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Juvenile Detention Law in the District of Columbia: A Practitioner's Guide

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INTRODUCTION

On each and every day of the year (excluding Sundays), children are presented for an initial hearing in the Family Division, Juvenile Branch of the Superior Court of the District of Columbia. Because of unusually broad and often misapplied preventive detention laws, children charged with property offenses such as theft, or status offenses such as truancy and ungovernability, are subject to detention for an indefinite period of time through summary procedures which do not adequately ensure the reliability of the detention decision.

Because the detention of juveniles has become routine in superior court, its potential harm to the child is often easy to ignore. The child is deprived of liberty and of the home and family support system he or she has known.[1] The injurious consequences of this confinement, such as stigmatization, negative self-labeling, and institutionalization have been well noted.[2] In addition, detention increases the likelihood that the child will be committed if found delinquent.[3] Given these grave consequences, detention should be used sparingly, and imposed through procedures which ensure the decision to detain will be a considered and reliable one.

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1. *See, e.g., In re* M., 473 P.2d 737, 747 n.25 (Cal. 1970):

> 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, impersonal cell or room away from home or family. . . . The experience tells the youngster that he is "no good" and that society has rejected him. So he responds to society's expectation, sees himself as delinquent, and acts like one.

Id.

2. *See, e.g.*, Schall v. Martin, 467 U.S. 253, 291 (1984) (Marshall, J., joined by Brennan and Stevens, JJ., dissenting); United States v. Edwards, 430 A.2d 1321, 1355 (D.C. 1981) (Ferren, J., concurring in part, dissenting in part) (noting the greater likelihood of conviction of incarcerated defendants, due to conditions of confinement which "are so harsh or intolerable as to induce [the defendant] to plead guilty, or that damage his appearance or mental alertness at trial"). Many other cases have noted the impediment to the accused's ability to participate in the investigation and planning of their case when detained pretrial. *See* Campbell v. McGruder, 580 F.2d 521, 532-33 (D.C. Cir. 1978) (discussion of "disturbing evidence" that a defendant "at liberty pending trial stands a better chance of not being convicted or, if convicted, of not receiving a prison sentence").

3. *See, e.g.*, Stevens H. Clarke & Gary G. Koch, *Juvenile Court: Therapy or Crime Control, and Do Lawyers Make a Difference?*, 14 LAW & SOC'Y REV. 263, 304-06 (1980) (concluding that, after controlling the effects of the present offense and prior record, the commitment rate remains much greater for children held in detention).

This Article will examine the District of Columbia preventive detention statute and its application to the children appearing in Juvenile Court. Intended as an aid to counsel practicing in Juvenile Court, this Article will describe the operation of the preventive detention law, highlight important issues in the detention process, and consider the viability of constitutional attacks upon the statute.

I. PREVENTIVE DETENTION IN THE DISTRICT OF COLUMBIA

A. *The Procedure*

When a child in the District is arrested, and neither the police nor Social Services decide to release the child to a parent or guardian after application of District of Columbia Superior Court Juvenile Rule 106, the child must be brought to court for a detention hearing by the end of the next day (excluding Sundays).[4] At the detention hearing, the court must choose one of the following options for determining the child's placement:[5]

(1) Release to a parent, guardian or other custodian who promises to bring the child to future court hearings;[6]
(2) Placement in the Home Detention Program, wherein the child resides in the home of a parent or other guardian (as in (1)), but where the child's compliance with the court-ordered curfew and other conditions is monitored by a representative of the Social Services Division;[7]
(3) Placement in a shelter home, i.e., a home in the community staffed by the Youth Services Administration, typically housing from eight to twelve youths awaiting further court proceedings;[8]

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4. D.C. CODE ANN. § 16-2312(a)(1) (1989 Repl.).

5. *Id.* § 16-2312(d)(1). The release or detention of a child is the only matter which must be decided at the initial hearing. "[A]ny other part of the hearing (including the filing of a petition)" may be postponed for up to five days, for good cause shown. *Id.* § 16-2312(g).

6. *Id.* § 16-2312(d)(2)(A). The court may order that a child so released comply with any conditions "reasonably necessary to assure the appearance of the child at the factfinding hearing or [the child's] protection from harm." *Id.* § 16-2312(d)(2)(C). In practice, some of the most commonly imposed conditions of this type include a curfew, school attendance, drug-testing, and staying away from the scene of the alleged offense, the complaining witness, and any alleged co-perpetrators.

7. *Id.* § 16-2312(d)(2)(A).

8. D.C CODE ANN. § 16-2310(d)(1)(A) (1989 Repl.). Prior to placing a child in shelter care, the court must find that the child is either a danger to him or herself or that there is no parent, guardian, custodian, or other person or agency available to provide care and supervision, that the child is unable to care for him or

(4) Placement in secure detention;[9]
(5) Referral to the Youth Services Administration Screening Team to choose from among all or some of the above options.

The detention hearing usually begins right after the child has been arraigned on the charges (if a petition has been filed). A representative of Social Services provides the court with a recommendation as to release or detention, as well as the information which formed the basis of this recommendation.[10] The Social Services worker will generally provide the court with a wide range of information, including home and school adjustment, drug and alcohol use, and any prior contacts with the juvenile justice system.[11]

Having received Social Services's recommendation, the court will usually turn to counsel for the government and then to counsel for the child to hear their respective positions. It is not uncommon for the court to ask the child's parent (or other family members present) either for additional information or for an opinion as to what the court should do regarding placement or conditions of release. Before the court can order detention or shelter care, it must first conduct a hearing to determine whether there is probable cause to believe that the allegation in the petition is true.[12] If there is no probable cause to believe that the child committed the offense alleged or that an offense actually occurred, the child must be released.[13]

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herself, and that no other resources are available to the family to safeguard the child without removal. *Id.* § 16-2310(b). As a result, there is no requirement for a showing that a child is a danger to the person or property of others.

9. *Id.* § 16-2310(a). At present, Oak Hill Youth Center is the only secure facility operating as a detention center for youths charged as juveniles in the District of Columbia.

10. Before the amended Juvenile Rules went into effect on August 1, 1995, Rule 102(f) provided that statements by the respondent and his or her parents during the intake interview were not admissible for any purpose at any hearing prior to the disposition hearing. New Rule 102(c) makes clear that such statements by a respondent are inadmissible only at a subsequent fact-finding hearing or criminal trial based on the allegations in the juvenile complaint. While statements made by parents are not excluded from use at a fact-finding hearing, use of such statements continues to present significant hearsay problems.

11. It is arguable that the Social Services worker's inclusion of prior arrests which did not result in an adjudication is objectionable because Rule 106, which specifies the criteria for detention, does not specify such prior charges. This argument is less persuasive now that the Rule has been amended to make clear that the specified criteria do not provide the exclusive basis on which the judicial officer is to make the detention decision.

12. D.C. CODE ANN. § 16-2312(e)-(f) (1989 Repl.).

13. *Id.* § 16-2312(f).

B. *Detention: Legal Standards and Issues*

District law presumes that a child charged as a juvenile will be released.[14] The court can only order detention if such a restriction on the child's liberty is required to protect the person or property of others or of the child or to secure the child's presence at the next court hearing.[15] The statute permits no other reason for detention (e.g., "to teach the child a lesson").[16]

Section 16-2310(b) authorizes detention of a much different type. This section permits the use of "shelter care" placement for the protection of the child, or "because the child has no parent, guardian, custodian, or other person or agency able to provide supervision and care for [the child] . . . ." By statute and rule, District law makes a clear distinction between "shelter care" and "detention." Shelter care is defined as "temporary care of a child in physically unrestricting facilities."[17] Detention is defined as "temporary, secure custody."[18] Detention may be ordered when necessary to protect the person or property of others or of the child, or to secure the child's appearance at future hearings.[19]

Shelter care may only be ordered to protect the person of the child or because there is no adult able to provide supervision and care for the child, the child is unable to care for him or herself, and there are no resources or arrangements that would enable the family to safely care for the child.[20]

Superior Court Juvenile Rule 106 is similarly divided into two sections discussing the relevant factors for courts to consider in deciding whether to order a

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14. Sections 16-2310(a) and (b) state in relevant part: "A child shall not be placed in detention prior to a factfinding hearing or a dispositional hearing unless he is alleged to be delinquent or in need of supervision and unless it appears from the available information that detention is required . . . ." D.C. CODE ANN. § 16-2310(a)-(b) (1989 Repl.).

15. *Id.* § 16-2310(a).

16. *Id.* § 16-2310(b). When a judge considers removal of a child from home, the court must "secure for [the child] custody, care and discipline as nearly as possible equivalent to that which should have been provided for [the child] by [the] parents." D.C. SUPER. CT. JUV. R. 2. Rarely, if ever, does the court have the resources that would even begin to satisfy this mandate. Nonetheless, judges consistently ignore this mandate and place children in facilities that neither provide care nor supervision consistent with Rule 2. One concrete example of this type of abuse appears where children determined to be eligible for special education are placed in secure detention. Oak Hill presently has no certified special education instructors and routinely fails to implement individual educational plans as mandated by the Individuals with Disabilities Education Act, 20 U.S.C. § 1400 *et seq.* (1988 & Supp. V 1993).

17. D.C. CODE. ANN. § 16-2301(14) (1989 Repl.).

18. *Id.* § 16-2301(13).

19. *Id.* § 16-2310(a).

20. *Id.* § 16-2310(b).

child into either type of care. Sections 16-2310(a) and (b) both recognize protection of the child as a ground for court-ordered placement outside the home. Rule 106(a) makes clear, however, that detention is only justified when the need to protect the child arises from behavior of the child (e.g., narcotics addiction, alcoholism, suicidal actions). Shelter care is the only permissible out-of-home placement when the need to protect the child arises from the acts or inactions of others (e.g., abusive or threatening conduct toward the child by family, dangerous conduct toward the child by others from whom the parents are unable to protect the child, or the inadequacy of existing living arrangements).[21] Rule 106(b)(3) categorically prohibits the placement of children in secure detention who need shelter care.

The clear distinction between detention and shelter care within the statute and the Rule is not evident within the actual workings of the District's juvenile justice system. The Youth Services Administration operates one secure institution, Oak Hill Youth Center, and a number of shelter houses. Many children subject to detention under Section 16-2310(a) and Rule 106(a) are placed in shelter houses, either directly by the court or later by the Youth Services Administration Screening Team. These shelter houses are the only facilities in which youths in shelter care may be housed. Thus, there is no difference in the residence or the daily living situation of a youth *detained* at a shelter house and a youth *placed* in shelter care.

However, the difference between the status of the two remains very important. When a child residing in a shelter house seeks reconsideration of his or her status under Rule 107, the justification for placing the child there will no doubt be critical.[22] For example, if the child was placed in shelter care because of abusive conduct from an individual who has since been incarcerated, the basis for removing the child from the home would no longer exist. Such a child must be allowed to return home. It is unlikely that such a simple change in circumstances would require the return home of a child who had exhibited narcotics addiction or suicidal actions. It is incumbent upon counsel to ensure that the judicial officer does not use the need for shelter care as a basis for an order for secure detention.

Counsel practicing in Juvenile Court must be familiar with several issues concerning the application of Rule 106. First, as amended, the Rule explicitly

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21. D.C. SUPER. CT. JUV. R. 106(b) (as amended, Aug. 1, 1995).

22. Rule 107(c) provides that the "judicial officer ordering the release of a respondent . . may at any time amend the order to impose additional or different conditions of release." D C SUPER CT JUV R 107(c) (as amended, Aug. 1, 1995).

invites judicial officers to base detention decisions on factors not specifically enumerated in the Rule. Such unchannelled discretion may in some cases render the Rule unconstitutional.

On August 1, 1995, the amendments to Rule 106 took effect.[23] One of the more important of these amendments is the addition of an explicit statement that the criteria in the Rule are not the exclusive basis for the judicial officer's detention decision.[24] As a result, factors which the former Rule arguably excluded, such as truancy, can now be used as a basis for detention. In addition, the amended Rule 106(a)(3) rather substantially expanded the criteria for detention to protect the child. The factors now deemed "relevant" include:

(i) Narcotics addiction by respondent or *other indication of illegal drug use*,
(ii) *Abuse of alcohol by the respondent*,
(iii) Suicidal actions or tendencies of the respondent, and
(iv) Other seriously self-destructive behavior creating an imminent danger to the respondent's life or health.[25]

The pre-amendment rule allowed detention only for "severe and chronic drug abuse" and "severe and chronic alcoholism," actions which put the respondent at grave risk of either imminent or long-term harm. By changing the criteria to include any "indication of illegal drug use," a single positive drug test now may be a permissible basis for detention, irrespective of the length of use, any indication of the severity of the respondent's drug problem, or treatment alternatives available in the community. What was arguably improper and irrelevant information under the prior Rule will likely be a staple of every initial hearing where detention is seriously considered. Preventive detention premised on such grounds as school attendance or a single positive drug test raises strong due process concerns.[26] Counsel should be prepared to raise this challenge at the initial hearing.

A second issue concerns the applicability of factors in one part of the Rule to detention decisions based on a different part of the Rule. Rule 106(a) contains different lists of the factors which are relevant[27] to each of the different reasons for

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23. 123 Daily Wash. L. Reptr. 1465, 1472 (D.C. Super. Ct. July 26, 1995).

24. The Rule now states that the "relevant factors include but are not limited to" the criteria in the Rule. D.C. SUPER. CT. JUV. R. 106(a)(3).

25. D.C. SUPER. CT. JUV. R. 106(a)(3)(i)-(iv) (as amended, Aug. 1, 1995) (emphasis added).

26. *See* discussion *infra* section II B.

27. D.C. CODE ANN. § 16-2310(c) (1989 Repl.).

detention: to protect the person of others, to protect the property of others from serious loss or damage, to protect the respondent's own person, or to secure the respondent's presence at the next court hearing.[28] Accordingly, the factors relevant to determining whether detention is required to protect the person of others are not the same as those relevant to determining whether detention is required to protect the property of others, or to protect the child, or to secure the child's presence at the next hearing.[29] The very act of separating the relevant factors under the sections relating to the different purposes of detention would be unnecessary if any factor, listed or otherwise, could be considered. For example, the record of the child's previous offenses against persons are relevant to whether or not detention is necessary to protect the person of others, but not the property of others. The court's determination to detain must be for a specific statutory purpose and must be supported by factors which are relevant to that purpose. Defense counsel should argue that where none of the factors relevant to a particular detention purpose exists, the child cannot be detained for that purpose.

Third, the Rule continues to make an important and prominent distinction between the instant case (and any other pending cases), which are termed "charges" and any prior adjudications, which are termed "offenses."[30] Because the child has neither admitted guilt nor been found guilty in any pending cases, those cases involve merely allegations, or charges. Any prior case resulting in a finding of guilt is properly denoted as an offense. This distinction would be rendered meaningless if the Rule were read to also permit the court to base a detention decision on prior "charges" which have been dismissed without a finding of guilt. Accordingly, counsel should argue that the child's prior record of arrests should

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28. D.C. SUPER. CT. JUV. R. 106 (a)(1)-(4) (as amended, Aug. 1, 1995).

29. For example, the factors relevant to determining whether detention is necessary to protect the person of others include:

(i) Record of the respondent's previous offenses against persons,
(ii) Record of the respondent's previous weapons offenses,
(iii) Nature and circumstances of the pending charge,
(iv) Nature and circumstances of other pending charges, if they involve an offense against the person or a weapons offense,
(v) Allegations of danger or threats to witnesses, and
(vi) Emotional character and mental condition of the respondent.

D.C. SUPER CT. JUV. R. 106(a)(1)(i)-(vi) (as amended, Aug. 1, 1995). "The nature and circumstances of the pending charge" is the only factor which appears on more than one list. It is deemed relevant to determining whether detention is necessary to protect the person or property of others.

30. *See, e.g.*, D.C. SUPER. CT. JUV. R. 106(a)(1), which lists among the criteria for detention to protect the person of others "the respondent's previous *offenses* against persons," the "[n]ature and circumstances of the pending *charge*," and the "[n]ature and circumstances of other pending *charges*." *Id.* (emphasis added).

not be considered in the detention decision.[31]

Finally, perhaps the only limitation that may remain from pre-amendment days is the issue whether a child may be detained where the only factor indicating the need for detention is the "nature and circumstances of the pending charge." This remains one of the factors listed in Rule 106(a)(1), as relevant to detention to protect the person of others, and Rule 106(a)(2), as relevant to detention to protect the property of others.

The court of appeals has spoken, albeit cryptically, on this issue in *In re M.L. DeJ.*[32] In *M.L. DeJ.*, the court faced a challenge to a detention order of a youth charged with carnal knowledge and assault. While the record on this expedited appeal was incomplete, the child's counsel asserted that the court below ordered detention to protect the person of others "based solely on 'the nature and circumstances of the pending charge.' "[33] The court of appeals observed that [s]tanding alone, this would not constitute sufficient grounds for detention."[34] The court added that the record before it contained "no indication that anything other than the 'nature and circumstances of the pending charge' was considered below."[35] Consequently, the court remanded the case to the lower court to file a statement of reasons for the detention.

Whether the court meant that detention could never be justified by the nature and circumstances of the pending charge alone, or that detention was not proper unless the record indicated that all of the factors deemed relevant have been considered by the court, has remained unclear. On three different occasions, superior court judges have issued written opinions taking the view that detention may be legally ordered based solely on the nature and circumstances of the pending charge, provided that the court has considered all the relevant factors listed in Rule 106.[36] While reaching that conclusion, Judge Schwelb acknowledged that the section of *In re M.L. DeJ.* previously paraphrased, "appears . . . to support" the position that the nature and circumstances of the pending charge,

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31. While the amended Rule 106 explicitly states that the relevant factors include but are not limited to the listed criteria, the structure of the Rule suggests that prior arrests continue to be irrelevant. By explicitly specifying pending charges as relevant, the Rule should continue to be read as implicitly excluding prior charges that did not result in adjudication.

32. 310 A.2d 834 (D.C. 1973).

33. *Id.* at 836.

34. *Id.*

35. *Id.*

36. *In re* M.R., 117 Daily Wash. L. Rptr. 1121 (D.C. Super..Ct. June 1, 1989); *In re* C.R.S., 109 Daily Wash. L. Rptr. 309 (D.C. Super. Ct. Feb. 20, 1981); *In re* Michael M., 108 Daily Wash. L. Rptr. 1613 (D.C. Super. Ct. Aug. 27, 1980).

without more, could never justify detention.[37] Likewise, in *C.R.S.*, Judge Schwelb initially ordered detention based solely on the nature and circumstances of the crime charged. In a Memorandum Opinion, the court of appeals set aside that order and remanded the case to the lower court to consider what conditions of release would be appropriate. Judge Schwelb recognized that the court of appeals had not remanded the case for a more complete statement of reasons but rather for a determination of appropriate conditions of release. Nevertheless, in his written opinion, Judge Schwelb stated that this ruling should not be taken to mean that detention based solely on the nature and circumstances of the charge would never be proper, but instead should be interpreted as requiring well articulated "compelling reasons," before the court can do so.[38] This conclusion, however, ignores the fact that when the court of appeals wanted reasons in *M.L. DeJ.* it remanded the case and asked for them. In reaching this conclusion, it is hard to see why if "compelling reasons" are what the court wanted in *C.R.S.*, it did not ask for them.

The court of appeals has not addressed this issue in a published opinion since *M.L. DeJ.* Judge Schwelb's remark in *C.R.S.* that the issue is "in some confusion and disarray" is undoubtedly accurate.[39] However, in light of the language of *M.L. DeJ.*, and the absence from District law of other safeguards which would make detention based solely on those grounds constitutionally permissible, the legality of detention based solely on the nature and circumstances of the pending charge is questionable.

Detention is not permitted unless one of the statutory grounds exists. Nor is detention required simply because the facts before the court show that it would be permitted. Rule 106(a)(5) expressly states that release under appropriate conditions remains an option in all cases.[40] Defense counsel must show the court that appropriate supervision can be provided without detaining the child.

Where detention has been ordered, counsel for respondent should consider filing a motion to reconsider or reduce the level of detention pursuant to Rule 107(c).[41]

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37. *Michael M.*, 108 Daily Wash. L. Rptr. at 1617.

38. *C.R.S.*, 109 Daily Wash. L. Rptr. at 313.

39. *Id.*

40. Rule 106(a)(f) provides that "[i]f detention appears justified . . . the person making the decision may nevertheless consider . . . the respondent's living arrangements and degree of supervision." D C SUPER. CT. JUV. R. 106(a)(f) (as amended, Aug. 1, 1995).

41. Rule 107(c) states in relevant part:

A respondent who has been placed in detention, shelter care, or released under conditions pursuant to D.C. Code §16-2312, or the Corporation Counsel, may, at any time thereafter upon written

The Rule permits counsel for respondent to petition the judicial officer ordering detention to reduce a child's level of detention, or to amend the previously imposed conditions of release, where a child has been released to community supervision. Rule 107(c) remains an effective and underutilized tool for defense attorneys seeking modification of condition of release or for the reduction of the level of detention. Counsel should demonstrate to the court how information which was not available at the time of the detention hearing supports the requested change.

II. CONSTITUTIONAL ATTACK ON THE DISTRICT'S JUVENILE PREVENTIVE DETENTION LAWS

Under the District's detention law, a child may be detained pending further court hearings for an indefinite period of time for any offense. In addition, the law requires no finding of prior involvement with the court system. Moreover, the detention decision may be based on evidence introduced at the initial court appearance which shows merely probable cause to believe the child has committed an offense. The statute and rules are silent on the standard of proof required for the detention decision. The low standard of proof, and the absence of any limits on the length of detention or the offenses for which a child may be detained, render the District's detention scheme subject to constitutional challenge.[42] While the Supreme Court has ruled that a statutory scheme authorizing the preventive detention of juveniles may be constitutional, *Schall v. Martin*,[43] it has never addressed the constitutionality of detaining anyone, juvenile or adult, under a scheme similar to the District's detention statute.

A. *Preventive Detention Law*

Preventive detention has been an accepted and common feature of the juvenile

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application to the Family Division, have the order reviewed by the judicial officer who entered the order.

D.C. SUPER. CT. JUV. R. 107(c) (as amended, Aug. 1, 1995). As amended, D.C. SUPER. CT. JUV. R. 47-I(d) vests the calendar judge with the authority to rule on such motions, or to certify them to another judicial officer where appropriate.

42. For additional discussion on the appropriate standard of proof for detention decisions, see Julia Colton-Bell & Robert J. Levant, *Clear and Convincing Evidence: The Standard Required to Support Pretrial Detention of Juveniles Pursuant to D.C. Code Section 2310*, 3 D.C. L. REV. 213 (1995).

43. 467 U.S. 253 (1984).

justice system since its inception.[44] Virtually every state juvenile statutory scheme has explicitly provided for detention where the court concludes that the child poses a danger to commit a new crime if released.[45] It was in this context that the Supreme Court first addressed the issue of preventive detention in *Schall v. Martin*. The *Schall* majority used a two-step analysis to uphold the New York juvenile preventive detention statute. First, the Court considered whether preventive detention served a legitimate state interest.[46] Second, the Court addressed whether the statute's procedural safeguards were adequate to justify the pretrial detention "of at least some" accused juveniles.[47]

The *Schall* majority easily concluded that the statute served legitimate state interests. The Court noted the "legitimate and compelling state interest" of protecting the community from crime.[48] On the other hand, the Court concluded that the juvenile's liberty interests were diminished by two factors: 1) unlike adults, juveniles are "always in some form of custody";[49] and 2) the state has an equally valid interest in protecting the juvenile from the consequences of his or her criminal activity—which include physical injury and the "downward spiral of criminal activity into which peer pressure may lead the child."[50] The Court concluded that the legitimacy of these interests was confirmed by the widespread use of preventive detention in the states.

The Court also decided that the preventive detention under the statute served a non-punitive purpose. The Court based this conclusion on 1) the absence of any indication of such a purpose in the statute; 2) the fact that detention is "strictly limited in time" under the statute;[51] and 3) the conditions of confinement, which it

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44. *See* D. FREED & P. WALD, BAIL IN THE UNITED STATES 1964 at 93-109.

45. *Id. See also Schall*, 467 U.S. at 267 n.16 (collecting state statutes).

46. *Schall*, 467 U.S. at 263-64.

47. *Id.* at 264.

48. *Id.*

49. *Id.* at 265. The Court observed that the juvenile's interests may be subordinated to the State's "parens patriae interest in preserving and promoting the welfare of the child." *Id.* (quoting Santosky v. Kramer, 455 U.S. 745, 766 (1982)). The dissent vigorously disputed the majority's conclusion that detention is the equivalent to the custody of a parent who has the child's best interests at heart. *Id.* at 289-90. The opinion noted that secure detention entails incarceration in a facility closely resembling a jail, where assaults are common. Other commentators have noted that a much higher percentage of juveniles are detained pre-adjudication than post-adjudication, where they are exposed to conditions and associations which foster delinquency. *See, e.g.*, Barry C. Feld, *Criminalizing Juvenile Justice: Rules of Procedure for the Juvenile Court*, 69 MINN. L. REV. 141, 201 (1984).

50. *Schall*, 467 U.S. at 266.

51. *Id.* at 269.

found reflected a regulatory purpose.[52]

In its discussion of the second factor, the Court noted that under the statute, the maximum possible detention of a juvenile accused of a serious crime was 17 days,[53] and the maximum possible detention for a less serious crime was 6 days. The Court emphasized that "[t]hese time frames seem suited to the limited purpose of providing the youth with a controlled environment and separating him from improper influences pending the speedy disposition of his case."

The Court then considered whether New York's procedures afforded juveniles sufficient protection against erroneous and unnecessary deprivations of liberty. The Court found that the requirements of notice, counsel, a hearing, a statement of facts and reasons for detention, and a probable cause hearing were sufficient to satisfy detention under the Fourth Amendment in *Gerstein v. Pugh*,[54] and were therefore adequate in this context.[55] In reaching this decision, the Court specifically rejected the assertion that the statute was constitutionally inadequate because it did not specify the factors on which the Family Court judge should rely in making the detention decision,[56] the crimes for which detention was

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52. *Id.* at 270-71. In United States v. Salerno, 481 U.S. 739 (1987), the Court found that preventive detention for adults in the criminal system served a regulatory purpose. In making that decision, the Court looked to legislative intent and whether one can rationally assign a regulatory purpose to preventive detention. *Id.* at 747. For a criticism of this analysis, see Marc Miller & Marty Guggenheim, *Pretrial Detention and Punishment*, 75 MINN. L. REV. 335, 364-73 (1990) (concluding preventive detention is no less punitive simply because retribution does not appear to be its purpose and proposing test based on the intent and power of the punisher and the effect on the individual being punished).

53. *Schall*, 467 U.S. at 270 (citing Family Court Act, New York Jud. Law § 320.5(3)(b) (McKinney 1983).

54. 420 U.S. 103 (1975). *Gerstein* held that the Constitution requires a judicial determination of probable cause before extended post-arrest restraints on liberty because prolonged detention entails a Fourth Amendment seizure of the person. The Court concluded, however, that such a probable cause determination need not occur in an adversarial hearing. *Id.* at 120-21.

55. 467 U.S. at 277. The dissent strongly argued that these procedures are rudimentary in nature and provide little guarantee of accuracy. *Id.* at 283-86 (Marshall, J., dissenting).

56. *Id.* at 279. The Court stated:

> Given the right to a hearing, to counsel, and to a statement of reasons, there is no reason that the specific factors upon which the Family Court judge might rely must be specified in the statute. As the New York Court of Appeals concluded, "to a very real extent Family Court must exercise a substitute parental control for which there can be no particularized criteria."

Id. (citations omitted).

authorized,[57] or a more exacting standard of proof than probable cause.[58]

Three years after *Schall*, in *United States v. Salerno*,[59] the Supreme Court rejected a facial attack on the constitutionality of the provisions of the federal Bail Reform Act which authorized the preventive detention of adults charged with certain serious crimes. Among the factors which the Court cited in support of the validity of the statute were:

(1) that detention was only available in the case of individuals charged with "the most serious crimes;"[60]
(2) that before ordering preventive detention the court must find by clear and convincing evidence that there are no conditions of release which would assure the safety of the community;[61]
(3) that "the judicial officer is not given unbridled discretion in making the detention determination. Congress has specified the considerations relevant to that decision;"[62]
(4) that "the maximum length of pretrial detention is limited by the stringent time limitations of the Speedy Trial Act."[63]

In upholding the constitutionality of the statute, the Court noted that the qualitative difference between the liberty interests of adults and juveniles is relevant to determining whether the legislation is "regulatory" or "punitive." The *Salerno* Court noted that *Schall* upheld a preventive detention statute which permitted detention of any juvenile accused of any crime.[64] The Court indicated that the greater liberty interests of adults require a more carefully tailored

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57. *Id.* at 269 n.18. The Court concluded that the discretion to limit crimes subject to detention resided with the legislature, and that any attack on such a ground would have to made on a case by case basis. *Id.* The Court also noted that "there is no indication that delimiting the category of crimes justifying detention would improve the accuracy of the [detention] determination in any respect." *Id.* at 277 n.29.

58. There are, of course, arguments that the Court's evaluation of this criterion was flawed. While such an analysis is beyond the scope of this Article, it merits brief mention here. Studies of children in detention have shown that the majority of juveniles who are preventively detained are not charged with serious offenses. *See, e.g.*, Feld, *supra* note 49, at 199. Accordingly, as the dissenting opinion in *Schall* noted, prevention of the minor offenses that these juveniles may commit yields little benefit to the public and great cost to the juvenile. *See Schall*, 467 U.S. at 297 (Marshall, J., joined by Brennan and Stevens, JJ., dissenting).

59. 481 U.S. 739 (1987).

60. *Id.* at 747.

61. *Id.* at 750.

62. *Id.* at 742.

63. *Id.* at 747.

64. *Salerno*, 484 U.S. at 750.

statute,[65] and it emphasized that the Bail Reform Act was much narrower than the Family Court Act at issue in *Schall*.[66]

The District of Columbia statute authorizing the preventive detention of adults provides these same safeguards and more.[67] Only individuals charged with a crime of violence, a dangerous crime, obstruction of justice, or a crime involving a serious risk of obstruction of justice or threats to witnesses may be detained.[68] The judge must find that there is a substantial probability that the accused committed the offense charged.[69] This standard is considerably higher than probable cause.[70] Finally, the judge must also find by clear and convincing evidence that there is no condition or combination of conditions of release which would assure the safety of the community.[71]

These procedural protections are far more substantial than the protections afforded juveniles in the District. While courts have consistently held that juvenile proceedings are fundamentally different from adult criminal trials as a result of the "parens patriae interest in preserving and promoting the welfare of the child,"[72] there remains no doubt that the Due Process Clause requires that certain basic constitutional protections afforded to adults accused of crimes also be afforded to juveniles.[73] The Due Process balance has consistently been struck toward providing for the "informality" and "flexibility" that characterizes juvenile proceedings while ensuring that such proceedings comport with the fundamental fairness that the Due Process Clause demands.[74]

B. *The Application of Detention Law to Juvenile Court in the District of Columbia*

Schall v. Martin imposes a major obstacle to a challenge to the facial constitutionality of the District's juvenile preventive detention scheme. In

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65. *Id.* at 750-51.
66. *Id.*
67. D.C. CODE ANN. § 23-1322 (1989 Repl.).
68. *Id.* § 23-1322(a)(1)-(3).
69. *Id.* § 23-1322(b)(2)(c).
70. United States v. Edwards, 430 A.2d 1321, 1329 (D.C. 1981) (en banc).
71. D.C. CODE ANN. § 23-1322(b)(2)(A) (1989 Repl.).
72. Santosky v. Kramer, 455 U.S. 745, 766 (1982).
73. *See generally In re* Gault, 387 U.S. 1, 37-57 (1967) (notice of charges, right to counsel, privilege against self-incrimination, right to confrontation and cross-examination); *In re* Winship, 397 U.S. 358 (1970) (proof beyond a reasonable doubt standard).
74. *See* Schall v. Martin, 467 U.S. 253 (1984).

confronting a facial challenge, a court could declare the statute unconstitutional only if there is no conceivable set of circumstances under which the statute would be valid.[75] With one notable exception, the District's scheme provides either the same or greater protections than the New York Family Court Act. Each scheme provides for the procedural protections of notice, counsel, a hearing, a statement of facts and reasons for detention, and a probable cause determination. Indeed, the District's Rule 106 goes further than the New York Statute in that it enumerates the criteria by which the court should make its detention decision. The *Schall* Court upheld a statutory scheme which gave the decision maker *no* guidance. The recent amendments to Rule 106, however, allow the court to consider factors which are not listed in the Rule and which loosen the criteria for detention in some instances. But in light of *Schall*, this distinction should not affect the facial constitutionality of the scheme. Moreover, neither scheme limits detention to a narrowed class of serious offenses,[76] and neither requires a showing greater than probable cause to believe that the respondent committed the instant offense.

One notable difference from the Family Court Act construed in *Schall* is that the District scheme imposes no limit on the duration of the detention. Indeed, in one recent case the court of appeals approved a 213-day detention, while declining under the circumstances to address the constitutional challenge.[77] Finding that the New York statute served a regulatory and not a punitive purpose, the *Schall* Court emphasized that the statute "strictly limited" the time of detention.[78] Therefore, the absence of a time limit in the District scheme arguably renders the detention punitive. This argument is bolstered by the fact that relatively short time limits exist in juvenile court statutes and rules across the country. At present, 33 states have strict limits on the amount of time that a juvenile may spend in detention prior to trial. In 2 of those states, Louisiana[79] and Massachusetts,[80]

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75. *Salerno*, 481 U.S. at 740-45.

76. Several states strictly limit the offenses for which juveniles may be detained prior to trial. Florida has recently changed its law to require release before a court hearing unless the child is alleged to have committed a serious crime and shows certain other risk factors. *See, e.g.*, FLA ST ANN. § 39.044 (West 1995). Despite this trend, *Schall's* approval of a scheme which has no limits on the crime would seem to foreclose this argument.

77. *In re* K.H., 647 A.2d 61 (D.C. 1994). While the court found the length of the detention "troublesome," the court did not reverse the detention order because 1) much of the delay was due to the juvenile's attorney's illness on an earlier trial date; 2) the juvenile did not file an appeal from his February 15 detention until August 11; and 3) the juvenile was recently detained in another case, so a decision in this case would have "a strong advisory element, since it is unlikely it would lead to his release in any event." *Id.* at 63.

78. *Schall*, 467 U.S. at 269.

79. LA. CHILD. CODE ANN. art. 821(E) (West 1995). The comment to this section states that "[i]n

preventive detention of juveniles is not permitted. Juveniles in those states are either released or held on bond. Those unable to make bond are entitled to have their cases tried within 15 days in Massachusetts[81] and 30 days in Louisiana.[82] In 23 other states, detained juveniles are entitled to trial within thirty 30 days of detention. In some states, the remedy for failure to comply with these time limits is release;[83] in others it is dismissal of the charges.[84] Of the 17 states which do not have strict time limits, more than half have some authority for controlling the length of detention. Several states that do not have strict limits on detention require that judges review the cases of all detained youths to determine if detention remains necessary.[85] In contrast, District law is utterly silent on limiting the length of pretrial detention. At present, it is unlikely that a juvenile detained in the District would even have a trial scheduled within 60 days of detention, which exceeds the maximum detention limit in the vast majority of states. Upon a factual demonstration that the vast majority of juveniles are regularly detained for substantially more than 60 days, a court may find that the detention is punitive, rather than regulatory, and that the statute therefore violates due process.

An additional omission from the District's statute that may raise constitutional concerns is the absence of any evidentiary standard of proof regulating the

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defining the court's options as release or bail, it eliminates the possibility of holding a child in so-called preventive detention."

80. MASS. ANN. LAWS ch. 119 § 68 (Law. Co-op 1975).

81. *Id.* § 68. Standing Order 1-88 of the Juvenile Court requires that all adjudications for juveniles detained on bond take place within twenty-one days. It is unclear whether this order simply provides an outer limit for any continuances granted under § 68, or if the order supplants the statutory limit.

82. LA. CHILD. CODE ANN. art. 877 (West 1995).

83. *See, e.g.*, ILL. REV. STAT. ch. 705 para. 405/5-14(B)(2) (Smith-Hurd 1995); IND. CODE ANN. § 31-6-7-6(g) (1992 Repl.); MD. JUV. CT. R. 914(b)(2).

84. *See* ARIZ. JUV. CT. R. 6.1(j); CAL. JUV. CT. R. 1485(d); LA. CHILD. CODE ANN. art. 877(C) (West 1995); N.M. CHILD. CT. R. 10-226(e); N.D. CENT. CODE § 27-20-24 (1991 Repl.).

85. In Hawaii, for example, a detention order cannot last longer than seven days, but may be extended in seven day increments. HAW. FAM. CT. R. 135 and 136. In Iowa, a new hearing is required if the seven day detention order lapses without a trial being held. IOWA CODE ANN. § 232.44(7) (West 1994). In the District, a detained child may move to have the order of detention reconsidered. D.C. SUPER. CT. R. 107(c) (as amended, Aug. 1, 1995). A system which forces detention to terminate in the absence of judicial action plainly expresses a stronger preference for release and provides greater protection for children's liberty interests than one which allows detention to endure absent judicial action following a motion.

Another means of limiting pretrial detention of juveniles exists in Alabama, where the Alabama Supreme Court has issued the following guidelines for its juvenile courts: within 30 days, 50% of all detained juveniles will have had their cases tried. By 60 days, 75%, by 90 days, 90%, and by 120 days, 100. While these guidelines do not create any substantive rights, they do set a standard which the trial courts no doubt strive to match.

determination of whether detention is necessary under the statutory criteria. Before any type of detention may be ordered the court must find that probable cause exists regarding the allegation in the petition.[86] While the court of appeals has not addressed this precise issue in the juvenile context, the court has dealt extensively with the issue in the adult or criminal branch of the court. The court, citing *Salerno*, has consistently held that the clear and convincing evidence standard must be applied anytime the government seeks preventive detention based on dangerousness.[87] The court later determined that the very same standard of clear and convincing evidence must be applied when detention is based upon risk of flight.[88]

Even if the absence of a detention time limit or a statutory standard of proof does not render the statutory scheme *facially* unconstitutional, it is an important factor which, combined with other case-specific factors, may render the detention unconstitutional as applied. In individual litigation under the due process clause, the juvenile is not faced with meeting the daunting standard of a facial challenge (i.e., showing that there is no conceivable set of circumstances under which the statute would be valid). Indeed, in rejecting the facial challenge in *Schall*, the Court specifically pointed to the availability of individual litigation to correct on a case-by-case basis "any erroneous detentions."[89]

In addition to factors conducive to challenging the length of detention,[90] factors which may render the detention subject to challenge include: a relatively minor crime for which the child is detained;[91] a record of relatively minor offenses or property offenses; episodic drug or alcohol use, rather than severe and chronic drug addiction indicating an imminent danger to the child; and social factors which are not directly related to danger or appearance, such as school attendance, curfew, and obedience to parental rules. Because the state interest is protecting the community and the child from serious harm, that interest is severely diminished where the predicted harm is not significant.[92] Similarly, reliance on factors not

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86. *See* D.C. CODE ANN. § 16-2312(f) (1989 Repl.); Gerstein v. Pugh, 420 U.S. 103 (1975).

87. Lynch v. United States, 557 A.2d 580 (D.C. 1989).

88. Kleinbart v. United States, 604 A.2d 861 (D.C. 1992).

89. *Schall*, 467 U.S. at 281.

90. Counsel need not wait until detention has become lengthy to challenge it. The fact that a trial date has been set three or four months from the date of the hearing indicates that, absent unusual circumstances, detention will continue for that period of time.

91. The *Schall* majority specifically mentioned this factor as one which should be litigated on a case-by-case basis. 467 U.S. at 269 n.18.

92. *See supra* note 49.

directly related to dangerousness renders the court's decision unreliable. Despite persuasive evidence, the Court in *Schall* rejected the juvenile's assertion that predictions of dangerousness are *always* unreliable.[93] Nevertheless, there is a strong argument that due process is offended by such a prediction in an individual case when such predictions of dangerousness are based on irrelevant factors.

CONCLUSION

The recent amendments to the District's detention criteria have expanded what was already a very sweeping detention scheme. By deleting "factors that shall be deemed relevant" and inserting "factors which include but are not limited to," one can expect that this expansion in the detention criteria will result in an increase in the already large number of juveniles detained pending trial.

The legal analysis and policy rationale in this Article for limiting impermissible and inappropriate juvenile detention should be utilized by counsel when litigating on behalf of their juvenile clients. Counsel should seek to ensure that juvenile proceedings comport with the requirements of due process and respect the liberty interests of their juvenile clients.

93. *Schall*, 467 U.S. at 278-79.