. Victims frequently are African American, or are young, female, or lower income whites."

Similar accounts of widespread baseless arrests are disturbingly common throughout the country. The tragic case of Freddie Gray, who died in police custody after what has been described as "running while black,"[6] revealed a pervasive practice of arresting people without probable cause. Even the chief prosecutor for Baltimore City said that the officers who arrested Gray "failed to establish probable cause for Mr. Gray's arrest, as no crime had been committed."[7] In the four years preceding his death, Baltimore paid out $5.7 million in connection with cases alleging brutality and civil rights violations.[8] Few of the cases were ultimately prosecuted, and the victims included a 15-year-old boy riding a dirt bike, a 26-year-old pregnant accountant who had witnessed a beating, a 50-year-old woman selling church raffle tickets, a 65-year-old church deacon rolling a cigarette, and an 87-year-old grandmother aiding her wounded grandson.[9] According to one commentator, the absence of probable cause is the subject of jokes in Baltimore: "You know what probable cause is on Edmondson Avenue? You roll by in your radio car and the guy looks at you for two seconds too long."[10]

It is also common in high profile incidents for police to wrongly attribute criminal activity to people of color. Thus, in McKinney, Texas, police confronted unarmed black teenagers at a pool party after being called in connection with reports of fighting and assertions that the black youth did not have permission to be at the private pool.[11] When the police arrived, they immediately began cuffing the black teenagers and placing them on the

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Letter from Bill Lann Lee, Acting Assistant Attorney General, Civil Rights Division to Janet E. Jackson, City Attorney, City of Columbus (undated), http://www.justice.gov/crt/about/spl/documents/columbus.php.

[6] Justin George, *Tensions Remain Over Gray's Death*, BALTIMORE SUN (Apr. 22, 2015), http://www.baltimoresun.com/news/maryland/baltimore-city/bs-md-ci-freddie-gray-follo-20150421-story.html.

[7] Richard Perez-Pena, *6 Baltimore Police Officers Charged in Freddie Gray Death*, N.Y. TIMES (May 1, 2015), http://www.nytimes.com/2015/05/02/us/freddie-gray-autopsy-report-given-to-baltimore-prosecutors.html.

[8] Radley Balko, *U.S. cities pay out millions to settle police lawsuits*, WASH. POST (Oct. 1, 2014), http://www.washingtonpost.com/news/the-watch/wp/2014/10/01/u-s-cities-pay-out-millions-to-settle-police-lawsuits.

[9] *Id*.

[10] Bill Keller, *David Simon on Baltimore's Anguish: Freddie Gray, the drug war, and the decline of real policing*, THE MARSHALL PROJECT (Apr. 29, 2015), https://www.themarshallproject.org/2015/04/29/david-simon-on-baltimore-s-anguish.

[11] Matt Pearce, *Texas Officer Suspended After Aggressively Confronting Teens at Pool Party*, LOS ANGELES TIMES (June 8, 2015), http://www.latimes.com/nation/nationnow/la-na-texas-officer-teen-20150608-story.html.

ground.[12] A fourteen-year-old bikini-clad girl with no involvement in the altercation was violently thrown to the ground by an officer, who then placed his knee in her back.[13] As further details of the incident were revealed, it turned out that the party host, a black 19-year-old, lived in the residential development and had hosted the pool party and cookout for friends. A fight started after a white woman used racial slurs and told her to go back to her "Section 8 home."[14]

In all too many situations, questionable stops have led to tragic consequences. In another Texas incident, a young black woman named Sandra Bland was found dead in her jail cell three days after being stopped for allegedly changing lanes in her car without signaling.[15] Although much of the attention focused on her death, there was considerable public discussion about the fact that she was in jail after being stopped for such a minor transgression.[16] The state trooper's own video recording detailed Ms. Bland's repeated assertion of her rights and her incredulity at being arrested for a traffic citation.[17] The video of the arrest fueled concerns that the trooper both escalated the incident, and then claimed to have been assaulted by her, even as she protested that he was hurting her. In the video, the trooper is heard pondering how to portray what happened.[18] Ms. Bland was charged with assault on a public servant and taken to jail.[19]

These baseless, often racially tinged arrests are not isolated

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[12] *Id.*

[13] *Id.*

[14] Abby Phillip, "*Go Back to Your Section 8 Home": Texas Pool Party Host Describes Racially Charged Dispute with Neighbor,* WASH. POST (June 8, 2015), http://www.washingtonpost.com/news/morning-mix/wp/2015/06/08/go-back-to-your-section-8-home-texas-pool-party-host-describes-racially-charged-dispute-with-neighbor.

[15] Associated Press, *Video Shows How Sandra Bland Traffic Stop Escalated in Texas*, WALL STREET JOURNAL (July 21, 2014), http://www.wsj.com/articles/video-shows-how-sandra-bland-traffic-stop-escalated-in-texas-1437530816.

[16] *See*, *e.g.*, K.K. Rebecca Lai, et al., *Assessing the Legality of Sandra Bland's Arrest*, N.Y. TIMES (July 22, 2015), http://www.nytimes.com/interactive/2015/07/20/us/sandra-bland-arrest-death-videos-maps.html.

[17] Ryan Grim, *The Transcript of Sandra Bland's Arrest is as Revealing as the Video*, HUFFINGTON POST (July 22, 2015), http://www.huffingtonpost.com/entry/sandra-bland-arrest-transcript_55b03a88e4b0a9b94853b1f1.

[18] *Id.*; Eli Hager, *What You May Have Missed in the Sandra Bland Video*; THE MARSHALL PROJECT (July 22, 2015), https://www.themarshallproject.org/2015/07/22/what-you-may-have-missed-in-the-sandra-bland-video.

[19] Abby Ohlheiser &Abby Phillip, *'I Will Light You Up!': Texas Officer Threatened Sandra Bland with Taser During Traffic Stop*, WASH. POST (July 22, 2015), http://www.washingtonpost.com/news/morning-mix/wp/2015/07/21/much-too-early-to-call-jail-cell-hanging-death-of-sandra-bland-suicide-da-says.

incidents. Cities around the country are paying out millions of dollars to settle cases in which charges were never filed or the cases were dismissed after it was determined that arrests were made without probable cause.[20] Here in California, as elsewhere, the possibility of wrongful arrest is greatly magnified by the presence of racial profiling. Reports of law enforcement stops made on the basis of race continue to surface in Los Angeles,[21] Oakland,[22] San Francisco,[23] San Diego,[24] and Sacramento.[25] Racially motivated stops and arrests are so prevalent that the California Legislature has enacted legislation requiring improved documentation and reporting of stops, and setting up a board to increase diversity and racial and identity sensitivity in law enforcement.[26]

Arrests without probable cause also occur because of twisted interpretations of *County of Riverside v. McLaughlin's 48*-hour rule. Law enforcement agencies in jurisdictions around the country have acknowledged that they routinely hold criminal suspects for up to 48 hours to continue their investigation of the person.[27] There is reason to believe

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[20] *See, e.g.*, Balko, *supra* note 8. (The article reports that Chicago paid out $84.6 million in fees, settlements, and awards in the previous year; that in 2011, Los Angeles paid out $54 million, and New York paid out a whopping $735 million; that Oakland paid out $74 million to settle 417 lawsuits since 1990; that Denver paid $13 million over 10 years; that Dallas paid out over $6 million since 2011; and that Minneapolis paid out $21 million since 2003.)

[21] *LA police to pay $725,000 to racial profiling victims*, RT QUESTION MORE (Apr. 30, 2015) [http://rt.com/usa/254589-la-police-racial-profiling/].

[22] Carolyn Jones, *Oakland: Study finds racial bias in boys' arrests*, SAN FRANCISCO CHRONICLE (Aug. 28, 2013) [http://www.sfgate.com/crime/article/Oakland-Study-finds-racial-bias-in-boys-arrests-4765892.php].

[23] Jonah Owen Lamb, *Questions about racial disparities surround SFPD arrests report*, SAN FRANCISCO EXAMINER(Apr. 16, 2015)
[http://archives.sfexaminer.com/sanfrancisco/questions-of-racial-profiling-surround-sfpd-arrests-report/Content?oid=2926904].

[24] Pauline Repard, *Chief reports traffic stop race disparity*, SAN DIEGO UNION-TRIBUNE (Feb. 25, 2015)
[http://www.sandiegouniontribune.com/news/2015/feb/25/racial-profiling-traffic-stops-police-minorities/].

[25] See, *e.g.*, COUNTY OF SACRAMENTO, OFFICE OF INSPECTOR GENERAL, 2011 ANNUAL REPORT 26-34 (2012) (reporting racial disparities in traffic stops, length of detention of suspects, and incidence of being searched for African Americans in Sacramento County).

[26] Racial and Identity Profiling Act of 2015, Aseem.Bill 953 (Weber), 2015-2016 Reg. Sess. ch.4662015 Cal. Stat. [http://www.leginfo.ca.gov/pub/15-16/bill/asm/ab_0951-1000/ab_953_bill_20151003_chaptered.pdf].

[27] Steven J. Mulroy, *"Hold" On: The Remarkably Resilient, Constitutionally Dubious 48 Hour Hold*, 63 CASE W. RES. L. REV. 815, 816-817 (2013).

that many such detentions take place without probable cause,[28] and that detainees are often interrogated during the 48-hour period in an attempt to develop probable cause to continue holding them.[29] Ironically, the 48-hour rule is used to support this practice by interpreting the rule to give law enforcement "up to" 48 hours to obtain grounds for an arrest.[30] However, this rationale was specifically rejected in *County of Riverside v. McLaughlin*, which held that delay "for the purpose of gathering additional evidence to justify the arrest" was not a permissible reason.[31]

These all too common situations provide strong contemporary confirmation that probable cause determinations by a neutral, detached judicial officer are an essential safeguard against blatantly illegal arrests, unsupported allegations of criminality, and mistakes. While not all instances of wrongful arrest are discernible from the initial paperwork, some are.

B. Harm from Unnecessary Detention

Protections against wrongful arrest are also important because unnecessary incarceration, even for brief periods, is harmful to young people.[32] Every day a young person is unable to go to school is a day of education lost, with measurable long-term effects. Many detained youth are already far below grade level in academic achievement, and a substantial percentage suffer from learning disabilities or mental health disorders.[33] Several studies have found that incarceration significantly reduces the likelihood of high school graduation.[34] Studies report that fewer than 20

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[28] *Id.* at 821.

[29] *Id.* at 816. (In some jurisdictions, arrest forms blatantly provide an option for detention "for investigation," as an alternative to filling in the alleged offense. *See id*. at 827-828.)

[30] *Id.* at 848, 854.

[31] County of Riverside v. McLaughlin, 500 U.S. 44, 56 (1991).

[32] *But cf.* Schall v. Martin 467 U.S. 253, (1984). (A divergent view was expressed by Chief Justice Rehnquist's in *Schall v. Martin*, in which he explained that pretrial incarceration of children is not really punitive because "juveniles, unlike adults, are always in some form of custody." *Id.* at 265. That statement has occasioned a good deal of criticism over the years. It might be difficult now to find anyone who would put forth such an assertion.)

[33] RICHARD A. MENDEL, THE ANNIE E. CASEY FOUNDATION, NO PLACE FOR KIDS: THE CASE FOR REDUCING JUVENILE INCARCERATION 12 (2011).

[34] *See* JUSTICE POLICY INSTITUTE, STICKER SHOCK: CALCULATING THE FULL PRICE TAG FOR YOUTH INCARCERATION 29-30 (2014); James H. Keeley, *Will Adjudicated Youth Return to School After Residential Placement? Results of a Predictive Variable Study*, 89 J. CORRECTIONAL ED. 65-85 (2006); D. Wayne Osgood, E. Michael Foster, & Mark E. Courtney, *Vulnerable Populations and the Transition to Adulthood,* 20 THE FUTURE OF

percent of youth who have been incarcerated either as juveniles or adults have diplomas or GEDs.[35]

Incarceration may contribute to mental illness and suicidal behavior, or worsening of mental status.[36] Moreover, the experience of incarceration is itself a traumatic experience:

> Loss of liberty, personal identity, and the familiar landscape of daily life is a frightening, disorienting, and life-changing event for a person of any age, but it is especially so for young people. Institutional placement deprives youth of the moorings in their lives—support from family and friends, school, sports, and other activities that would otherwise help them to cope with anxiety and uncertainty. It subjects youth to a complete loss of control and forced exposure to a negative peer culture.[37]

Juvenile incarceration also exacts a heavy toll on future employment. Researchers have found that, four years after release, individuals incarcerated as juveniles or young adults suffered a reduction in employment equivalent to about three weeks less work per year, and black youth saw a five weeks per year reduction. [38] Even 15 years after release,

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CHILDREN 216 (2010); 91 Wendy Cavendish, *Academic Achievement During Commitment and Post Release Education Related Outcomes of Juvenile Justice Involved Youth With and Without Disabilities*, 91 J. EMOTIONAL & BEHAVIORAL DISORDERS 41-52 (2013); Gary Sweeten, *Who Will Graduate? Disruption of High School Education by Arrest and Court Involvement*, 23 JUSTICE QUARTERLY (2006); Randi Hjalmarsson, *Criminal Justice Involvement and High School Completion*," 93 J. URBAN ECONOMIES 613-630 (2008).

[35] Osgood, et al., *supra* note 34 at 216. citing He Len Chung, Michelle Little & Laurence Steinberg, *The Transition to Adulthood for Adolescents in the Juvenile Justice System: A Developmental Perspective* 68-81, ON YOUR OWN WITHOUT A NET , Osgood, et al. eds, U. Chi. Press, 2005); Christopher Uggen & Sara Wakefield, *Young Adults Reentering the Community from the Criminal Justice System: The Challenge of Becoming an Adult 114-144*, *in* ON YOUR OWN WITHOUT A NET, *(*Osgood, et al., eds., U. Chi. Press, 2005).

[36] Javad H. Kashani, et al., *Depression Among Incarcerated Delinquents*, 3 PSYCHIATRY RESEARCH 185-191 (1980). *See also* KAREN ABRAM, et al., SUICIDAL THOUGHTS AND BEHAVIORS AMONG DETAINED YOUTH, JUV. JUST. BULL. (U.S. Dept. of Justice, Wash., D.C.), July 2014, at 1-8; *and* BARRY HOLMAN & JASON ZEIDENBERG, JUSTICE POLICY INSTITUTE, THE DANGERS OF DETENTION: THE IMPACT OF INCARCERATING YOUTH IN DETENTION AND OTHER SECURE FACILITIES 8-9 (2006),

[http://www.justicepolicy.org/images/upload/06-11_rep_dangersofdetention_jj.pdf].

[37] SUE BURRELL, NATIONAL CHILD TRAUMATIC STRESS NETWORK, TRAUMA AND THE ENVIRONMENT OF CARE IN JUVENILE INSTITUTIONS 2 (2013).

[38] Bruce Western & Katherine Beckett, *How Unregulated is the U.S. Labor Market? The Penal System as a Labor*

Market Institution, 104 AM. J. SOC. 1030, 1048 (1999); Mendel, *supra* note 33 at 12;

those who had been incarcerated in their youth worked many fewer hours per year than similar individuals who had not been incarcerated.[39]

Not surprisingly, incarceration may increase future justice system involvement.[40] Aside from the other impacts, detention exposes young people to others who have been in trouble with the system. Extensive research suggests that such exposure actually increases antisocial behavior.[41] One theory about this is that in being grouped together with youth who have been in trouble, young people come to self-identify themselves as belonging to that group.[42] Also, exposure to those youth increases access to drugs, weapons and information about ways to commit crime.[43] One of the primary ways to avoid these effects is to keep young people out of institutions and in their homes.[44]

Also, detention for any length of time interferes with the young person's ability to do the very things needed to properly defend the case. Youth are cut off from their family, and this makes it difficult for family members to process what has happened and to mobilize support that could affect the outcome of the case.[45] Youth are less able to help their lawyer to locate witnesses, and to demonstrate by their good behavior and involvement in pro-social activities, that they can be trusted in the community. All of these factors contribute to the likelihood that the young person will receive a custodial sentence.[46] And sadly, the very fact of being

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HOLMAN & ZIEDENBERG, supra note 36 at 9-10.

[39] *Id.* at 1049.

[40] HOLMAN & ZIEDENBERG, *supra* note 36, at 4-5.

[41] Joel Rosch, *Deviant Peer Contagion: Findings from the Duke Executive Sessions on Deviant Peer Contagion*, THE LINK (Child Welfare League of America, Wash., D.C.), Fall 2006, at 1. *See also,* Kenneth A. Dodge, Thomas J. Dishion, & Jennifer E. Lansford, *Deviant Peer Influences in Intervention and Public Policy for Youth*, 20 SOC. POL'Y REP. 3 (Society for Research in Child Development, 2006).

[42] Rosch, *supra* note 41 at. 2. *See also,* Dodge, et al., *supra* note 41 at 4.

[43] Rosch, *supra* note 41 at 2. *See also,* Dodge, et al., *supra* note 41 at 4.

[44] Rosch, *supra* note 41 at 16. *See also,* Dodge, et al., *supra* note 41 at 14.

[45] Research on detained adults has found that incarceration of even 2 to 3 days increases the likelihood that a low risk person will commit a new crime before trial, and increases the liklihood that they will recidivate at 12 and 24 months. CHRISTOPHER T. LOWENKAMP, MARIE VAN NOSTRAND, & ALEXANDER HOLSINGER, THE HIDDEN COSTS OF PRETRIAL DETENTION 11, 19 (ARNOLD FOUNDATION, 2013). This is because the person's place in the community becomes more destabilized as the number of days of pretrial detention increases. This destabilization is believed to lead to an increase in risk for both failure to appear and new criminal activity. *Id.* at 3.

[46] Thus, it has been found that detained adult defendants are over four times more likely to be sentenced to jail and over three times more likely to be sentenced to prison than defendants who are released at some point pending trial. *See generally*, CHRISTOPHER T.

held in an institutional setting, with its regimented schedules and restrictions, reduces the opportunities needed to develop the skills needed to be successful in the community.[47]

Unnecessary detention may expose young people to a range of institutional abuses and dangerous conditions. A 2011 report found clear evidence of recurring or systemic maltreatment of youth in a majority of states.[48] The same report identified 52 lawsuits since 1970 that resulted in a court-sanctioned remedy in response to allegations of problems with violence, physical or sexual abuse by staff, and/or excessive use of isolation or physical restraints.[49] In an updated 2015 report, the author found proof of pervasive or ongoing maltreatment of youth in 14 states since 2011, and substantial evidence of maltreatment in 7 more states.[50] The author pointed to the inability of public officials to prevent maltreatment or even to clean up juvenile facilities when inhumane conditions are revealed.[51] Clearly, even brief periods of detention may expose youth to dangerous or inadequate conditions of confinement.

These harms have long been recognized in case law. The California Supreme Court has observed that even short periods of detention may be detrimental to youth. In *In re William M*., the California Supreme Court noted that the decision to take a youth away from his home, his parents, and his friends is fraught with "grave consequences."[52] In explaining this, the opinion quoted from an amicus brief stating that:

> Locking up children charged with or suspected of offenses before adjudication, probably does more to contribute to the army of habitual criminals than any other procedure in what is called the juvenile justice system. It is difficult for an adult who has not been through the experience to realize the terror that engulfs a youngster the first time he loses his liberty and has to spend the night or several days or weeks in a cold,

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LOWENKAMP, MARIE VAN NOSTRAND, & ALEXANDER HOLSINGER, INVESTIGATING THE IMPACT OF PRETRIAL DETENTION ON SENTENCING OUTCOMES 3 (ARNOLD FOUNDATION, 2013).

47 *See generally,* NATIONAL RESEARCH COUNCIL, JUVENILE JUSTICE REFORM: AN ADOLESCENT DEVELOPMENT APPROACH 179-180 (2013).

48 The findings included 39 states, the District of Columbia and Puerto Rico. Mendel, *supra* note 33 at 5-9; *accord* RICHARD A. MENDEL, MALTREATMENT OF YOUTH IN U.S. CORRECTIONS FACILITIES: AN UPDATE, THE ANNIE E. CASEY FOUNDATION (2015), at 6.

49 MENDEL (2011), *supra* note 33 at 6-8; MENDEL (2015), *supra* note 48 at 2.

50 MENDEL (2015), *supra* note 48 at 2, 10-22.

51 *Id*. at 29.

52 *In re* William M. 3 Cal.3d 16, 30-31 (1970).

> impersonal cell or room away from his home or family. . . the speed with which relatively innocent youngsters succumb to the infectious miasma of "Juvy" and its practices, attitudes and language. . . is not surprising. The experience tells the youngster that he is no good' and that society has rejected him.[53]

Because of the negative effects of incarceration, California courts have strictly construed statutory time limits. In *In re Robin M.*, the California Supreme Court emphasized that the 48-hour period for filing a petition under Section 631 begins at the time of arrest, and not at the time the probation officer receives the young person at juvenile hall.[54] More recent cases have also been strict in applying the statutes.[55] The appellate court in *In re Daniel M.*[56] found error in the failure to release the young person in a case in which the supplemental petition was not filed until three judicial days (or six calendar days) beyond the statutory filing deadline. The appellate court in *In re Tan T.*[57] held that the juvenile court erred in failing to release a youth who was held for 56 hours – eight hours beyond the 48-hour limit for the filing of a petition. Similarly, the appellate court in *In re Angel M.*[58] found that, as required by Welfare and Institutions Code section 632, it was error not to release a youth who was not brought to court the next judicial day after a petition was filed. In other words, appellate courts count the hours in determining whether overdetention of young people has occurred.

C. Costs of Excessive Detention

California has a long history of overdetention of juveniles. The 1960 *Report of the Governor's Special Study Commission on Juvenile Justice* that led to the enactment of our modern Juvenile Court Law[59] found that, "Unnecessary detention is both costly and unwarranted. To reduce the large volume of juvenile detention in California, the Commission recommends a

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53 *Id.* at 31 n.25.

54 *In re* Robin M., 21 Cal.3d 337, 343, fn.11 (1978).

55 None of the cases cited in this paragraph have addressed the premise of this article, that the California statutory scheme fails to provide for a probable cause determination within 48 hours. They are cited here for the proposition that courts have recognized and responded to the legislative mandates they have been given under Welfare and Institutions Code sections 631 and 632.

56 *In* re Daniel M., 47 Cal.App.4th 1151 (1996).

57 *In re* Tan T., 55 Cal.App.4th 1398, 1403-1404 (1997).

58 *In re* Angel M., 58 Cal.App.4th 1498, 1506 (1997). (Review denied Feb. 18, 1998.)

59 CAL. WELF. & INST. CODE §§ 500-914, CAL. STATS. 1961, CH. 1616, § 1.

more conscientious, discriminating exercise of detention screening decision by probation departments and early detention hearings. Otherwise, California's undistinguished reputation for excessive detention practices will persist."[60] Unfortunately, our excessive detention practices do persist. While juvenile arrest rates have continued to fall for more than a decade, California's juvenile detention rate remains the fifth highest in the country.[61]

Unnecessary detention has serious fiscal ramifications. In a 2012 Board of State and Community Corrections survey, the weighted statewide average daily cost to house youth among all Juvenile Halls was $352.06 per day.[62] These costs are consistent with national data. A 2014 Justice Policy Institute report found that, based on data from 46 states, the average cost of the most expensive confinement option for a young person was $407.58 per day.[63] If youth are routinely over-detained for even one day, the unnecessary costs to the system are considerable.

II. California Juvenile Statutory Law

California juvenile court law has no provisions for probable cause determinations within 48 hours. Instead, it provides for a "prima facie" finding to be made at the first court hearing. Under California law, a youth taken into custody must be released within 48 hours, *excluding nonjudicial days* unless a wardship petition has been filed within that time.[64] On top of that, California law allows an additional judicial day after the petition is

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[60] GOVERNOR'S SPEC. STUDY COMM'N ON JUV. JUST., REPORT OF THE GOVERNOR'S SPECIAL STUDY COMMISSION ON JUVENILE JUSTICE – PART I – RECOMMENDATIONS FOR CHANGES IN CALIFORNIA'S JUVENILE COURT LAW 41-42 (1960), quoted in *In re William M*., 3 Cal 3d at 25-26 n.5.

[61] *See* NATIONAL CENTER FOR JUVENILE JUSTICE, JUVENILE OFFENDERS AND VICTIMS: 2014 NATIONAL REPORT 191 (Melissa Sickmund & Charles Puzzanchera eds., 2014).

[62] BOARD OF STATE AND COMMUNITY CORRECTIONS, AVERAGE DAILY COST TO HOUSE YOUTH IN JUVENILE HALLS AND CAMPS/RANCHES (2012), http://www.bscc.ca.gov/downloads/Avg_Cost_Juv_Fac.pdf.

[63] JUSTICE POLICY INSTITUTE (2014), *supra* note 34 at 3. [Note that the data included both detention facilities and post-adjudication confinement facilities.]

[64] Section 631, subdivision (a) of the California Welfare and Institutions Code provides that ". . .the minor shall be released within 48 hours after having been taken into custody unless within that period of time a petition to declare the minor a ward has been filed pursuant to this chapter or a criminal complaint against the minor has been filed in a court of competent jurisdiction." (West 2015).

filed to bring the youth to court,[65] at which time the court[66] makes its prima facie finding.[67] The statutory provisions are reiterated in a Court Rule.[68] Thus, while *County of Riverside v. McLaughlin* specifically found it inappropriate to add extra time for holidays and weekends,[69] California's statutory scheme for juveniles does just that.[70] Applying California's statutory time limits the following detention periods would be permitted:

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[65] Section 632, subdivision (a) of the California Welfare and Institutions Code provides that, ". . .unless sooner released, a minor taken into custody under the provisions of this article shall, as soon as possible, but in any event before the expiration of the next judicial day after a petition to declare the minor a ward or dependent child has been filed, be brought before a judge or referee of the juvenile court for shearing to determine whether the minor shall be further detained." (West 2015).

[66] Section 635, subdivision (c), subsection (1) of the California Welfare and Institutions Code provides that, at the detention hearing "The court shall order the release of the minor unless a prima facie showing has been made that the minor is a person described in Section 601 or 602." Section 601 is the jurisdictional statute for status offenses (including truancy, habitual disobedience and curfew violations), and Section 602 is the jurisdictional statute for criminal offenses. There are additional statutory limitations on secure confinement of youth for offenses under Section 601. *See* CAL. WELF. & INST. CODE §§ 601, 602. (West 2015).

[67] This is the closest California law comes to language on probable cause determinations for juveniles.

[68] Cal. Rules of Court 5.752.

[69] County of Riverside v. McLaughlin, 500 U.S. 44, 57-58 (1991).

[70] *See* CAL. WELF. & INST. CODE §632 (West 2015); County of Riverside v. McLaughlin, 500 U.S. 44 (1991). Because of the additional judicial day allowed after the petition is filed the statutory scheme for juveniles allows even more time than would be permitted for adults to bring the person to court.

Day of Arrest	**Day By Which Petition Must Be Filed - §631(a) – 48 hours**	**Day by Which Initial Court Hearing & Prima Facie Case Must Be Held - §632, 635(c)(1) – next judicial day after petition filed**	**Days of Detention Prior to Prima Facie Determination**
Monday	Wednesday	Thursday	3
Tuesday	Thursday	Friday	3
Wednesday	Friday	Monday	5
Wednesday before holiday weekend	Friday	Tuesday	6
Thursday	Monday	Tuesday	5
Thursday before holiday weekend	Tuesday	Wednesday	6
Friday	Monday	Tuesday	5
Friday before holiday weekend	Tuesday	Wednesday	6
Wednesday before Thanksgiving 4 day weekend[71]	Tuesday	Wednesday	7

From the standpoint of detention, it is in the interest of juveniles to be arrested on Monday or Tuesday and to avoid holiday weekends. However, under current statutory law, even those arrested on Monday or Tuesday may be detained for a full day longer than is permitted by *County of Riverside v. McLaughlin*. And as will be discussed in Section V, *Alfredo A.* itself interpreted the statutes to permit a probable cause determination

[71] *See* CALIFORNIA COURTS, *Court Holidays* (2015), http://www.courts.ca.gov/holidays.htm.

within 72 hours – a full day longer than would be permitted for adults.

III. Actual Practice in California Counties

In preparing to write this article, the author wanted to learn whether, despite the statutory scheme and the holding in *Alfredo A.*, there were counties that nonetheless provide a probable cause determination within 48 hours. A Public Records Act request was sent to the presiding juvenile court judge in each county.[72] If the answer was that there were no responsive documents, a follow up survey was sent to clarify what the county's process is, that is, whether courts follow the statutory timelines or whether there is an independent determination made within the 48-hour period. Forty-nine counties responded to the Public Records Act request, the survey, or both.[73]

Sixteen counties indicated that they do provide judicial probable cause determinations on weekends and holidays.[74] Within that group, two counties clarified that their probable cause determinations are only made within 72 hours (the *Alfredo A.* time limit).[75] Twenty-two counties reported that they follow the Welfare and Institutions Code time limits for prima facie determinations.[76] None of the responding counties reported providing weekend or holiday "in person" detention hearings.[77] Only a handful of counties had written materials to offer in response to the request for documents on probable cause determinations or prima facie findings.

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[72] The Public Records Act request, sent in Spring 2015, pursuant to California Rules of Court, rule 10.500, asked for judicial administrative records, including orders, policies, local rules, schedules, memoranda, guidance, reports, or other writings, pertaining to: Time limits on detention before a prima facie determination must be made in the county; any schedule or other guidance governing when a child arrested on a particular day and/or time must be brought to court; whether the prima facie determination in the county is made at the initial detention hearing (CAL. WELF. & INST. CODE §§ 632, 635); whether the prima facie determination in the county is made at a point earlier than the initial detention hearing (CAL. WELF. & INST. CODE §§ 632, 635), and if so, when it is made, who is present, and the process (including, but not limited to, whether it is a paper review by a judge, a weekend court hearing, and whether the minor and/or counsel are present); whether the county provides weekend or holiday detention hearings; and any records of discussions or proposals for change on these issues over the past three years and any changes resulting therefrom. (Copies of the request are on file with the author.)

[73] Responses from the counties are on file with the author.

[74] The counties are Butte, Humboldt, Los Angeles, Marin, Mendocino, Nevada, Orange, Sacramento, San Diego, San Francisco, San Luis Obispo, Santa Cruz, Solano, Stanislaus, Tulare and Ventura. (Copies of the responses are on file with the author.)

[75] The counties are Nevada and Ventura. (Copies of these responses are on file with the author.)

[76] Copies of the counties' responses are on file with the author.

[77] Copies of the counties' responses are on file with the author.

Overall, the responses indicated a huge variation in county practice,[78] with a majority of counties failing to comply with the 48-hour rule. Within the responses there were bright spots. A number of judges reported that they personally take responsibility for assuring that probable cause determinations are made on weekends and holidays.[79] A series of counties also spoke of having an on-call judge to handle the determinations on weekend or holidays.[80] Sacramento County has a formal schedule for bringing youth to court[81] and a probable cause review schedule assigning judges to probable cause duty months in advance.[82] But in general, it was troubling that so many counties fail to provide judicial review if more than 48 hours will elapse before the initial court hearing. The article turns now to a discussion of the underlying Supreme Court cases.

IV. Federal Constitutional Law (Gerstein and McLaughlin)

In recognition of the tremendous harm caused by detention in the absence of probable cause, the United States Supreme Court has repeatedly upheld the right to a prompt judicial determination. In *Gerstein v. Pugh* (hereafter "*Gerstein*"), the Supreme Court addressed a challenge to Florida procedures allowing warrantless arrests to be made without such a determination.[83] The court found the procedures constitutionally infirm, holding that, if a suspect is to be detained following a warrantless arrest, the Fourth Amendment requires a "prompt" judicial determination that he or she has committed a crime.[84] The court held that implementation of the Fourth Amendment's protection against unfounded invasions of liberty and

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[78] Also, it was difficult to interpret some of the responses, so the actual numbers of counties in various categories might be different upon further investigation. Also, case law uses the term "probable cause determination" and California's closest term is "prima facie finding." Although the request clearly indicated that the inquiry was in relation to the kind of determination made in connection with the 48-hour rule, some of the responding counties may have misunderstood. This tabulation gave the benefit of the doubt to counties that indicated in any way that they have weekend probable cause determinations.

[79] This was the case in Mendocino and San Luis Obispo Counties. (Copies of the responses are on file with the author.)

[80] The counties are Butte, Humboldt, Los Angeles, Marin, Mendocino, Orange, Sacramento, San Diego, San Francisco, San Luis Obispo, Santa Cruz, Solano, and Tulare. (Copies of the responses are on file with the author.).

[81] County of Sacramento Superior Court, Detention Hearing After Taken Into Custody (May 5, 2015) (on file with author).

[82] County of Sacramento Superior Court, Probable Cause Review Schedule (May 7, 2015) (on file with author).

[83] Gerstein v. Pugh, 420 U.S. 103, 116 (1975).

[84] *Id*. at 125.

privacy requires that the existence of probable cause be decided by a neutral and detached magistrate whenever possible.[85] The court recognized the need to provide law enforcement officials with a brief period of detention after arrest "to take the administrative steps incident to arrest,"[86] but noted that once the person is in custody, the need for a neutral determination increases significantly:

> The consequences of prolonged detention may be more serious than the interference occasioned by arrest. Pretrial confinement may imperil the suspect's job, interrupt his source of income, and impair his family relationships. (Citation). Even pretrial release may be accompanied by burdensome conditions that effect a significant restraint of liberty. (Citation). When the stakes are this high, the detached judgment of a neutral magistrate is essential if the Fourth Amendment is to furnish meaningful protection from unfounded interference with liberty. Accordingly, we hold that the Fourth Amendment requires a judicial determination of probable cause as a prerequisite to extended restraint of liberty following arrest.[87]

Accordingly, the court held that the Fourth Amendment requires a judicial determination of probable cause as a prerequisite to extended restraint of liberty following arrest. [88] At the same time, the *Gerstein* court recognized that prompt probable cause determinations do not require the "full panoply of adversary safeguards" of "counsel, confrontation, cross-examination, and compulsory process"[89] The court observed that, "This issue can be determined reliably without a formal adversarial hearing. The standard is the same as that for arrest. That standard—probable cause to believe the suspect has committed a crime—traditionally has been decided by a magistrate in a non-adversary proceeding on hearsay and written testimony. . ."[90] Further, the court did not view probable cause determinations as a "critical stage" of the proceedings requiring appointment of counsel.[91]

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[85] *Id.* at 112.

[86] *Id*. at 114.

[87] *Id*. (citations omitted).

[88] *Id*.

[89] *Id*. at 119.

[90] *Id*. at 120 (footnote omitted).

[91] *Id*. at 122, citing Coleman v. Alabama, 399 U.S. 1 (1970); United States v. Wade, 388 U.S. 218, 226-27, (1967) explaining that "critical stages" are those pretrial procedures that

The *Gerstein* court also noted that state systems of criminal procedure vary widely, and that flexibility and experimentation by the states is desirable.[92] States might be able to accelerate preliminary hearings, make the determination as part of the initial court hearing, or find other ways to meet the requirement, so long as "Whatever procedure a State may adopt, it must provide a fair and reliable determination of probable cause as a condition for any significant pretrial restraint of liberty, and this determination must be made by a judicial officer either before or promptly after arrest."[93]

In *County of Riverside v. McLaughlin* (hereafter "*McLaughlin"*),[94] the Supreme Court defined the "promptness" requirement for making the probable cause determination mandated in *Gerstein*. The case was a class action seeking injunctive and declaratory relief under 42 U.S.C. § 1983, alleging that Riverside County violated the holding of *Gerstein*, by failing to provide "prompt" judicial determinations of probable cause to persons arrested without a warrant.[95] The County combined such determinations with arraignment procedures, which under County policy, were to be conducted within two days of arrest, excluding weekends and holidays.[96]

Writing for the majority, Justice O'Connor reiterated that in *Gerstein*, the court held that the Fourth Amendment requires a prompt judicial determination of probable cause as a prerequisite to an extended pretrial detention following a warrantless arrest.[97] Unfortunately, she said, lower court decisions applying *Gerstein* have demonstrated that it is not enough to say that probable cause determinations must be "prompt."[98] The standard, she explained, has been too vague to provide sufficient guidance and has led to "a flurry of systemic challenges to city and county practices, putting federal judges in the role of making legislative judgments and overseeing local jailhouse operations."[99] Moreover, said Justice O'Connor,

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would impair defense on the merits if the accused is required to proceed without counsel.

92 Gerstein v. Pugh, 420 U.S. at 123-24.

93 *Id.* at 124–25.

94 *See* County of Riverside v. McLaughlin, 500 U.S. 44 (1991).

95 *Id*. at 44.

96 *Id.* at 47.Under the County policy, which tracked closely the provisions of Cal. Penal Code Ann. § 825 (West 2015), arraignments were to be conducted without unnecessary delay and, in any event, within two days of arrest, excluding weekends and holidays. Thus, an individual arrested without a warrant late in the week could be held for as long as five days before receiving a probable cause determination. Over the Thanksgiving holiday, a 7–day delay was possible.

97 County of Riverside v. McLaughlin, 500 U.S. at 47.

98 *Id.* at 55-56.

99 *Id.* at 56.

flexibility has its limits, and *Gerstein* is not a "blank check."[100] A State has no legitimate interest in detaining for extended periods individuals who have been arrested without probable cause.[101]

Accordingly, the *McLaughlin* court held that, "Taking into account the competing interests articulated in *Gerstein*, we believe that a jurisdiction that provides judicial determinations of probable cause within 48 hours of arrest will, as a general matter, comply with the promptness requirement of Gerstein."[102] The court added that, "This is not to say that the probable cause determination in a particular case passes constitutional muster simply because it is provided within 48 hours. Such a hearing may nonetheless violate *Gerstein* if the arrested individual can prove that his or her probable cause determination was delayed unreasonably."[103] The court specified that, "Examples of unreasonable delay are delays for the purpose of gathering additional evidence to justify the arrest, a delay motivated by ill will against the arrested individual, or delay for delay's sake."[104] At the same time, the opinion noted that courts must allow a substantial degree of flexibility in evaluating whether the delay in a particular case is unreasonable.[105] Thus, courts may not ignore "the often unavoidable delays in transporting arrested persons from one facility to another, handling late-night bookings where no magistrate is readily available, obtaining the presence of an arresting officer who may be busy processing other suspects or securing the premises of an arrest, and other practical realities."[106] But, said the court, when an arrested individual does not receive a probable cause determination within 48 hours, "the calculus changes."[107] In such a case, the burden shifts to the government to demonstrate the existence of a bona fide emergency or other extraordinary circumstance. "The fact that in a particular case it may take longer than 48 hours to consolidate pretrial proceedings does not qualify as an extraordinary circumstance. [108] Nor, for

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100 *Id.* at 55.

101 *Id.*

102 *Id.*

103 *Id.*

104 *Id.*

105 *Id.* at 56-57.

106 *Id.*

107 *Id.* at 57.

108 *Id.* The *McLaughlin* court noted again that, under *Gerstein*, jurisdictions may choose to combine probable cause determinations with other pretrial proceedings, so long as they do so promptly. This necessarily means that only those proceedings that arise very early in the pretrial process—such as bail hearings and arraignments—may be chosen. Even then, every effort must be made to expedite the combined proceedings. *Id.* (citing Gerstein v. Pugh, 420 U.S. 103, 124 (1975)).

that matter, do intervening weekends. A jurisdiction that chooses to offer combined proceedings must do so as soon as is reasonably feasible, but in no event later than 48 hours after arrest."[109]

Applying these principles to the Riverside situation, the court observed that the County's policy was to offer combined proceedings within two days, exclusive of Saturdays, Sundays, or holidays.[110] As a result, persons arrested on Thursdays might have to wait until the following Monday before receiving a probable cause determination. The delay might be even longer if there were an intervening holiday.[111] As a result, the County's regular practice exceeded the 48-hour period deemed constitutionally permissible.[112]

V. The Alfredo A. Decision – Wrong Then and Now

A. Background of Alfredo A.

In July of 1991, the Los Angeles County Juvenile Court, after consultation with county counsel, adopted the "official position" that *McLaughlin's* strict 48-hour rule does not apply in juvenile detention proceedings. Again, because of the statutory exclusion for nonjudicial days, a child arrested just before a weekend could easily spend five days (or up to seven at Thanksgiving) in custody before being brought to court, just as had been the case in *McLaughlin*.[113] In a case challenging that position, the California Supreme Court granted review to determine whether that

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[109] County of Riverside v. McLaughlin, 500 U.S. at 57. Several of the Justices in *McLaughlin* wanted an even stronger standard of promptness. Justice Marshall, writing a dissenting opinion joined in by Justices Blackmun and Stevens, wanted judicial probable cause determinations to be considered "prompt" only if provided immediately after the state has "take[n] the administrative steps incident to arrest." (citing Gerstein v. Pugh 420 U.S. at 114). County of Riverside v. McLaughlin, 500 U.S. at 59, (Marshall, J., dissenting). Justice Scalia, in a separate dissenting opinion, would have adopted a similar definition, and would have drawn the line at "certainly no more than 24 hours." *Id.* at 59, 68-70 (Scalia, J., dissenting). In his view, "Hereafter a law-abiding citizen wrongfully arrested may be compelled to await the grace of a Dickensian bureaucratic machine, as it churns its cycle for up to two days—never once given the opportunity to show a judge that there is absolutely no reason to hold him, that a mistake has been made. In my view, this is the image of a system of justice that has lost its ancient sense of priority, a system that few Americans would recognize as our own." *Id.* at 71 (Scalia, J., dissenting).

[110] County of Riverside v. McLaughlin, 500 U.S. at 58.

[111] *Id.*

[112] *Id.* at 58-59.

[113] County of Riverside v. McLaughlin, 500 U.S. 44, 48 (1975).

position passed constitutional muster.[114]

Alfredo A. v. Superior Court concerned a 16-year-old in Los Angeles who spent five days in custody before he was taken before a judge on allegations that he had possessed cocaine base for sale.[115] Had he been an adult, Alfredo could have been held no longer than 48 hours. Alfredo challenged California's statutory scheme and a Los Angeles Superior Court policy that did not guarantee detained children a probable cause hearing within 48 hours.

In a shaky plurality decision, four justices voted to uphold the lower court decision, over the strong dissent of three justices. Chief Justice Lucas, joined by Justices Panelli and Baxter, wrote the opinion for the plurality (hereafter "plurality opinion"); Justice Arabian wrote a concurring and dissenting opinion.[116] Justice Mosk dissented, joined by Justices Kennard and George; Justice George wrote a separate dissenting opinion, as well.[117] Justice Mosk's opinion for the dissenters (hereafter "dissenting opinion") emphasized that the plurality opinion in the case does not represent the views of a majority of the court, and that, as a result, its analysis lacks authority as precedent and its holding is limited to that case alone. [118]

B. The Plurality Opinion (The 48-Hour Rule Does Not Apply to Juveniles)

The plurality opinion found it beyond dispute that *Gerstein's* constitutional requirement of a prompt judicial determination of probable cause for the extended pretrial detention of any person arrested without a warrant applies to juveniles as well as adults. However, the opinion went on to find that the High Court did not intend that the strict 48-hour rule announced in *McLaughlin*, be applied to juveniles.[119] Specifically, the plurality opinion found that, "under the Fourth Amendment the circumstances of a juvenile differ sufficiently from those of an adult that the "promptness" requirement of *Gerstein v. Pugh*, supra, 420 U.S. 103, 95 S.Ct. 854, is satisfied if a juvenile detainee is provided a probable cause

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114 Alfredo A. v. Superior Court, 6 Cal.4th 1212, 1215-1216 (1994).

115 *Id.* at 1216-1218.

116 *Id.* at 1232 (plurality opinion).

117 The plurality was barely that, and the holding represented a last ditch effort to decide the case. The court handed down its original "decision" on May 3, 1993, comprised of four opinions, none commanding more than three votes. On July 15, 1993, the court ordered a rehearing on its own motion. *Id.* at 1238 (Mosk, J., dissenting).

118 *Id.* at 1237 (Mosk, J., dissenting).

119 *Id.* at 1216 (plurality opinion).

determination within 72 hours following a warrantless arrest with no extension of time for nonjudicial days."[120] In order to reach its conclusion that the 48-hour rule does not apply to California children, the plurality opinion abandoned Fourth Amendment scrutiny. Although *County of Riverside* v. *McLaughlin* and *Gerstein v. Pugh* are strictly Fourth Amendment cases addressing the "seizure" of persons, the plurality's analysis in *Alfredo A.* moved quickly into a discussion of Fourteenth Amendment Due Process under *Schall v. Martin*.[121]

In *Schall*, the U.S. Supreme Court upheld New York's juvenile preventive detention statute against a due process challenge, finding that the New York statute served the state's legitimate interest in protecting the society and the youth from further criminal activity, and that the statute's "flexible" procedural safeguards were constitutionally adequate.[122] The court reviewed past decisions that had extended basic due process protections to juveniles,[123] but emphasized that the Constitution does not mandate elimination of all differences in the treatment of juveniles.[124] The primary concern of the *Schall* court was the "fairness" of the procedures under which judges ordered children to be held prior to trial.

But *Schall* did *not* address how promptly, under the Fourth Amendment, a determination had to be made whether there as a probable cause to believe that the youth had committed a crime. In fact, the children in *Schall* had already had an initial hearing, complete with appointment of a law guardian, before reaching the stage at issue before the court.[125]

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[120] *Id.* at 1236 (plurality opinion).

[121] Even Justice Arabian, who concurred in the result to create the plurality, had trouble with the Fourteenth Amendment analysis. In his view, the plurality opinion employed unnecessary "circuitry" in its reliance on *Schall v. Martin* and *Reno v. Flores*, as the 72 hour limit was justified under Fourth Amendment analysis. *Id.* at 1232-1233, 1259 n.1 (Arabian, J., concurring and dissenting).

[122] Alfredo A. v. Superior Court, 6 Cal.4th 1212, 1226-1227 (1994)(plurality opinion) (citing Schall v. Martin, 467 U.S. 253, 263 (1984)).

[123] Alfredo A. v. Superior Court, 6 Cal.4th 1212, 1225 (1994) (plurality opinion) (first citing Schall v. Martin, 467 U.S. 253, 263 (1984; and then *In re* Gault, 387 U.S. 1 31-57 (1967) (notice of charges, sworn testimony, a record of the proceedings, right to appeal, representation by an attorney, opportunity to confront witnesses, privilege against self-incrimination); *In re* Winship 397 U.S. 358 (1970)(proof beyond a reasonable doubt); Breed v. Jones 421 U.S. 519 (double jeopardy).

[124] Alfredo A. v. Superior Court, 6 Cal.4th 1212, 1225 (1994) (plurality opinion) (citing Schall v. Martin, 467 U.S. 253, 263 (1984)) (pretrial detention); McKeiver v. Pennsylvania 403 U.S. 528 (1971) (jury trial); and Santosky v. Kramer 455 U.S. 745, 766 (1982) (parens patriae interest).

[125] Analysis of *Schall* is made more complicated by the fact that New York has additional due process protections and uses different terminology. Schall v. Martin, 467 U.S. 253,

Strangely, the plurality opinion acknowledged the language in *Schall* specifically stating that the propriety of any detention "prior to a juvenile's initial appearance in Family Court" was not directly at issue in that case.[126] This was so because the petitioners had been afforded an "initial appearance," and therefore were not directly challenging the period of detention from arrest until their first appearance in court.[127]

The *Alfredo A.* plurality opinion was premised on *Schall's* flexible due process analysis. It noted that when a youth is detained on suspicion of criminal activity, in contrast to an adult detained under similar circumstances, the inquiry into the propriety of the extended detention is much broader in scope than a determination, in the strict Fourth Amendment sense, of whether "factual" probable cause exists to believe the youth committed the crime for which he was taken into custody.[128] Thus, whereas the sole issue in *Gerstein* was whether there was factual probable cause to detain the adult arrestee pending further proceedings, *Schall* took the view that, where juvenile detentions are concerned, such a factual probable cause determination is but one component of the broader inquiry implicated in the determination whether to extend the pretrial detention of a juvenile arrested without a warrant.[129] The plurality opinion discussed at length, the California statutory factors that go into the determination whether a child should remain detained after the initial hearing.[130]

In an effort to head off the argument that the *Schall* decision did not

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269-270 (1984). Under New York law, immediately after arrest, the child goes before the Family Court judge, who makes a preliminary determination as to the jurisdiction of the court, appoints a law guardian for the child, and advises the child of his or her rights, including the right to counsel and the right to remain silent. *Id.* at 257 n.5. That phase does not exist in California. Our first judicial hearing is what would be the second hearing in New York.

126 Alfredo A. v. Superior Court, 6 Cal.4th 1212, 1225-1226 (1994) (plurality opinion) (citing Schall v. Martin, 467 U.S. 253, 257–258 n.5 (1984)). This fact was not lost on dissenting Justices Mosk, George and Kennard in *Alfredo A.* The dissenters were taken aback at the reliance on *Schall*, given the fact that the propriety of detention based on a warrantless arrest was not at issue; the sole question concerned judicially ordered detention. Alfredo A. v. Superior Court, 6 Cal.4th 1212, 1247 (1994) (Mosk, J., dissenting).

127 Alfredo A. v. Superior Court, 6 Cal.4th 1212, 1225-1226 (1994) (plurality opinion).

128 *Id.* at 1221.

129 *Id.* at 1224-1225 (citing Alfredo A. v. Superior Court, 6 Cal.4th 1224-1225 (1994); Schall v. Martin, 467 U.S. 253, 263 (1984).

130 *Id*. at 1220-1222. Those factors include whether detention is required as a matter of immediate and urgent necessity for the protection of such minor or another person or property (which may include consideration of the gravity and circumstances of the offense); and whether the young person is likely to flee the jurisdiction. *Id.* at 1221-1222 (citing CAL. WELF. & INST. CODE §635).

survive the later decision in *McLaughlin*, the plurality opinion then turned to *Reno v Flores*.[131] In *Flores*, the Supreme Court had ruled that juveniles detained for suspicion of violating immigration laws did not have a right to automatic review by an "Immigration Judge" of the initial deportability and custody determinations.[132] The court had also rejected the contention that the regulations were infirm because they failed to set forth a time period within which the hearing before the "Immigration Judge," when requested must be held.[133] The *Alfredo A.* plurality opinion admitted that *Flores* "is of limited precedential value" since it arose under the Fifth Amendment Due Process Clause, rather than the Fourth Amendment, and since it deals with deportable alien children, who may not enjoy the same Fourth Amendment protections as citizen children.[134] The opinion urged, nonetheless, that the unwillingness of the Supreme Court to demand rigid procedures in *Flores* reinforced the holding of *Schall*. It used language from *Flores* and earlier cases on the states' parens patriae interest in preserving the welfare of the child. [135] Turning to *Flores'* analysis of *Schall*, the plurality opinion also quoted the now infamous line by Justice Rehnquist that, "'juveniles, unlike adults, are always in some form of custody."[136]

Thus, despite the intervening opinion in *County of Riverside v. McLaughlin*, the plurality opinion looked to *Flores*, with its reliance on the earlier decision in *Schall*, to support the position that rigid application of the 48-hour rule is not required in juvenile detention cases.[137] The plurality opinion concluded that the "promptness" requirement of *Gerstein* applies to juveniles as well as adults, but that the United States Supreme Court's adoption of the 48-hour rule in *McLaughlin* "was neither foreseen nor intended by that court to be rigidly operable in juvenile postarrest detention proceedings."[138] The plurality opinion noted that, given the "fundamental differences between juvenile and adult detention proceedings," the court

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131 *Id.* at 1227-1230 (discussing Reno v. Flores, 507 U.S. 292 (1993)).

132 *Id.* at 1229 (citing Reno v. Flores, 507 U.S. 292, 308 (1993)).

133 *Id.*

134 *Id*. at 1229, 1230 n.5. The due process claim in *Flores* arose under the Fifth Amendment because undocumented people have a right to due process of law at deportation proceedings under the Fifth Amendment. Reno v. Flores, 507 U.S. 292, 306-307 (1993).

135 Alfredo A. v. Superior Court, 6 Cal.4th 1212, 1228 (1994) (plurality opinion) (citing Reno v. Flores, 507 U.S. 292, 316-318 (1993)) (citations to cases discussed in *Flores* omitted).

136 *Id.* at 1228 (quoting from Schall v. Martin, 467 U.S. 253, 265 (1984)) (citing Reno v. Flores, 507 U.S. 292, 302 (1993)).

137 *Id.* at 1230.

138 *Id.* at 1231.

would not infer otherwise.[139] In other words, said the plurality opinion, *Gerstein* applies to children, but *McLaughlin* does not.

The plurality did, however, recognize some limits. Despite its holding that California juvenile proceedings need not be held within 48 hours, the plurality opinion disapproved the exception for "nonjudicial" days" that would permit longer periods of custody for those detained just prior to weekends or holidays. Specifically, the opinion held that the formal detention hearing provided for in Welfare and Institutions Code section 632, subdivision (a), may serve to fulfill the constitutional requirement where it is held within 72 hours of the juvenile's arrest, and the court makes a determination that sufficient probable cause exists for the extended post arrest detention of the juvenile.[140] Further, if the 72-hour period includes one or more "nonjudicial days," such that the juvenile court is unable or unwilling to provide a full statutory detention hearing within that period, then the Constitution independently requires that the juvenile be afforded a separate, timely judicial determination of probable cause for any extended period of detention beyond the 72 hours following arrest.[141]

Thus, the plurality opinion found that the open-ended statutory exception for nonjudicial days embodied in California's statutory scheme violates the Fourth and Fourteenth Amendments. It never explained why the nonjudicial days were improper, while the time in excess of McLaughlin's 48-hour rule was considered appropriate "consistent with the integrated provisions of our juvenile detention statutory scheme."[142]

Justice Arabian's concurring and dissenting opinion refused to endorse the Fourteenth Amendment due process analysis, on the ground that this is really a Fourth Amendment issue.[143] However, he used a "flexible" Fourth Amendment analysis based on *New Jersey v. T.L.O.* to reach the same conclusion as the plurality opinion.[144]

C. The Dissenting Opinions (Calling for Strict Application of the 48-Hour Rule)

Three members of the court took strong opposition to the plurality opinion in *Alfredo A.* Justice Stanley Mosk, writing for himself, Justice

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139 *Id.*

140 *Id.* at 1232.

141 *Id.*

142 *Id.* at 1216, 1232.

143 *Id.* at 1232-1234 (Arabian, J., concurring and dissenting).

144 *Id.* at 1235-36.

Kennard, and Chief Justice George,[145] observed that the "promptness" requirement of *Gerstein* and *McLaughlin* is predicated on the proposition that a state has no legitimate interest in detaining for extended periods individuals who have been arrested without probable cause. The opinion noted that it was firmly established almost a decade before *Gerstein* was handed down that "'the Bill of Rights is [not] for adults alone.'"[146] With respect to probable cause determinations, the dissenting justices observed, "It would be unreasonable to hold that when the person in question happens to be a juvenile, the guaranty is illusory."[147] The opinion further emphasized that "the presence of youth does not make up for the absence of probable cause."[148]

The dissenting justices pointed out that even though there might be legitimate reasons for detaining a youth prior to trial, those reasons are lacking where the probable cause does not exist to justify the state's exercise of power.[149] Where probable cause is lacking, the state has no authority to intervene at all, even for the benefit of the delinquent child.[150] Thus, there is no reason to distinguish between children and adults in setting time limits for determining probable cause.[151]

The dissenting justices were not convinced that the need for informality and flexibility discussed in *Schall* is relevant in the context of probable cause determinations. They reiterated that *Schall* dealt with the very different issue of pretrial detention *after* an initial judicial determination.[152] Thus, the *Schall* court was concerned only with formal, adversarial probable cause hearings, and not the informal, non-adversarial judicial probable cause determinations discussed in *Gerstein* and *McLaughlin*.[153] The dissenting justices pointedly observed that cases should not be used as authority for propositions not considered.[154] Moreover, they explained, the *Schall* opinion is based on the Fourteenth Amendment's due process clause. *Gerstein* and *McLaughlin*, by contrast, rest on the Fourth

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145 *Id.* at 1236-58 (Mosk, J., dissenting). Chief Justice George also wrote a separate dissenting opinion. *Id.* at 1258-59 (George, C.J., dissenting).

146 *Id.* at 1244 (Mosk, J., dissenting) (citing *In re* Gault, 387 U.S. 1, 13 (1967)).

147 *Id.* at 1247.

148 *Id.* at 1244.

149 *Id.* at 1244-45.

150 *Id.* at 1244.

151 *Id.*

152 *Id.* at 1247-49 (quoting at 1249 from Schall v. Martin, 467 U.S. 253, 258 & n.5 (1984)).

153 *Id.* at 1249.

154 *Id.*

Amendment.[155] The *Schall* "implication" simply did not survive the holding of *McLaughlin.*[156]

The dissenting justices also dispensed with *Flores*. They noted that in *Flores*, the United States Supreme Court rejected a challenge to an Immigration and Naturalization Service regulation governing detention of allegedly deportable children based solely on the due process clause of the Fifth Amendment.[157] They pointed out that *Flores* discussed *Schall*, but did not even allude to the Fourth Amendment, *Gerstein* or *McLaughlin.*[158] The dissenting justices found that unsurprising, given that deportable undocumented people are not even within the protection of the Fourth Amendment.[159] They concluded that, just as in *Schall*, *Flores* cannot be authority for a proposition it could not have considered.[160]

The dissenting justices reiterated the holding of *McLaughlin* that "'[a] State has no legitimate interest in detaining . . . individuals who have been arrested without probable cause" generally beyond 48 hours.'"[161] It added that it is inconceivable that a "legitimate interest" could somehow spring into being when the individual in question turns out to be a juvenile.[162] In fact, observed their opinion, extended detention in the absence of probable cause is arguably even less reasonable for juveniles because adults, at least in California, generally have the right to release on bail.[163]

Further, dissenting Justices Mosk, George, and Kennard pointed out that the "informality" and "flexibility" of juvenile proceedings are designed to make the process more expeditious than that of criminal proceedings, not less.[164] "Thus, if any colorable attack could be mounted against *McLaughlin's* definition of 'promptness,' it would be that it is too long, not too short."[165] They referenced Welfare and Institutions Code section 1254, which calls for action to be taken within 24 hours if the case involves a misdemeanor, noting that such a time limit seems to be perfectly

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155 *Id.* at 1250-51.

156 *Id.* at 1250.

157 *Id.*

158 *Id.*

159 *Id.* (citing United States v. Verdugo–Urquidez, 494 U.S. 259, 265 (1990)).

160 *Id.*

161 *Id.* at 1252 (quoting from County of Riverside v. McLaughlin, 500 U.S. 44, 55 (1991)).

162 *Id.*

163 *Id.*

164 *Id.* at 1254.

165 *Id.*

workable.[166]

The dissenting justices closed their opinion by referencing the historic basis of the Fourth Amendment in protecting innocent people. They urged that by failing to protect innocent juvenile arrestees, law-abiding innocent juveniles "may be compelled to await the grace of a Dickensian bureaucratic machine, as it churns its cycle. . .never once given the opportunity to show a judge that there is absolutely no reason to hold him, that a mistake has been made."[167] To the dissenting justices, this was evidence of "a system of justice that has lost its ancient sense of priority, a system that few Americans would recognize as our own."[168]

Justice Ronald George emphasized, in a separate dissent, that "the consequences of even a relatively brief, wrongful incarceration are likely to be more detrimental and long-lasting to an innocent, vulnerable child than to an innocent adult." [169] While differentiation between adults and juveniles may be justified in some Fourth Amendment contexts, he explained, that was not the case here.[170]

D. Alfredo A. Was Wrongly Decided

Although *Alfredo A.* carries no precedential value outside of Los Angeles[171] and our limited research suggests that most counties follow the statutory timelines rather than *Alfredo A.*, a short summary of the flaws in its legal analysis may be useful. To begin with, it relies heavily on *Schall v. Martin,* which dealt not with the probable cause determination phase, but with pretrial detention after a judicial hearing. Also, *Schall* did not deal with the Fourth Amendment probable cause issue. It was a Fourteenth

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166 *Id.*

167 *Id.* at 1257-58 (quoting from County of Riverside v. McLaughlin, 500 U.S. 44, 71 (1991) (Scalia, J. dissenting) (internal citations and quotations omitted)).

168 *Id.*

169 Alfredo A. v. Superior Court, 6 Cal.4th 1212, 1258 (1994) (C.J. George, dissenting).

170 *Id.*

171 Unfortunately, the California Judges Benchguide, § 116.12 (Determination of Probable Cause) uses the *Alfredo A.* time limit of 72 hours as the time limit for probable cause determinations. Further, a "Judicial Tip" in § 116.5 (Purpose of Detention Hearing; When Required), confirms that weekend probable cause hearings are considered good practice, but are not required: "In many counties, the practice is not to wait for the detention hearing for the determination of probable cause, but to have the probation (or police) officer speak with an on call judge to obtain this determination within 24 hours of the detention. Some courts use fax communication or make other arrangement for judicial determination of probable cause." ADMINISTRATIVE OFFICE OF THE COURTS, CENTER FOR JUDICIAL EDUCATION AND RESEARCH: CALIFORNIA JUDGES BENCHGUIDE 116, JUVENILE DELINQUENCY INITIAL OR DETENTION HEARING (2011).

Amendment case. Further, *Schall* is not good authority for what constitutes promptness, as it was decided seven years before *McLaughlin* announced the 48-hour rule.[172] Finally, knowing what we now know about the impact of incarceration, the assertion that detention is somehow less serious for children than for adults is unsupportable. Nor can *Flores* provide authority for flexible procedures that exceed 48 hours because it was a Fifth Amendment, not a Fourth Amendment case. There is absolutely no legal basis on which to differentiate between children and adults in the context of probable cause determinations. In the words of Justice O'Connor, "A State has no legitimate interest in detaining for extended periods individuals who have been arrested without probable cause."[173] The age of the individual arrestee is immaterial.

VI. Decisions from Other Jurisdictions

In failing to apply the 48-hour rule to children, California's statutory scheme and the *Alfredo A.* plurality decision are at odds with evolving jurisprudence in other jurisdictions.

In the case of *In re S.J.,* [174] a youth in Washington, D.C., was held from Thursday until Tuesday over Memorial Day weekend before a probable cause determination was made. Efforts to procure the presence of a law enforcement officer for a Friday hearing were made, but had failed. The appellate court found, nonetheless, that, ". . . the trial court was without authority to order the detention of appellant for the period of time ordered here without a finding that there was "probable cause to believe that the allegations in the petition are true."[175]

Washington State has also recognized the applicability of the 48-hour rule in juvenile cases. In *State v. K.K.H.*,[176] the appellate court emphatically recognized that they had a right to a judicial probable cause determination within 48 hours.[177]

Louisiana has also recognized the 48-hour rule in juvenile cases. In *State in Interest of K.W.,* the young person was brought before the juvenile court 6 days after being taken into custody.[178] The court held that, "The bedrock constitutional protections contained in the [*McLaughlin*] decision

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172 Alfredo A. v. Superior Court, 6 Cal.4th 1212, 1215 (1994).

173 County of Riverside v. McLaughlin, 500 U.S. 44, 55 (1991).

174 *In re* S.J., 686 A.2d 1024, 1026 & n.6 (D.C., 1996).

175 *Id.* at 1026.

176 State v. K.K.H., 75 Wash.App. 529 (1994).

177 *Id.* at 533-34.

178 State in Interest of K.W., 137 So. 3d 798, 800 (2014).

also apply to juveniles in delinquency proceedings."[179] The appellate court in K.W. specifically addressed two of the arguments offered by the court below to justify delays beyond 48 hours. The trial court had argued that a longer period was needed to aggregate the probable cause determination with other proceedings. The appellate court disagreed: "While it is true that the constitution allows for some additional delay in a magistrate's finding of probable cause in order to permit states to aggregate proceedings, under no circumstance, however, does that constitute a basis for extending detention without a finding of probable cause beyond the 48-hour limit."[180] The court also held, referring to the specific language of *County of Riverside v. McLaughlin*, that intervening weekends and holidays do not justify a longer period before the probable cause determination must be made.[181]

Recent United States Department of Justice litigation has also resulted in settlements requiring compliance with the 48-hour rule. In its Investigation of the Shelby County, Tennessee Juvenile Court,[182] the Department of Justice found that the system fails to hold timely probable cause hearings for children arrested without a warrant by "failing to hold detention hearings on weekends and holidays."[183] Specifically, the investigation found that,

> Children arrested on a Friday, for example, have a constitutional right to a probable cause determination by Sunday at the latest. Under JCMSC's current procedure, the earliest that a child arrested after 10:30 am on a Friday could be presented for a detention hearing (and have a probable cause determination) would be Monday afternoon. If Monday was a holiday, that child's probable cause determination would not be made until Tuesday afternoon, approximately 96 hours after arrest. Significantly, JCMSC has no policy in place to provide detained children held over extended holiday weekends with a timely probable cause

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179 *Id.* at 801.

180 *Id.* at 801-02 (citing County of Riverside v. McLaughlin, 500 U.S. 44, 57 (1991): "A jurisdiction that chooses to offer combined proceedings must do so as soon as is reasonably feasible, but in no event later than 48
hours after arrest.")

181 *Id.* at 802 (citing County of Riverside v. McLaughlin, 500 U.S. 44, 57 (1991)).

182 UNITED STATES DEPARTMENT OF JUSTICE, CIVIL RIGHTS DIVISION: INVESTIGATION OF THE SHELBY COUNTY JUVENILE COURT (Apr. 26, 2012),
http://www.justice.gov/crt/about/spl/documents/shelbycountyjuv_findingsrpt_4-26-12.pdf.

183 *Id.* at 17.

hearing. [184]

The Department of Justice reiterated the holdings of *Gerstein* and *McLaughlin*. It went on to state that, "Although the Supreme Court has not addressed whether *Gerstein* hearings are required for juveniles, the Sixth Circuit has answered this question affirmatively. *Cox v. Turley*, 506 F.2d 1347, 1353 (6th Cir. 1974) ('Both the Fourth Amendment and the Fifth Amendment were violated because there was no prompt determination of probable cause – a constitutional mandate that protects juveniles as well as adults.')."[185]

Significantly, the Department of Justice recognized that (like California) the Tennessee statutory scheme excludes Saturdays, Sundays, and holidays from the time computation.[186] It went on to state that, ". . . to meet requirements of the Fourth Amendment, JCMSC must follow the 48-hour timeline under *Riverside*, not the state statute. . . on its face, it appears to violate the Constitution." [187] In the ensuing Memorandum of Agreement Regarding the Juvenile Court of Memphis and Shelby County, the court agreed to revise its policies, procedures and practices to assure that a judicial probable cause determination is made within 48 hours of arrest, and that no child is detained beyond 48 hours if such a determination has not been made.[188] As part of the ongoing compliance, Shelby County has agreed to provide training for law enforcement, as well as Magistrate training. In explaining the reasons this is such an important issue for children, the Due Process Monitor stated:

> Establishing probable cause prior to detention is also important because it is well established that even a short time in detention can have long-term negative effects on

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[184] *Id.* Data reviewed for the investigation "indicated that in the five year period from 2005 to 2009, the court detained approximately 815 children for three days or more before holding a detention hearing and making a probable cause determination." *Id.* at 18.

[185] *Id.* at 17.

[186] *Id.* at 18.

[187] *Id.*

[188] U.S. DEP'T OF JUSTICE, CIVIL RIGHTS DIV., MEMORANDUM OF AGREEMENT REGARDING THE JUVENILE COURT OF MEMPHIS AND SHELBY COUNTY 9 (2012). The Department of Justice had found that the constitution requires a formal system in which at least one Magistrate, one JD, one ADA, and one probation officer is available for several hours each weekend, three-day weekend, and holiday to hold probable cause and detention hearings. *See* U.S. DEP'T OF JUSTICE, CIVIL RIGHTS DIV., INVESTIGATION OF THE SHELBY COUNTY JUVENILE COURT 18, 61 (2012), http://www.justice.gov/crt/about/spl/documents/shelbycountyjuv_findingsrpt_4-26-12.pdf

> children. According to social scientists, time spent in detention increases the likelihood that a child will be a repeat offender. For children who have prior trauma or mental health issues, detention can exacerbate those issues. Children in detention are also exposed to negative peer connections and positive school and community-based connections are disrupted.[189]

VII. Attention to Front End Process is Needed

Clearly, California law and practice with respect to the 48-hour rule need attention. Our statutes should clearly delineate the timelines needed to effectuate prompt probable cause hearings and provide guidance to courts about how to make the finding. This should be done through legislation amending the Welfare and Institutions Code. Before that occurs, counties should establish their own rules and protocols to assure compliance with the 48-hour rule, as a significant number have already done. Fixing that part of the process will provide much needed safeguards against blatantly unfounded arrests. But while we are looking at the front end of the system, additional changes could make a huge difference in protecting young people against unnecessary detention.

A. Juvenile Courts Should Provide Weekend Detention Hearings

The longstanding 9 to 5 schedule for juvenile court has no place in modern juvenile justice. The purpose of juvenile court intervention is to provide individualized care and treatment of young people,[190] but current law and practice appear to be designed to serve the convenience of court officials. If banks and retail stores can operate at the time their customers need them, so too can juvenile courts. Again, while providing prompt probable cause determinations will provide some of the protections needed to prevent unnecessary detention, much more is needed at the front end of the system. There is absolutely no reason the investigative functions needed for a detention hearing cannot be accomplished within 48 hours. And, as one expert on court processing has observed, "Timely case processing has

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[189] Compliance Report #4—October 2014 from Sandra Simkins Due Process Monitor, to Winsome Gayle, Civil Rights Division, Special Litigation Section, U.S. Department of Justice; Honorable Dan Michael, Presiding Judge, Memphis-Shelby Juvenile Court; Honorable Mark H. Luttrell, Jr., Mayor, Shelby County, Tennessee; Jina Shoaf, Assistant County Attorney 12 (Dec. 15, 2014), http://www.justice.gov/crt/about/spl/documents/shelby_dueproc4_12-15-14.pdf.

[190] *See* CAL. WELF. & INST. CODE § 202(b). (West 2015).

the potential to generate better outcomes for youth, their families, and their communities."[191]

This is hardly a new idea. Long ago, the National Advisory Committee for Juvenile Justice and Delinquency Prevention called for a detention hearing before a judge and appointment of counsel within 24 hours after the young person is taken into custody.[192] Similarly, the Institute of Judicial Administration/American Bar Association *Juvenile Justice Standards* recommended a period of no more than 24 hours between detention and review of the petition by a judicial officer.[193] The *Standards* also called for an attorney for the accused juvenile to be present at the hearing, with a presumption against the validity of any waiver of counsel.[194]

Courts in a number of other states already have statutory requirements for weekend detention hearings to comply with the 48-Hour Rule.[195] Thus, in Palm Beach, Florida, juveniles held in secure confinement have a detention hearing the next day.[196] Other jurisdictions provide weekend detention hearings even though there is no formal legislation requiring it. In Pima County, Arizona, detention hearings are held every day of the year, and children have their hearing by the next day after being taken into custody.[197] At the hearing, the court determines probable cause, decides

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[191] JEFFREY A. BUTTS, GRETCHEN RUTH CUSICK & BENJAMIN ADAMS, DELAYS IN YOUTH JUSTICE 10 (2009).

[192] U.S. DEP'T OF JUSTICE, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, STANDARDS FOR THE ADMINISTRATION OF JUVENILE JUSTICE: REPORT OF THE NATIONAL ADVISORY COMMITTEE FOR JUVENILE JUSTICE AND DELINQUENCY PREVENTION § 3.155 (1980).

[193] INST. OF JUDICIAL ADMINISTRATION AND AMERICAN BAR ASSOCIATION, JUVENILE JUSTICE STANDARDS, STANDARDS RELATING TO INTERIM STATUS: THE RELEASE, CONTROL, AND DETENTION OF ACCUSED JUVENILE OFFENDERS BETWEEN ARREST AND DISPOSITION § 6.5 (1980).

[194] *Id.* § 7.6.

[195] ALASKA STAT. ANN. § 47.12.250(c) (West 2001) (hold a hearing immediately, and in no event more than 48 hours later); FLA. STAT. ANN. 985.255(1) (West 2014) (child shall be given a hearing within 24 hours after being taken into custody); N.H. REV. STAT. ANN. § 169-B:13(1) (2001) (within 24 hours excluding Sundays and holidays); N.J. STAT. ANN. §2A:4A-38(e) (West 1995) (no later than the morning following being taken into custody); W.VA. CODE ANN. § 49-4-705 (without unnecessary delay and in no event may delay exceed the next day).

[196] OFFICE OF THE STATE ATTORNEY, 15TH JUDICIAL CIRCUIT, PALM BEACH COUNTY, FLORIDA, *How The Juvenile Court Works*, http://www.sa15.state.fl.us/stateattorney/VictimWitness/indexJUV.htm (last visited Oct. 31 2015).

[197] *What if My Child Has a Detention Hearing*, PIMA COUNTY JUVENILE COURT (2011), http://www.pcjcc.pima.gov /HTML%20files/WhatIf/DetentionHearing.html. A 1989

whether the public defender will be appointed, and whether the child should remain in detention.[198]

New Jersey requires an initial hearing within 24 hours.[199] If the hearing occurs during the week, it is in front of a judge, and if it is on the weekend it occurs by telephone. [200] As the state has instituted front-end risk screening through its work with the Juvenile Detention Alternatives Initiative (JDAI),[201] these hearings have resulted in substantial reduction of unnecessary detention. In 2013, 32.5% of detained youth were released or ordered into detention alternatives at this early stage.[202]

In New York City, children have been processed over the weekend since 2008.[203] Unlike the process in other jurisdictions, the initial hearing is held prior to the filing of a petition, and the central issue is whether the child should be remanded into custody. If the child has no attorney, a public defender is appointed. Many children are released. Since weekend hearings began in 2008, only 1069 of 5291 youth admitted by police have been detained.[204] Because this early scrutiny reveals youth arrested for relatively minor "offenses," more cases are diverted from formal processing. New York has saved a good deal of money that would otherwise have been spent on unnecessary detention, and thousands of youth have been spared the negative effects of incarceration. The court costs have been minimal because the hearings utilize adult court staff that were already doing weekend hearings for adults. Legal Aid Society lawyers like having the earlier access to clients, and volunteer to work on weekends because they

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Arizona Court of Appeals case found that differential treatment of juvenile and adult arrestees raised equal protection concerns, and required juvenile arrestees, like adult arrestees, to be brought to court within 24 hours. JV-111701 v. Superior Court, 163 Ariz. 147, 151 (1989).

198 *Id.*

199 N.J. STAT. ANN. § 2A:4A-38(e) (West 1995) ("The initial detention hearing shall be held no later than the morning following the juvenile's placement in detention including weekends and holidays.")

200 Telephone Interview with Joelle Kenney, Juvenile Justice Comm'n, N.J. (Aug. 11, 2015).

201 The Juvenile Detention Alternatives Initiative (JDAI) is an initiative of the Annie E. Casey Foundation. It operates in more than 40 states and 300 sites around the United States. JDAI provides extensive support to jurisdictions working to reduce unnecessary confinement of juveniles. http://www.aecf.org/work/juvenile-justice/jdai/

202 *Id.*

203 Telephone Interview with Tamara Steckler, Attorney-in-Charge, Juvenile Rights Practice, Legal Aid Society (Aug. 11, 2015).

204 *Id*. The data is to August 2, 2015. The releases represent youth "adjusted" without further charges by probation; youth released, diverted or given a citation to appear by the prosecutor; and youth released at the pre-petition hearing. *Id.*

get extra pay. According to Tamara Steckler, the Legal Aid Society Attorney-in-Charge, people in the system are amazed that the system used to allow youth to sit in detention all weekend.[205]

The authority for weekend detention hearings already exists in California. Code of Civil Procedure section 134, subdivision (c), provides: "In any superior court, one or more departments of the court may remain open and in session for the transaction of any business that may come before the department in the exercise of the civil or criminal jurisdiction of the court, or both, on a judicial holiday or at any hours of the day or night, or both, as the judges of the court prescribe."[206]

B. Counsel Should Be Appointed Prior to the Weekend Hearing or Initial Review

Because children are not entitled to bail, and because the detention decision requires careful consideration of factors that the young person may not be able to articulate on their own, counsel should be appointed to represent children at the expedited detention hearing stage.

Although *Gerstein* found that probable cause determinations were not a critical stage requiring appointment of counsel,[207] more recent decisions of the Supreme Court have taken a different approach. Thus in *Rothgery v. Gillespie County,* the court found that a criminal defendant's initial appearance before a judicial officer, where he learns the charge against him and his liberty is subject to restriction, marks the start of adversary judicial proceedings that trigger attachment of the Sixth Amendment right to counsel.[208] That reasoning makes particular sense in the context of juvenile proceedings. The decision whether to detain a youth after a probable cause determination requires much broader considerations than are involved in the bond hearing at issue in *Rothgery*. Counsel can be immensely helpful to the court in providing background information, providing options for supervision, and contacting relatives.

Knowing what we now know about the anxiety experienced by young people in detention, providing them with counsel who can explain what is happening and when it will happen serves an important function. The National Council of Family and Juvenile Court Judges guidelines provide that, "If the juvenile justice process is not timely, many youth will

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205 *Id.*

206 CAL. CIV. PRO. CODE § 134(c) (West 2015).

207 Gerstein v. Pugh, 420 U.S. 103,122 (1975).

208 Rothgery v. Gillespie C'ty, Tex., 554 U.S. 191, 213 (2008).

experience prolonged uncertainty. Prolonged uncertainty can increase anxiety. Increased anxiety can negatively impact trust and a sense of fairness. If a youth does not perceive the juvenile justice system to be predictable and fair, then the system's goal of changing behavior is less likely to be achieved."[209]

In a number of the jurisdictions that provide weekend hearings, counsel is appointed. Thus, in Alaska, the hearing must be held within 48 hours, and that, "The minor is entitled to counsel."[210] In New Hampshire, the hearing must be held within 24 hours (excluding Sundays and holidays), and the court must appoint counsel.[211] In New York, counsel is appointed at the pre-petition hearing on weekends.[212] The Shelby County agreement with the Department of Justice requires the appointment of counsel for any child whose indigence cannot be readily determined in advance of the Probable Cause Determination.[213] Under the agreement, defense attorneys are to have an opportunity to challenge the government's evidence of probable cause, by cross-examining witnesses, presenting alternative testimony, or by any other appropriate means.[214] Records must be kept detailing when defense counsel was appointed, the forms of evidence used, and whether the defense attorney challenged such evidence or presented alternative evidence. [215] An even more recent Department of Justice investigation in St. Louis, Missouri has similarly called for an end to ex parte probable cause hearings, with a meaningful opportunity to challenge probable cause determinations through counsel.[216]

Conclusion

In *Alfredo A.*, Chief Justice George spoke of the potential for even a brief wrongful incarceration to be more detrimental and long lasting to an innocent, vulnerable child than to an innocent adult.[217] His words are

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[209] NAT'L COUNCIL OF FAMILY AND JUVENILE COURT JUDGES, JUVENILE DELINQUENCY GUIDELINES: IMPROVING COURT PRACTICE IN JUVENILE DELINQUENCY CASES 44 (2005).

[210] ALASKA STAT. ANN § 47.12.250(c) (2001).

[211] N.H. REV. STAT. ANN. § 169-B:13(1) (2011).

[212] N.Y. FAM. CT. ACT. §307.4(2) (McKinney 2010).

[213] UNITED STATES DEPARTMENT OF JUSTICE, U.S. DEP'T OF JUSTICE, CIVIL RIGHTS DIV., MEMORANDUM OF AGREEMENT REGARDING THE JUVENILE COURT OF MEMPHIS AND SHELBY COUNTY 9 (2012).

[214] *Id.* at 10.

[215] *Id.*

[216] U.S. DEP'T OF JUSTICE, CIVIL RIGHTS DIV., INVESTIGATION OF THE ST. LOUIS COUNTY FAMILY COURT 13, 23-25 (2015), http://www.justice.gov/opa/file/641971/download.

[217] *Alfredo A. v. Superior Court*, 6 Cal.4th 1212, 1258 (1994) (George, C.J., dissenting).

especially poignant when viewed against the contemporary evidence of racial profiling and routine groundless arrests in so many jurisdictions. It was just such dangers that led the *Gerstein* court call for safeguards against "the overzealous as well as the despotic."[218] We need prompt judicial probable cause determinations because "[t]he awful instruments of the criminal law cannot be entrusted to a single functionary."[219] When public officials puzzle over how to address racial and class disparities in our justice system, this would be a good place to start. Children must not sit unnecessarily in detention because we do not want to work on weekends.

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[218] *Gerstein v. Pugh*, 420 U.S. 103, 118 (1975) (quoting McNabb v. United States, 318 U.S. 332, 343, (1943)).

[219] *Id.*