MINUTES OF THE SENATE COMMITTEE ON JUDICIARY

Held in Room 519 S, at the Statehouse at 10:00 a. m./p.m., on January 17, 1979.

All members were present except:

The next meeting of the Committee will be held at 10:00 a. m./p.m., on January 18, 1979.

~~These minutes of the meeting held on xxxxxxxxxxxxxxxxxx, 19xx were considered, corrected and approved~~

Elwaine F. Pomeroy
Chairman

The conferees appearing before the Committee were:

Ellen Richardson - Kansas Childrens Service League

Staff present:

Art Griggs - Revisor of Statutes
Jerry Stephens - Legislative Research Department
Wayne Morris - Legislative Research Department

Senate Bill 22 - An act concerning the Kansas juvenile code; concerning the issuance of warrants. Mr. Griggs distributed materials pertaining to the subject matter of this bill, copies of which are attached hereto. Committee discussion followed. During the discussion, the question was raised as to why a deprived child should be brought in by a warrant. Discussion also centered on how an allegedly abused child is brought before the court. A committee member inquired as to what the charge would be if the child was deprived.

Ellen Richardson of the Kansas Childrens Service League testified that she objected to including a deprived child as a status offender. She stated a deprived child is a victim rather than offender.

Further committee discussion followed, including discussion of the possibility of amending the statute to provide for protective custody orders. Staff was requested to bring back to the committee proposals along these lines.

Senate Bill 23 - Juvenile code, juvenile detention or correctional facility definition. The staff gave background information concerning the bill, and the study by the interim committee. A copy of the materials distributed by the staff is attached hereto. There were no conferees on the bill. Following committee discussion, Senator Simpson moved to report the bill favorably; Senator Parrish seconded the motion, and the motion carried on a vote of six to three.

continued -

Senate Bill 4 - Probate code, social security benefits, refusal to grant letters of administration. The chairman referred back to the handouts passed out to the committee members the previous day, concerning possible amendments to Section 1. Senator Burke moved to amend the bill as illustrated in the ballooned copy; Senator Hein seconded the motion, and the motion carried. Committee discussion followed concerning the reason for increasing from 30 days to 180 days the time within which the affidavit could be filed. The staff reported that with regard to Section 2, the statute was first passed in 1965, at which time the amount was $750.00; it was increased to $1500.00 in 1970; and it last increased in 1976, to $2,000.00. Senator Berman moved to amend the bill in lines 52 and 70 by increasing the $2,000 to $5,000; Senator Parrish seconded the motion, and the motion carried. Senator Hein moved to report the bill favorably as amended; Senator Burke seconded the motion, and the motion carried.

Senate Bill 43 - Crime of giving a worthless check, notice and service charges. The chairman referred to the material passed out at yesterday's meeting concerning the bill. Following committee discussion, Senator Burke moved to amend the bill by making the mailing notice requirement be that of ordinary postage prepaid mail; Senator Werts seconded the motion. During committee discussion, one member stated his opposition to the motion because it would lend presumption to something that might not occur. Another member pointed out that the committee could either eliminate the oral notice, or eliminate the requirement that mailing be by certified or restricted mail. Senator Simpson made a substitute motion to amend the bill by eliminating the provision for oral notice; Senator Parrish seconded the motion, and the motion carried. Following further committee discussion, it was the consensus of the committee to leave the mailing requirement as it presently is in the bill. A committee member suggested that the dollar amount be eliminated entirely, in view of the recent Court of Appeals decision. It was pointed out that the statute would apply in those instances where merchants have not posted notices, and also in instances where the checks are between individuals, as contrasted with a check given to a merchant. The hour of adjournment having arrived, further committee discussion was postponed for a later date.

The meeting adjourned.

These minutes were read and approved by the committee on 1-22-79.

1-17-79

GUESTS

SENATE JUDICIARY COMMITTEE

| NAME | ADDRESS | ORGANIZATION |
|---|---|---|
| David L. Hiebert | 112 W. 6th. Topeka. | Kansas Legal Services |
| Jon Kessler | Intern with Don Allegrucci | |
| John Deardoff | Intern Senate Judic | |
| Ellen Richardson | KCSL Box 5314 Topeka | Ks. Children's Service League |
| Charles V. Hamm | State Office Bldg. | Soc. & Rehab Services |
| Marty Snyder | 3 Townsite Plaza #240 | KCDAA |
| Judy Tenwink | 221 Woodlawn | KWPC |
| David Charvat | Lawrence Journal-World | News |
| Ann Kebberger | League Women Voters Ks. | |
| Tracey Strader | Topeka | NASW |
| Oscar Troche | Topeka | Intern-Sen. Hess |
| Bill Gough | Topeka | KACL |
| Mike Barbar | " | Dept of Corrections |

1-17-79

Prepared by Art Griggs
Revisor's Office

JJDPA

# JUVENILE JUSTICE AND DELINQUENCY PREVENTION ACT

The federal Juvenile Justice and Delinquency Prevention Act (JJDPA) was passed by the U.S. Congress in 1974 and provides juvenile justice funds to states that elect to participate in that act. In order to receive formula grants for federal funds under the act, states are expected to accomplish certain changes in their juvenile justice system. The biggest change requirement under the act relates to status offenders. It requires states to "provide that within three years after submission of the initial plan that juveniles who are charged with or have committed offenses that would not be criminal if commmitted by an adult, or such nonoffenders as dependent or neglected children, shall not be placed in juvenile detention or correction facilities" (sec. 223(a)(12)). Further, the act provides that a state's failure to achieve compliance within the three-year limitation shall terminate a state's eligibility for funding, unless it is determined that the state is in "substantial compliance with the requirement, through achievement of deinstitutionalization of not less than 75 per centum of such juveniles, and has made, through appropriate executive or legislative action, an unequivocal commitment to achieving full compliance within a reasonable time not exceeding two additional years." Thus, for a state to continue to receive JJDPA formula grants, they must meet the 75% requirement in three years and 100% compliance in five years.

How compliance with the act is monitored and determined is by surveying a state's juvenile facilities when the state first elects to participate in the act. The facilities are classified as to whether or not they are "juvenile detention or correctional facilities", then a count is taken as to how many status offenders are in such detention or correctional facilities. That number is the number which must be reduced by 75% in three years and reduced to 0 in five years from initial participation.

Kansas, by provisions contained in 1978 SB 553, §§31 and 32, has statutorily mandated virtually 100% compliance after two years from initial participation.

The Governor's Committee on Criminal Administration was instrumental in having the 1980 limitation on detention of status offenders incorporated into the Juvenile Code. That committee is the state planning agency for administration of the JJDPA funds in Kansas. They have recently received the results of the first survey of state juvenile facilities. The survey categorizes facilities as to whether or not they are "juvenile detention or correctional facilities" and gives a count of the number of status offenders in such facilities.

The results of the survey showed 525 status offenders in juvenile detention or correctional institutions and an additional 53 status offenders in county jails or city lockups. In order to continue receiving JJDPA funds, Kansas must reduce this figure by 75% within three years. Although it is not clear what beginning date is to be used for computing the three year period, using October 1, 1977, (beginning of 1st Kansas JJDPA grant period) the 75% reduction must be made by October, 1980.

From the above, it can be seen that in March, 1978, 578 status offenders were placed in detention facilities or placements that will not be permitted after January 1, 1980. This raises the question of what alternatives will be available then. The survey also showed that there are twenty-four facilities that could be used for detention and placement of status offenders after January 1, 1980, and fifty-two facilities that could not if nothing changes before that date. As yet, none of the JJDPA money available to Kansas has been used to establish specific alternative facilities or placements for status offenders. The first year's JJDPA money to Kansas was in the amount of $631,000.00. On August 4, 1978, the Governor's Advisory Committee on Juvenile Justice considered the first JJDPA grant which was in the amount of $178,783, to be used to establish a 19-bed, non-secure facility for multi-problem hard-to-place youths. JJDPA grants must then be finally approved by the GCCA; their next meeting is scheduled for September. In October, the Governor's Advisory Committee on Juvenile Justice will then consider future JJDPA grants.

The committee may wish to consider extending the January 1, 1980, limitation on status offenders in order to gain more time to see what alternatives will be available. A six month extension would not appear to jeopardize the federal JJDPA funds. If no extension is enacted this next legislative session, the status offender limitations will become effective before the legislature meets again.

1-17-79

THE SEVENTH JUDICIAL DISTRICT OF KANSAS
JOHN MIKE ELWELL
ASSOCIATE DISTRICT COURT JUDGE

PHONE: 841-7700
DOUGLAS COUNTY

11TH & NEW HAMPSHIRE
LAWRENCE, KANSAS 66044

# APPREHENSION AND DETENTION OF JUVENILES AFTER THE 1977 - 1978 LEGISLATIVE CHANGES

I would like to state at the outset that I do not support the changes made by the Legislature in those areas which I have discussed below and at best would attribute the confusion and contradictions to their lack of understanding and failure to carefully analyze what they were doing.

The 1977-1978 Legislature substantially changed the Kansas juvenile code as it pertains to the apprehension and detention of juveniles, especially wayward and truant children. (See Senate Bill No. 553 as amended by the House Committee of the Whole). These changes raise the following issues for juvenile courts and law enforcement officers:

I. May law enforcement officers take into custody and hold wayward and truant children?

II. Where may a juvenile alleged or adjudged to be a wayward, truant, or traffic offender be detained during the following periods of time:

A. Prior to a detention hearing;

B. Subsequent to a detention hearing; and

C. Following adjuducation and prior to final placement?

## I. MAY LAW ENFORCEMENT OFFICERS TAKE INTO CUSTODY AND HOLD WAYWARD AND TRUANT CHILDREN?

Prior to the recent changes there were no provisions in the juvenile code for the taking into dustody of juvenile offenders. These matters have been handled with such informal procedures as "pick-up orders". Senate Bill No. 553 adds two (2) new sections dealing with this problem.

Section 33 provides as follows:

"(a) If the court finds from a petition filed pursuant to K.S.A. 1977 Supp. 38-816, as amended, that there is probable cause to believe that a child is a delinquent or miscreant child, or a traffic offender, the court may issue a warrant commanding that the child named in the petition be taken into custody and brought before the court. The warrant may designate the place the child is to be taken in the event the child is taken into custody at a time when the court is not open for the regular conduct of business. Such warrant shall describe the offense charged in the petition.

(b) When there is probable cause shown under oath or affirmation that a person is in contempt of an order of the court issued pursuant to the juvenile code, the court may issue a warrant commanding the person alleged to be in contempt to be taken into custody and brought before the court to show cause why such person should not be held in contempt of court."

Section 33 thus provides the means for the Court to issue a warrant commanding the apprehension of an alleged delinquent, miscreant, or traffic offender. However, there is no provision for the issuance of a warrant for an alleged wayward or truant child. This section corresponds to the warrant section of the code of criminal procedure, K.S.A. 22-2302, and allows a warrant to be issued upon a finding of probable cause by the court.

Section 9 provides as follows:

"A law enforcement officer may take a child under eighteen (18) years of age into custody when:

(a) Any offense has been or is being committed by such child in the officer's view;

(b) The officer has a warrant or court order commanding that such child be taken into custody;

(c) The officer has probable cause to believe that a warrant or court order commanding that such child be taken into custody has been issued in this state or in another jurisdiction for an act committed therein which, if committed in this state, would make such a child a delinquent child; or

(d) The officer has probable cause to believe that the child is a delinquent, miscreant, wayward, or deprived child or a traffic offender or truant and that:

(1) Such child will not be apprehended or evidence of the offense will be irretrievably lost unless such child is immediately taken into custody; or

(2) Such child may cause injury to self or others or damage to property or may be injured unless immediately taken into custody."

Section 9 provides the circumstances under which a juvenile may be apprehended by a law enforcement officer, and corresponds to K.S.A. 22-2401 in the code of criminal procedure.

When both of these sections are read together it is apparent that the only circumstance in which a juvenile believed to be a wayward or truant may be taken into custody is a situation where the officer has probable cause to believe that the child is wayward or truant and either 1) will not be apprehended or evidence of the offense will be irretrievably lost unless such child is immediately taken into custody; or 2) the child may cause injury to self or others or damage to property or may be injured unless immediately taken into custody.

The interplay of these two sections results in the rule that a child alleged to be wayward or truant cannot be taken into custody unless an emergency exists. As a practical matter, Subsection d, of New Section 9, like Subsection (C) (2) of K.S.A. 22-2401, is a method of apprehension which is to be used as a last resort in emergency situations. The method of apprehension which has been preferred since the founding of our country is the arrest pursuant to a warrant. This method provides the maximum protection to the person to be apprehended since it requires a finding of probable cause by an independent magistrate. Yet, this method is not available to the children who are alleged to have committed the least serious offenses.

It may be argued that when these two sections are read together, the effect is to prohibit the apprehension of wayward and truant children altogether. Howev

Subsection (d) of Section 9 clearly mentions wayward and truant children. It is obvious the legislature intended that the apprehension of wayward and truant youths be permitted under some circumstances since Section 9 specifically includes these two categories. Thus, without the intervention of a magistrate, a law enforcement officer must determine whether probable cause exists to believe that a youth is wayward or truant and he will not be apprehended or evidence will be destroyed if he is not immediately apprehended, or the child may injure himself or others unless taken into custody. This subsection either makes it extremely easy or extremely hard to take such a child into custody. On the one hand it can be argued that in every instance there is probable cause to believe the child will not be later apprehended if he is not immediately taken into custody since there is no other means for apprehension provided in the juvenile code. On the other hand it can be argued that a wayward or truant child by the nature of the offense is neither dangerous nor likely to escape, and further, in this sort of situation there is no evidence to be destroyed. Thus, apprehension of a wayward or truant child would never be justified.

It is doubtful that the legislature intended this result. Whether or not a wayward or delinquent child is taken into custody is now completely within the discretion of the individual officer. One officer may adopt the approach that since there is no other procedure by which a wayward or truant youth may be apprehended, the juvenile is not likely to be later taken into custody. Another may not want to stick his neck out, so he will adopt the approach that none of the criteria are met by any wayward or truant youth and refuse to take them into custody. This situation will not contribute to certainty and uniformity of application.

In conclusion it would appear that wayward and truant children may be apprehended by a law enforcement officer pursuant to Section 9(d). It would also appear that in many, if not the majority of the cases, a strained interpretation

will have to be placed on Section 9(d) in order to find that the facts meet the requirements that:

> "(1) Said child will not be apprehended or evidence of the offense will be irretrievably lost unless the child is immediately taken into custody; or
>
> (2) such child may cause injury to self or others or damage to property or may be injured unless immediately taken into custody."

This interpretation in the end will be made by individual law enforcement officers.

## II. WHERE MAY A JUVENILE ALLEGED OR ADJUDGED TO BE WAYWARD, TRUANT OR A TRAFFIC OFFENDER BE DETAINED?

Detention of juveniles who are wayward, truant, or traffic offenders, has been a problem for some time for those counties which do not have a juvenile detention facility separate from the county jail facility. This problem has been exacerbated by the recent amendments to the juvenile code.

### A. Prior to detention hearing and pendency of proceedings.

Prior to the amendments the court could temporarily detain a wayward or truant youth in the following places:

1) the custody of a person other than the legal custodian;

2) a children's aid society;

3) a public or private institution used as a home or place of detention or correction; or

4) the custody of the Secretary of Social and Rehabilitation Services.

(K.S.A. 1977 Supp. 38-819(b))

The court was further permitted to order a child alleged or adjudged to be delinquent or miscreant to be detained in the county jail or police station in quarters separate from adult prisoners. (K.S.A. 1977 Supp. 38-819(c)).

Although, when these two subsections are read together, it is questionable whether a wayward or truant youth or a traffic offender can be held in a separate portion of the county jail, out of necessity many judges have been detaining wayward, truant and traffic offenders in a separate portion of a jail facility on the ground that such a facility was a "place of correction". The words "of correction" were deleted from 38-819 by Senate Bill 553. This clearly removes this as a possible place to hang one's hat when placing a wayward or truant youth in some portion of the county jail.

When Subsection (c) of 38-819 is read in conjunction with Subsection (b) it seems impossible to argue that a wayward or truant youth may be held in any portion of the county jail. Subsection (c) permits the detention of DELINQUENT and MISCREANT youths in a separate section of the county jail. The noticeable absence of wayward and truant youths certainly offers the negative implication that such offenders should NOT be placed in any portion of the county jail.

This section of the code appears to apply to all points in time preceding the hearing on the petition. Thus, it would appear that the above mentioned limitations would apply at all times prior to adjudication.

B. Following adjudication and prior to final placement.

After a youth has been adjudicated to be a wayward or truant youth or a traffic offender, his detention is governed by K.S.A. 1977 Supp. 38-826. There were no substantial changes

made to this section with regard to detention. The only provision for placement in the county jail comes under Subsection (a)(5) which provides that the court may issue an order "placing such child, if sixteen (16) years of age or over, in the county jail pending final disposition..." and Subsection (b) which allows for placement of wayward and truant youths in the same manner as set out in (a)(5). Thus, a child sixteen (16) or over may be held in the jail after adjudication and prior to final disposition. The negative inference is that a child under sixteen (16) may not be placed in the county jail after adjudication.

This also creates a possible situation where a juvenile under age 16 convicted of murder will not be able to be held in the county jail pending placement at the youth center in which case the youth centers will have to be ready for immediate delivery of juveniles under 16 if all of the detention centers are full.

C. Conclusion.

It would appear that no child alleged to be wayward, truant or a traffic offender may be placed in the county jail, even in a separate facility, at any point prior to the formal hearing on the petition. After adjudication such a child may be temporarily placed in the county jail if he is sixteen (16) years of age or older.

III. WHAT EFFECT, IF ANY, DOES EXPRESS AUTHORITY TO ISSUE A WARRANT AS SET FORTH IN NEW SECTION 33 OF SENATE BILL 553 HAVE ON THE INHERENT AUTHORITY OF THE COURT TO ISSUE A PICK-UP ORDER FOR ALLEGED WAYWARD AND TRUANT JUVENILES?

A. New Section 33 (herein referred to as Sec. 33) specifically authorizes the court, upon a finding of probable cause upon a petition, to issue a warrant to take the child into custody. This authorization extends only to juveniles whom the court has probable cause to believe a delinquents, miscreants or traffic offend Thus wayward and truant youths are excluded from the prescribed warrant procedure.

B. Sec. 33 will take effect July 1, 1978, as there is no specific clause in Sec. 33 providing otherwise. Sec. 37 states: "This act shall take effect and be in force from and after its publication in the statute book."

C. In the past many Juvenile Courts in Kansas have proceeded to issue pick-up orders on wayward and truant youths under a theory of "inherent authority", as no specific authorization for such pick up orders or warrants is included in the present code. Apparantly such authority has been derived from reading the Code as a whole and deft statutory construction.

1. Sec. 38-801 declares the statute shall be liberally construed for the child's welfare and the best interests of the State.

2. Any child appearing to be wayward or truant is governed by the code. K.S.A. 1977 Supp. 38-806.

3. Under the direction of the court, a juvenile probation officer shall take possession and custody of any child under the court's jurisdiction and make such arrangements for the temporary care of any child as directed by the court. K.S.A. 1977 Supp. 38-814.

4. A peace officer may take a child into custody without a warrant and deliver him into the custody of a juvenile probation officer or take him forthwith before the court. K.S.A. 1977 Supp. 38-815.

5. A child may be detained in dustody up to 48 hours without a detention hearing and certain attendant due process messures. K.S.A. 1977 Supp. 38-815(c).

6. Prior to or during the pendency of a hearing on a petition to declare a child wayward or truant, the court may order the child to be placed in some form of temporary detention or custody.

D. By careful extrapolation the courts concluded they had "inherent authority to issue pick-up orders for wayward and truant youths. As a practical matter, if no such authority existed, the juvenile court would have no effective way of dealing with many juveniles in these classifications. If a "runaway" is not immediately detained, he will move on and the Court will lose its opportunity to act in the child's best interests.

E. Without any apparent indication of the legislative intent and without any case law to guide us in the matter, it is necessary to fall back on the rules of statutory construction. In doing so, the conclusion may be reached that the express provision for warrants in New Sec. 33 applies only to delinquents, miscreants and traffic offenders and not to waywards or truants. The implication is that by deletion of the "status" offenders, the legislature intended that the Court have no authority to issue pick-up orders for such youths. The implication is derived from the principle expressio unius est exclusio alterius. The express mention in a statute of one matter implies the exclusion of other similar matter not mentioned. See The Rules of Statutory Construction, 47 JKBA 29, 32 Spring (1978).

The issue is confused however by New Sec. 32 which provides for temporary detention of status offenders pending a detention hearing. This language could imply that courts have authority to pick up such youths in the first place. However this section does not go into effect until January 1, 1980. At that time, one would still have to deal with the language in Sec. 33

Apparently, the general intent of the new revisions of the Code is to treat status offenders different from the more serious type of offenders. This general intent and the specific exclusion of the status offenders, from the section indicat that courts will not have authority to issue pick-up orders on wayward and truant youths.

Now that the legislature has specifically spoken to the subject of warrants, the implication is that the inherent or implied authority to issue pick-up orders is no longer available to the court. Whereas, before the statute was silent on the subject and the court had to strain to make it work. Now, the statute addresses itself to the issue and the hunting season for "inherent" authority is over. The conclusion is there is no authority under the new Sec. 32 to issue warrants or pick-up orders for wayward or truant youths.

IV. IF THE COURT ISSUES A PICK-UP ORDER WITHOUT AUTHORITY, DOES IT ACT WITHOUT JURISDICTION?

A. The test for judicial immunity has been and remains, did the judge act in a "clear absence of all jurisdiction". See Holland v. Lutz, 194 Kan. 712 (1965). The Supreme Court of the U.S., on March 28, 1978, addressed the question of immunity and held that a judge was immune from damages liability under 42 U.S.C. S1983 when he erroneously approved a mother's petition for sterilization of her retarded 15 year old daughter. Stump v. Sparkman, Docket No. 76-1750; See 1 Law Times 153, April 13, 1978.

In Stump, the Court operates under the broad Indiana statutory grant of general jurisdiction. There was statutory authority for the sterilization of institutionalized persons, however, the statute did not expressly authorize judicial approval of tubal ligations. On the other hand, no Indiana statute and no case law prohibited a court of general jurisdiction from considering a petition which confronted Judge Stump. The Court held that the statutory authority for sterilization of institutionalized persons in the custody of the state does not warrant the inference that a Court of general jurisdiction has no power to act on a petition for sterilization of a minor in the custody of her parents.

The Court added, "Because the Court over which Judge Stump presides is one of general jurisdiction, neither the procedural errors he may have committed nor the lack of a specific statute authorizing his approval of the petition in question rendered him liable to damages for the consequences of his actions."

Unlike the Stump case, the juvenile court is not a court of general jurisdiction.

B. The juvenile court derives all its authority from the juvenile code. See K.S.A. (1977 Supp) 38-806. The Code was enacted as a special body of law specifically for the best interests of the child. K.S.A. (1977 Supp) 38-801. If the Court acts without code authorization, it acts in an absence of jurisdictio over the child. As concluded herein through statutory interpretation, under the revised code, the court has no authority to issue warrants or pick-up orders for wayward or truant youths. To do so, without further legislative direction would be to act in a clear absence of jurisdiction since jurisdiction is denied solely from the code.

V. IF THE COURT LACKS JURISDICTION WHEN IT ISSUES A PICK-UP ORDER, CAN THE JUDGE BE PERSONALLY LIABLE FOR ANY INJURIES SUSTAINED BY THE JUVENILE WHILE IN DETENTION?

A. Generally, in a 1983 action, any plaintiff who can prove actual damages is entitled to recover such damages from a defendant who deprived him of his civil rights. See Antiean,Federal Civil Rights Act, 102 (1971) Successful plaintiffs are also entitlted to exemplary or punitive damages, and, in the discretion of the trial court, even attorney's fees. See Antiean, 103 & 106.

B. Since a judge who detains a status offender may be stripped of his immunity for acting in an absence of jurisdiction, he may be exposed to the perils of a false imprisonment claim in a state action. The general rules regarding damages would apply and such a judge would be liable for all natural and probable consequences of his act. See 32 Am. Jur. 2nd 110 et seq.

C. In conclusion, a judge acting without jurisdiction will be held liable for any injuries sustained as a result of a wrongful detention.

SUBMITTED BY: John Mike Elwell, Douglas County Associate District Judge.
Robert D. Kroeker, Douglas County Assistant County Attorney.
Robert W. Fairchild, Attorney at Law

1-17-79

# REPORTS OF STANDING COMMITTEES

MR. PRESIDENT:

Your committee on Judiciary

Recommends that Senate Bill No. 23

"AN ACT amending the Kansas juvenile code; amending K.S.A. 1978 Supp. 38-840 and repealing the existing section."

Be passed.

Chairman

Elwaine F. Pomeroy

S-150 2-70-2M