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SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SAN DIEGO

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff, MICHAEL ROSE, Defendant.	CASE NO.: CD154096 DA. NO.: AAG417 POINTS AND AUTHORITIES IN SUPPORT OF DEMURRER

STATEMENT OF RELEVANT PROCEDURE

On July 19, 2000 MICHAEL, and six of his seven co-defendants, appeared in court for arraignment on the complaint. The complaint alleged in count one MICHAEL violated California Penal Code[1] (hereinafter "P.C.") section 245(a)(1) with a special allegation for P.C. section 12022.7(a). Count two alleges MICHAEL violated P.C. section 368(b)(1). Count three alleges an additional P.C. section 245(a)(1). Count four alleges a violation of P.C. section 211. Count 5 alleges another violation of P.C. section 245(a)(1). Count six alleges an additional violation of P.C. section 211. All of the counts contain a special allegation pursuant to P.C. section 422.75(c).

[1] All statutory references are to California Codes unless otherwise noted.

MICHAEL is not charged in counts seven and eight. The complaint also alleges that MICHAEL was fourteen years of age or older when he committed the offenses within the meaning of Welfare and Institutions Code (hereinafter "WIC") section 707(d)(2). All offenses were alleged to have been committed on July 5, 2000.

On July 19, 2000, MICHAEL, and his co-defendants, demurred to the Complaint and requested a continuance to file this motion. The court granted the motion for a continuance of the arraignment until August 25, 2000.

STATEMENT OF THE FACTS

The facts of this specific case are not pertinent to this motion.

INTRODUCTION

On March 7, 2000, California voters approved the "Gang Violence and Juvenile Crime Prevention Act of 1998," more commonly referred to as Proposition 21 (hereinafter referred to as the "Initiative"). The Initiative included a package of drastic reforms that profoundly changed the state's juvenile justice system, as well as impacting the state's adult criminal justice system. Of consequence here is Section 27 of the Initiative which amends WIC section 707, subd. (d). (herein referred to as "new law").

Prior to the passage of the new law, the process governing the transfer of a minor to adult court was pursuant to a "fitness" proceeding to determine the amenability of a minor for juvenile court treatment. The district attorney initiated the process by filing a petition (pursuant to WIC section 602) along with an allegation that the minor was not a fit and proper person for juvenile court proceedings. (WIC section 707). The minor was then entitled to a hearing on the minor's "amenability" for juvenile court jurisdiction. The minor's age and the nature of the charges dictated whether the minor was presumed "fit" or "unfit" for juvenile court treatment. This presumption could be overcome, by either party, by a preponderance of the evidence as to five criteria

enumerated in WIC section 707.[2]

The new law reallocates the transfer decision making power from the prosecutors and the court, and gives it to the prosecutor alone. The new law allows a prosecutor to exercise unfettered discretion in filing a case as a delinquency matter or directly in adult court without any further hearing or review. The new law is silent as to any factors to be considered when making this weighty decision. Instead, it allows for discretionary direct filing for minors based on age, nature of the offense and prior record.[3]

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[2] The five criteria were as follows:

(1) The degree of sophistication exhibited by the minor;
(2) Whether the minor can be rehabilitated prior to the expiration of the juvenile court's jurisdiction;
(3) The minor's previous delinquent history;
(4) Success of previous attempts by the juvenile court to rehabilitate the minor; and,
(5) The circumstances and gravity of the of the offense alleged in the petition to have been committed by the minor.

[3] Discretionary filing as follows:

(1) Any minor age 16 or older who are charged with a WIC section 707, subd., (b) offense. (WIC section 707, subd., (d)(1)).
(2) Any minor age 14 or older where any one or more of the following occur:
  (A) The offense, if committed by an adult, would be punishable by death or life imprisonment.
  (B) The minor personally used a firearm during the commission, or attempted commission of a felony.
  (C) The minor is alleged to have committed a WIC section 707, subd., (b) offense and one or more of the following apply:
    (i) Prior true finding for a WIC section 707, subd., (b) offense.
    (ii) Offense committed for the benefit of a street gang.
    (iii) Offense committed in violation of a person's civil rights.
    (iv) Victim was over 65, blind, deaf, quadriplegic, paraplegic, developmentally disabled, or confined to a wheelchair, and that disability was known at them time of the commission of the offense. (WIC section 707, subd., (d)(2)).
(3) Any minor aged 16 or older who is accused of committing one of the following if the minor sustained a previous felony true finding after the age of 14:
  (A) Victim was over 65, blind, deaf, quadriplegic, paraplegic, deve opmentally disabled, or confined to a wheelchair, and that disability was known at them time of the commission of the offense.
  (B) Offense committed n violation of a person's civil rights.
  (C) Offense committed for the benefit of a street gang. (WIC section 707, subd.,

It is clear that this reallocation of power, from the court and prosecutor, to the prosecutor alone, is without the benefit of established guidelines which were historically used as an indicator of the possible rehabilitation of the minor. The previous system took into account the seriousness of the offense, the sophistication of the minor and the crime, and the amenability of the minor. All decisions were made in consideration of the impact to, and protection of, our community, which was the public's primary concern in enacting the new law.

Now, the entire decision regarding who will be treated as an adult and who as a juvenile is in the hands of the prosecutor. Further, there is no judicial input, or recourse, in this process. The new law gives unfettered discretion to the prosecutor and injects an arbitrariness into the determination which renders the new law unconstitutional.

POINTS AND AUTHORITIES

Penal Code section 1004 sets forth the grounds on which a defendant may bring a demurrer:

> The defendant may demur to the accusatory pleading at any time prior to the entry of a plea, when it appears upon the face thereof either:
>
> 1. If an indictment, that the grand jury by which it was found had no legal authority to inquire into the offense charged, or, if an information or complaint that the court has no jurisdiction of the offense charged therein
>
> 2. That it does not substantially conform to the provisions of Sections 950 and 952, and also Section 951 in case of an indictment or information;
>
> 3. That more than one offense is charged, except as provided in Section 954;
>
> 4. That the facts stated do not constitute a public offense;
>
> 5. That it contains matter which, if true, would constitute a legal justification or excuse of the offense charges, or other legal bar to the prosecution.

A demurrer may be used as a vehicle for constitutional and other attacks on the sufficiency of an accusatory pleading. (*Velasco v Municipal Court* (1983) 147 C.A.3d 340, 195 Cal. Rptr. 108; *People v Jackson* (1985) 171 C.A.3d 609, 217 Cal. Rptr. 540.)

(d)(4)).

A. A DEMURRER IS A CHALLENGE TO THE JURISDICTION OF THE COURT OVER THE OFFENSE CHARGED; SINCE THE NEW LAW AND INITIATIVE ARE UNCONSTITUTIONAL THE REMEDY FOR LACK OF JURISDICTION IN THIS CASE IS DISMISSAL

When the Court has no jurisdiction over the offense charged, the Court is to sustain the demurrer since jurisdiction cannot be remedied. (Penal Code section 1007). Defendant was under the age of eighteen when the alleged crime occurred. WIC section 602 mandates that "...any person who is under the age of 18 years when he violates any law of this state...is within the jurisdiction of the juvenile court..." The Initiative added, or amended, many provisions of the Welfare and Institutions Code authorizing direct filing of juvenile cases in a court of criminal jurisdiction. This complaint was filed pursuant to the new law. The new law and the Initiative are unconstitutional. Therefore this court lacks jurisdiction over the defendant.

B. METHODS OF TRANSFER FROM JUVENILE COURT TO ADULT COURT

Every state has its own law that allows for transfer of juveniles to adult court. These statutes are often referred to as "transfer" or "waiver" laws. Prosecution in adult court occurs in one, or a combination of three, ways: judicial waiver, legislative waiver or prosecutorial waiver. The Initiative changed California's traditional judicial waiver system to a legislative and prosecutorial waiver method. Only the new law is challenged by this demurrer.

Prosecutorial waiver occurs when a prosecutor exercises an option to file charges in adult court instead of juvenile court. This waiver method is the most controversial since the accused is not afforded a hearing on the suitability of the transfer, and discretion rests entirely with the prosecutor with little statutory guidance. Critics have asserted that prosecutorial waiver is a process that "...invites arbitrary, capricious transfer decision on the part of the prosecutor." (See Charles J. Aaron & Michelle S.C. Hurley, *Juvenile Justice at the Crossroads*, CHAMPION, Jun. 1998, at 63).

C. THE NEW LAW IS UNCONSTITUTIONAL IN THAT IT VIOLATES THE UNIFORMITY OF LAWS CLAUSE OF THE CALIFORNIA CONSTITUTIONS

The Utah Supreme Court in *State v. Mohi* (Utah 1995) 901 P.2d 991, examined a discretionary direct-file system virtually identical to the new law. The scheme in Utah, like the new

law, specified that juveniles who were alleged to have committed certain offenses were eligible to have their cases filed directly in adult court without judicial input. Instead, the determination was solely in the hands of the prosecutor. The Utah Supreme Court struck down Utah's prosecutorial waiver statute, ruling its provisions violated the uniform operation of laws provision of the Utah State Constitution. (Utah Const. Art. I, 24). California has an identical constitutional provision. (Cal. Const. Art. IV, 16(a) ["All laws of a general nature have uniform operation."]).

The Utah Supreme Court focussed on the disparate treatment prosecutorial waiver afforded identically situated minors. The Court reasoned that two classes of minors, charged with the same crime, could be treated differently at the discretion of the prosecutor. The Court found:

> By the very terms of the statute, they are accused of the same offenses and fall into the same age range. There is absolutely nothing in the statute to identify the juveniles to be tried as adults; it describes no distinctive characteristics to set them apart from juveniles in the other statutory class who remain in juvenile jurisdiction... (T)he statute permits two identically situated juveniles, even co-conspirators or co-participants in the same crime, to face radically different penalties and consequences without any statutory guidelines for distinguishing between them. This amounts to unequal treatment... (*State v. Mohi*, *supra* 901 P.2d 991, 998 [emphasis added]).

The Court found there was no legitimate basis for treating the two classes differently. Specifically, *Mohi* held that the Utah legislature's goal of reducing juvenile crime and the means it chose to achieve this goal were not reasonably related because there was no guarantee that the goal would be achieved by giving the prosecutor unguided discretion. At the heart of the decision was the conclusion that the prosecutor's discretion was arbitrary and standardless since there were no guidelines governing the prosecutor's discretion. The Court emphasized the risks of uneven treatment posed by prosecutorial waiver:

> The scope for prosecutor stereotypes, prejudices, and biases of all kinds is simply too great. If it is the legislature's determination to have all members of a certain group of violent juveniles... tried as adults, it is free to do so. However, the legislature may not create a scheme which permits the random and unsupervised separation of all such violent juveniles into a relatively privileged group on the one hand and a relatively burdened group on the other. (*Id* at 1003 [emphasis added]).

Clearly, the Utah Supreme Court feared the prosecutorial waiver provision would lead to inappropriate grouping of identically situated minors into privileged and burdened groups which

could lead to consequences based on racial or ethnic bias. This fear is grounded in fact as supported by the several studies.

An analysis of the Florida prosecutorial waiver law revealed that minors transferred via prosecutorial waiver are seldom the serious and chronic offenders for whom prosecution and punishment in criminal court are arguably justified. (*Bishop and Frazier, Transfer of Juveniles to Criminal Court: A Case Study and Analysis of Prosecutorial Waiver*, (1991) 5 Notre Dame Journal of Law, Ethics and Public Policy 2).

Further, a study by the Justice Policy Institute confirmed the large discrepancies in confinement of minorities across the nation. A study in California, which utilized data collected from the Los Angeles County Probation Department research Division, Los Angeles County District Attorney's Office, California Youth Authority Research Division, California Department of Justice Criminal Justice Statistics Center, Department of Finance Demographic research Division and the United States Bureau of the Census examined two sets of three year periods on arrests (1996-1998) and sentencing (1997-1999). The study examined juvenile arrests and juveniles transferred to adult court. The purpose of the analysis was to test the hypothesis that minority youth were disproportionately transferred to adult court and sentenced to incarceration compared to white youths in similar circumstances.

The study's findings were that in 1996 whites comprised 25%, Latinos 51%, African-Americans 13% and Asians and other races 11% of Los Angeles County's population between the ages of 10 and 17. However, the data revealed that the non-white youths accounted for 95% of the cases where minors were found "unfit" and transferred to adult court. In fact, Latino youths were 6 times more likely, African-American youth are 12 times more likely, and Asian/other youth 3 times more likely than white youths to be found unfit for juvenile court and transferred to adult court in Los Angeles County. (Juvenile Justice Policy Institute: *"The Color of Justice: An Analysis of Juvenile Adult Court Transfers in California"* by Mike Males, Ph.D and Dan Macallair, MPA). Nothing in the prosecutorial waiver provision of the Initiative protects against disparate treatment among similarly situated minors.

Both studies clearly confirm the historically disparate handling of non-white youths in the juvenile justice system. Unfettered prosecutorial discretion can only compound this problem. It is reasonable to assume this trend will continue and result in more minority youth being directly filed in adult court.

Moreover, there is no truth to the assertion that changing transfer laws will result in longer sentences, deter crime or reduce recidivism rates. According to a May, 1995 report by the federal Office of Juvenile Justice and Delinquency Prevention, the following observation with respect to the efficacy of transferring minors to adult court:

> Although there have been few reliable studies on the impact of transfer and the studies describe behavior that predates recent large increases in violent juvenile crime, the most common findings of these studies indicate that transferring serious juvenile offenders to the criminal justice system does not appreciably increase the certainty or severity of sanctions. While transfer may increase the length of confinement for a minority of the most serious offenders, the majority of transferred juveniles receive sentences that are comparable to sanctions already available in the juvenile justice system. More importantly, there is no evidence that young offenders handled in criminal court are less likely to recidivate than those remaining in juvenile court.

For almost all types of offenses, juveniles committed to the Youth Authority by the juvenile court historically have been incarcerated for longer periods of time than juveniles who receive adult sentences and are sentenced to the Department of Corrections by a criminal court. (Legislative Analyst's Office, Analysis of the 1996-1997 Budget Bill (February, 1996). The Legislative Analyst's Office attribute the lengthier juvenile incarceration periods to the indeterminate sentencing system of the juvenile court. (*Id.*)

During hearings in 1995, some experts testified before California Task Force[4] that there is no evidence that any other waiver system was more effective than the judicial waiver system used in California. Judge Frank Orlando, Director of the Center for the Study of Youth Policy in Florida, stated:

> What does not work is mass transfers into the adult system using the concept and the perception that sending juveniles into the adult system is going to have a deterring effect on youth crime. That has not worked in Florida. In addition, the recent research that was done

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[4] The Task Force, created in 1994 by AB 2428 (Epple).

in Minnesota demonstrates that the kids they send to prison have higher rates of re-offending. The (Florida) kids we send to prison have much higher rates of re-offending. (Judge Frank Orlando (Ret.), Director, Center for the Study of Youth Policy, Ft. Lauderdale, Florida, in remarks addressing the Task Force on November 16, 1995).

Further, in "The Significance of Place in Bringing Juveniles into Criminal Court," Simon I. Singer raises concerns about the fairness of transfer proceedings based on geography. Through careful analysis of Federal Bureau of Investigations data he shows a phenomenally strong relationship between the size of a place and the percentage of juveniles brought to juvenile court.. This finding is supported by similar previous finding in statewide studies. He argues that these laws are likely to exacerbate the differences between treatment of youths in urban and rural areas.

D. THE NEW LAW IS UNCONSTITUTIONAL IN THAT IT VIOLATES THE EQUAL PROTECTION CLAUSE OF THE UNITED STATES AND CALIFORNIA CONSTITUTIONS

The fourteenth amendment of the United States Constitution provides in pertinent part that: "No state shall deny to any person within its jurisdiction the equal protection of the laws." (U.S. Const. amend. XIV, sec. 1). The California Constitution guarantees: "In criminal cases the rights of a defendant to equal protection of the laws..." (Cal. Const. art. 1, sec. 24).

Discrimination is not inherently evil or illegal. However, a law is possibly violative of equal protection when it sets apart a group of people, based on race or other immutable conditions, for prosecution, or increased punishment. The equal protection clause of the United States Constitution is an evolving doctrine. Currently, state action challenged on equal protection grounds, is subject to three levels of scrutiny depending upon the nature of the state action. First, under the rational basis test, state action must bear a rational relationship to a legitimate state interest. Second, under the intermediate scrutiny test, state action must bear a substantial relationship to an important state interest. Third, under strict scrutiny, state action must further a compelling state interest that cannot be achieved by less intrusive means. (*San Antonio Indp. Sch. Dist. V. Rodriquez* (1973) 411 U.S. 1; *Craig v. Boren* (1976) 429 U.S. 190; *Roe v. Wade* (1973) 410 U.S. 113).

Initially, equal protection challenges involved a two-tier scrutiny. The top tier of strict scrutiny review was reserved for statutes that created a distinction based upon a "clearly" suspect

criteria, or when the law infringed upon personal rights or interests deemed to be fundamental. These laws pass constitutional muster only if they are necessary to protect a compelling governmental interest. (*Dunn v. Blumstein* (1972) 405 U.S. 330, 342, 92 S. Ct. 995 (quoting *Shapiro v. Thompson* (1969) 394 U.S. 618, 634, 89 S. Ct. 1322)). Suspect classifications are based on race, (*McLaughlin v. Florida* (1964) 379 U.S. 184, 85 S.Ct. 283) national origin, (*Graham v. Richardson* (1971) 403 U.S. 184, 91 S. Ct. 1848) and ancestry (*Oyama v. California* (1948) 332 U.S. 633, 68 S. Ct. 269) . Fundamental rights or interests are those expressly or implicitly guaranteed by the United States Constitution. (*San Antonio School Dist. V. Rodriquez* (1973) 411 U.S. 1, 93 S. Ct. 1278).

The second tier was triggered when a law effected neither a suspect class nor a fundamental right. This less demanding scrutiny is referred to as the "rational basis test." Under this test a law is unconstitutional only if the means chosen by the legislative body are "wholly irrelevant to the achievement of the State's objective." (*McGowan v. Maryland* (1961) 366 U.S. 420, 81 S. Ct. 1101).

Several decades ago the Supreme Court began responding to the limitations of the traditional approach and developed an intermediate test. The Court reasoned that a legislative classification "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." (*Reed v. Reed* (1971) 404 U.S. 71, 92 S. Ct. 251). This fair and substantial relation test, or intermediate scrutiny test, appears to trigger a sharper focus of constitutional scrutiny and applies to two general categories. First are laws which impact upon "sensitive, although not necessarily suspect criteria of classification." (L. Tribe, American Constitutional Law section 16-3, p. 996 (1978).). The second category, which is pertinent to this motion, relates to laws that affect "important" personal interest or work a "significant interference with liberty or a denial of a benefit vital to the individual." (*Id* at 1090).

A law that affects significant personal rights merits scrutiny consistent with the importance of the right involved. A judicial inquiry should pursue the actual purpose of a statute and seriously

examine the means chosen to effectuate that purpose. A loose fit between the legislative ends and the means chosen to accomplish those goals is intolerable if the means leave a significant measure of similarly situated person unaffected by the enactment, or conversely, which includes individuals within the state's purview who are not afflicted with the problem the statute seeks to fix. (*Maryland v. Waldron* (1981) 289 Md. 683, 713, 426 A.2d 929).

California equal protection jurisprudence also grew out of a recognition of the inadequacy of the two federal standards. Justice Mosk observed, "[t]he vice of the binary theory...is that it applies either a standard that is virtually always met (the rational relationship test) or one that is almost never satisfied (the strict scrutiny test). Once the test is selected, the result of its application is foreordained..." (*Hays v. Wood* (1979) 25 Cal.3d 772, 796 (conc. Opn. Of Mosk, J.)). California adopted "means scrutiny" as the standard of judicial review applicable under the state equal protection provisions. (*Brown v. Merlo* (1973) 8 Cal.3d 855; *Hays v. Wood, supra*). The Court held that the constitution does "...not tolerate classifications which are so grossly overinclusive as to defy notions of fairness or reasonableness. " (*Brown v. Merlo, supra* at p. 877). The Court reached the same conclusion as to underinclusive classification. (*Id.* at p. 877, fn. 17). These holding were based on state Constitution construction and were therefore not constrained by more deferential federal Constitution standards. (*Id.* at 865, fn 7). The holding in *Brown v. Merlo* instructed the courts to scrutinize the means the lawmaker chose to advance its purpose. Therefore, our state Constitution insists on greater precision, and does so by requiring courts to scrutinize the means chosen to advance the purpose of the legislation.

The purpose of enacting the new law was to combat and reduce juvenile crime. It clearly allows similarly situated juveniles to be classified (thereby treated) differently. The new law significantly interferes with personal liberty and denial of benefits, namely the statutory right to juvenile treatment. Therefore, the new law is subject to the federal intermediate scrutiny test for constitutionality. The test is then whether there exists a fair and substantial relationship between the purported goal of the new law, and the means set forth to accomplish that goal.

The empirical data cited above clearly shows the goal of reducing crime will not be

accomplished by prosecuting juveniles in adult court. In fact, the statistics show that prosecuting juveniles as adults has the opposite effect in that they reoffend more often, sooner and more violently.

Using the same analysis, the new law still fails under the federal rational scrutiny test since there is no reasonable relationship between prosecuting juveniles as adults and reducing juvenile crime. The new law is unconstitutional as it violates the equal protection clause of the United States Constitution.

The new law also fails under the state means scrutiny test since this court is required to scrutinize the means chosen to advance the purpose of the legislation. The means chosen do not advance the purpose of the legislation and therefore the new law is unconstitutional under the California Constitution.

Moreover, the use of gender, race, religion or other improper characteristics in making jurisdictional decisions clearly will create a significantly greater vulnerability when reviewing a statute's legality. (*Lamb v. Brown* (10th Cir. 1972) 456 F.2d 18).] Again, the data overwhelmingly shows that more minority juveniles are transferred to adult courts in California than white juveniles. This disproportionate treatment, even if unintentional, cannot be ignored. The new law would continue this trend and create an illegal classification of minorities who will be charged as adults. The new law is unconstitutional as it violates the equal protection clause of the United States Constitution by creating a class based on race and treating that class more harsh than other similarly situated people.

E. THE NEW LAW IS UNCONSTITUTIONAL IN THAT IT VIOLATES THE DUE PROCESS CAUSE OF THE UNITED STATES AND CALIFORNIA CONSTITUTIONS

The due process clauses of the Fifth and Fourteenth Amendments to the United States Constitution require that no person be deprived of life, liberty, or property without due process of law.(U.S. Const. amends. V and XIV, sec. 1). The California Constitution guarantees: "In criminal cases the rights of a defendant... to due process of law..." (Cal. Const. art. 1, sec. 24).

The first United States Supreme Court case to address due process, in the context of juvenile court, was *Kent v. United States* (1966) 383 U.S. 541. This decision dramatically changed the nature of the juvenile justice system. In *Kent*, the defendant was sixteen and accused of entering the victim's apartment, taking her wallet and raping her. The defendant filed a motion for a hearing regarding suitability of transfer in anticipation of the judge ordering him to adult court. No hearing was held, the defendant was transferred and convicted in adult court. (*Id.*).

On appeal the United States Supreme Court held that due process required a juvenile be afforded both a hearing regarding transfer to adult court and a statement of reasons for the juvenile court judge's decision to transfer. (*Id.* at 557). In addition, the Court set forth factors to be considered by juvenile judges in making transfer decisions.[5] (*Id.* at 566-567).

Since then courts have struggled with the appropriate interpretation of the *Kent* decision. (See e.g., *Woodard v. Wainright* (5th Cir. 1977) 556 F.2d 781, 783-784, cert. Denied). Narrowly construed, the hearing requirement is derived from the Supreme Court's application of District of Columbia statutory law and only articulate the minimal procedures to be followed at such a hearing. However, a more liberal interpretation may be that federal due process requires that whenever a minor is given a statutory right to juvenile status, that right cannot be stripped with out a hearing as to amenability. (*State v. Angel C* (1998) 715 A.2d 652, fn 15). This broader view is further supported by the language in *Kent*. The Court noted that juvenile court's latitude in determining jurisdiction is not complete. There must be "...procedural regularity sufficient in the particular circumstance to satisfy the basic requirements of due process and fairness, *as well as* compliance with the statutory requirement of a 'full investigation'" The Supreme Court established that "basic requirements of due process and fairness" protections are independent of any statutory scheme, and are instead constitutional in nature. (*Kent, supra* at 553 [emphasis added]). Here, the Court clearly states that basic due process requirements are separate and independent from any statutory right.

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[5] Many states have incorporated the *Kent* factors into their juvenile codes, often verbatim. (See Eric K. Kleig, Note, *Dennis the Menace or Billy the Kid: An Analysis of the Role of Transfer to Criminal Court in Juvenile Justice*, 35 AM. CRIM. L. REV. 371 (1998)

The Court then underscores that since the petitioner, by statute, was "...entitled to certain procedures and benefits as a consequence of his statutory right to the 'exclusive' jurisdiction of the Juvenile Court. In these circumstances...we conclude that, as a condition to a valid waiver order, petitioner was entitled to a hearing... We believe that this result is required by the statute read in the context of constitutional principles relating to due process and the assistance of counsel " (*Kent, supra* at 557). It can be that the statutory right referred to in *Kent* is the right to juvenile jurisdiction, not judicial waiver. Therefore, the new law would violate due process since there is a statutory right to juvenile jurisdiction (WIC section 602) which can't be divested without a hearing as to amenability.

Even if this Court embraces the more narrow view, the new law still violates due process. The United States Supreme Court has held that the Fourteenth Amendment's guarantee against the deprivation of liberty without due process of law is applicable in juvenile delinquency proceedings. (*In re Gault* (1967) 387 U.S. 1, 13). The Court forewarned that the "Juvenile Court history has again demonstrated that unbridled discretion, however, benevolently motivated, is frequently a poor substitute for principle and procedures." (*Id.* at 18). Further, the Supreme Court held that the determination to transfer a minor to adult court is a "critically important" action. (*Kent, supra* at 560). In explaining, the Court stated the decision was potentially as important to that minor as the difference between five years confinement and a death sentence. (*Id.* at 557).

A statute (like the new law) that gives complete discretion to a prosecutor in determining whether to file in juvenile or adult court, without guidelines, is facially invalid. This discretion must be distinguished from traditional prosecutorial charging discretion. The new law provides that prosecutors may file identical charges in either juvenile or adult court. It is not a "charging" decision, but rather a jurisdictional one. This "critically important" determination requires appropriate guidelines to ensure due process. The new law contains no such guidelines. Equally disturbing is the fact that the new law does not require a prosecutor to use any discretion in this critical decision making process. In other words, if a prosecutor filed for adult handling in all cases, or in all cases involving weapons, without a specified statutory instruction to do so, the prosecutor

is violating due process by failing to exercise any discretion on a case-by-case basis. A judge whose blanket detention decisions, made without exercising discretion, constituted a denial of due process. (*In re William M.* (1970) 89 Cal.Rptr. 33). Therefore, a statute not mandating an exercise of discretion, according to established guidelines, is facially unconstitutional.

The instant case illustrates this issue completely. Here, there are eight boys, of varying ages, with vastly different delinquency backgrounds, that have different levels of culpability, who are all being directly filed in adult court. Each minor is constitutionally entitled to separate consideration, based on the statewide established guidelines, when making the critical decision to file in adult court. The new law contains no guidelines and doesn't mandate any consideration. Counsel is not making this argument to show the new law as applied to these minors is unconstitutional. This is offered only to show that the constitutional violations associated with the new law are perfectly depicted by the instant case.

F. THE NEW LAW IS UNCONSTITUTIONAL IN THAT IT VIOLATES THE CRUEL AND UNUSUAL PUNISHMENT CLAUSE OF THE UNITED STATES AND CALIFORNIA CONSTITUTIONS

The Eighth Amendment to the United States Constitution mandates no cruel and unusual punishment shall be inflicted (U.S. Const. amend VII). The California Constitution guarantees in criminal cases a defendant shall not suffer the imposition of cruel and unusual punishment.(Cal. Const. art. 1, sec. 24).

Whether a particular punishment violates the Eighth Amendment depends on whether it constitutes one of "those modes or acts of punishment...considered cruel and unusual at the time that the Bill of Rights was adopted," (*Frank v. Wainwright*, (1986) 477 U.S. 399, 405) or is contrary to the "evolving standards of decency that mark the progress of a maturing society." (*Trop v. Dulles* (1958) 356 U.S. 86, 101). In determining whether a punishment violates evolving standards of decency, the Court should look to the conceptions of modern American society as reflected by reliable evidence. (*Coker v. Georgia*) (1977) 433 U.S. 584, 592). In *Coker*, the defendant was

sentenced to death for committing aggravated rape. On certiorari, the United States Supreme Court reversed the death sentence. Seven members of the Court agreed the sentence should be reversed. Four of the Justices expressed the view that the Eighth Amendment of the United States Constitution barred punishments that were excessive in relation to the crime committed. (*Id.* At 584-585).

A variety of conditions within the juvenile justice system have been held to violate the United States Eighth Amendment, including endemic brutality and physical abuse of juveniles committed by an institution's staff, and also by other juveniles with tacit approval by the staff and insufficient staffing in situations that deny juveniles medical and psychiatric needs. (*Morales v. Turman* (E.D. Tex. 1974) 383 F. Supp. 53; rev'd (5th Cir. 1976) 535 F.2d 864; (1977) 430 U.S. 322).

Section 34 of the Initiative amends WIC section 1732.6 by adding subd. (b), which mandates that any minor filed directly in adult court under the new law, and convicted by the trier of fact, shall not be committed to the Youth Authority. WIC section 1732.6, subd. (c) provides that no person under the age of sixteen shall be housed in any facility under the jurisdiction of the Department of Corrections. Therefore, the new law requires minors, age sixteen and above, to serve their time in state prison. At this time the Department of Corrections is distributing juveniles (Who were previously sentenced pursuant to WIC section 1732.6, subd. (c)) among the twenty-four prison facilities including such high-security prisons as Pelican Bay and Corcoran.

Life in adult prisons is certainly more violent than life in juvenile detention programs. Juveniles in adult prisons are more likely to suffer personal violent victimization by staff and other prisoners. Further, research suggests that juveniles who are placed in adult prisons may become more violent in response to their violent surroundings.[6]

It is a violation of the Eighth Amendment prohibition against cruel and unusual punishment to place sixteen year old minors in prison with adult offenders. There is overwhelming evidence to show that they will be routinely targeted for sexual and physical assault. They have neither the

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[6] See Shari Del Carlo, Comment, *Oregon Voters Get Tough on Juvenile Crime: One Strike and You Are Out!*, 75 OR. L. REV. 1223 (1996) (citing a 1989 study reported that in adult prisons, sexual assault was five times more likely, beating by staff was nearly twice as likely, and attacks with weapons were approximately fifty-five percent more common than in juvenile centers).

physical stature, nor mental maturity, to protect themselves. This type of actual punishment is excessive compared to any crime they might commit. Additionally, it offends the standards of modern decency to sanction this kind of punishment.

G. THE INITIATIVE IS UNCONSTITUTIONAL IN THAT IT VIOLATES THE SINGLE SUBJECT RULE OF THE CALIFORNIA CONSTITUTION

Article 2, sec. 8(d) of the California Constitution mandates that an initiative measure embracing more than one subject may not be submitted to the electors or have any effect. Courts have determined that this requires that all of an initiative's parts be "reasonably germane" to each other, "and to the general purpose or object of the initiative." (*Senate of the State of California v. Jones* (1999) 21 Cal.4th 1142, 1157, quoting *Legislature v. Eu* (1991) 54 Cal.3d 492, 512). The objective for this constitutional limitation on the initiative process is to minimize the risk of confusion and deception of the voters. (*Amador Valley Joint Union High Sch. Dist. V. State Bd. Of Equalization* (1978) 22 Cal.3d 208, 231).

In *Jones*, the California Supreme Court reviewed pre-ballot Proposition 24, referred to as the "Let the Voters Decide Act of 2000." That initiative proposed to reduce and limit the annual salary of all Members of the Legislature, to limit the travel and living expenses of the same Members, provide for forfeiture of pay, and reimbursement, if the Legislature failed to pass a budget by a certain date and transfer of authority to reapportion voting districts from the legislature to the Supreme Court. (*Id* at 1146-1149). The Court, in deciding this initiative violated the single-subject rule, concluded that the portion of Proposition 24 that purported to transfer the power of reapportionment from the legislative to the judiciary branch was in itself a fundamental and far-reaching change in the law and clearly represents a separate subject within the meaning of the single-subject rule. (*Id* at 1167-1168).

Where an initiative violates the single-subject rule of the California Constitution, severance is not an available remedy. (*Senate of the State of California v. Jones* (1999) 21 Cal.4th 1142, 1157, quoting *California Trial Lawyers Association v. Eu* (1988) 200 Cal.App.3d 351, 361-362).

The Initiative violates a core provision of the California Constitution designed to ensure the integrity of the electoral process. The Initiative is arguably the largest crime-related initiative in California history. It's provisions address at least three distinct, unrelated subjects: (1) the juvenile justice system, (2) criminal gang activity; and (3) changes to Propositions 8 ("victims' Bill of Rights" initiative) and 184 ("Three Strikes" initiative) that affect sentencing in criminal court for offenses unrelated to juvenile or crime activity. The question is not whether these provisions fit under some broad purpose, but rather whether they relate to a main purpose and are reasonably germane to that purpose and each other.

It appears the Initiative has no main purpose. The official title, as prepared by the Attorney General is: "Juvenile Crime. Initiative Statute." However, many of the provision address gang activity, not limited to juvenile gang activity, such as increasing punishment for gang-related crimes, creates a crime of recruiting for gang activities, requires registration for gang activity and authorizes wiretapping for gang activities. None of these provisions' "main purpose" are related solely to juvenile crime. The Initiative also designates additional crimes as violent and serious felonies which relate to adult sentencing, not juvenile court dispositions. Since there is no common object among the various provisions, then they certainly cannot be characterized as so related and interdependent as to constitute a single scheme.

Furthermore, the provisions, as they relate to juvenile law, address a dizzying array of subjects including directly filing cases in adult court, reporting criminal history to the Department of Justice, detention of minors arrested for certain offenses, conditions of release pending the filing of a petition, amendments to informal supervision, arrest warrants, expanding accessibility of the public to juvenile court hearings, changing presumptions in a fitness proceeding, changing the nature of juvenile probation violation hearings, precluding sealing of records for life for certain offenses, adding a deferred entry of judgment law, disclosure of a juvenile court true finding, to the public for certain felonies, disclosure of the name of any minor arrested for a serious felony, and disallowing commitments to the Youth Authority for minors directly filed in adult court. None of these provisions are germane to each other. For example, the deferred entry of judgment provision

(See Initiative, Sec. 29) establishes a new law which allows certain minors to avoid a criminal record by complying with certain conditions of probation. By contrast certain provisions allow law enforcement to release the name of certain minors following their arrest (See Initiative, Sec. 31) and others prohibit the sealing of records for life. (See Initiative, Sec. 28). The Initiative clearly tries to overhaul both the juvenile and criminal justice systems simultaneously.

Most apparent is the provision transferring the juvenile court waivers from the court to prosecutors. (See Initiative, Sec. 26). This alone is a fundamental and far-reaching change in the law as to represent a single-subject within the meaning of Article 2, section 8 of the California Constitution. This is exactly the same situation the Supreme Court faced in *Jones, supra*. Namely, a reallocation of power traditionally embodied in one branch of the government to another section.

H. THE INITIATIVE IS ILLEGAL IN THAT IT VIOLATES THE ELECTIONS CODE

The Initiative violates the Elections Code and other laws and regulations governing the electoral process by containing text that is not consistent with text circulated in the petitions to voters for signatures in order to qualify the measure for the ballot in 1998. (Elections Code section 900-9015). Further, it inconspicuously amended provisions of prior ballot initiatives without making it clear to voters.

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CONCLUSION

MICHAEL respectfully requests that the demurrer be sustained and that the complaint be dismissed.

Dated: 8/14/06

Respectfully submitted,

STEVEN J. CARROLL
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by: _____
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_____
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