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MEMORANDUM

RE: Mandatory Waiver of Juvenile Court Constitutional Argument

DATE: May 25, 2005

Per your request, I have considered the possibility that NCGS §7B-2200, as applied to juveniles 13 years or older accused of first-degree murder, is unconstitutional. Based on my research, I believe that there is a viable argument that under the U.S. Supreme Court's decision of *Kent v. U.S.*, 383 U.S. 541, 86 S. Ct. 1045 (1966), §7B-2200 violates the 6th Amendment, providing assistance of counsel, and the 14th Amendment, providing for due process of law.

Kent v. U.S.

Kent, which was decided one year prior to the seminal juvenile justice decision of *In re Gault*, involved a 16 year old in the District of Columbia charged with a number of offenses, including rape, housebreaking and robbery. The juvenile made his first appearance in juvenile court, which had exclusive jurisdiction over the matter. According to the laws of D.C., he could be "bound over" to adult district court after the juvenile court made a "full investigation" of the matter. The juvenile court judge, however, ignored the juvenile's attorney's motions requesting a hearing on the waiver and release of social service records, and entered an order waiving jurisdiction. The U.S. Supreme Court found that waiver of jurisdiction is a "critically important" procedure determining "vitally important statutory rights" of the juvenile, and that as a result of the exclusive jurisdiction of juvenile court, the juvenile was entitled to certain procedures to protect him from consequences of adult court. The Supreme Court held that the juvenile was entitled to a hearing, including access to social and probation records to be reviewed

by counsel and considered by the court, and a “statement of reasons” for the court’s decision to transfer. The hearing must “measure up to the essentials of due process and fair treatment” as provided by the 14th Amendment, and the order from juvenile court must have findings to permit “meaningful review” from the reviewing court. The case was reversed and remanded. In addition, the Supreme Court provided an appendix, a policy memorandum to the statute in question, which listed eight factors to consider when making a “full investigation” of the waiver decision.

NCGS §7B-2200

NCGS §7B-2200 was enacted in 1998 as part of the Juvenile Justice Reform Act, and made effective on July 1, 1999 (It was merely a re-codification of former §7A-608). §7B-2200 states that if a juvenile is 13 years or older [incidentally, North Carolina provides the youngest age at which a juvenile may transferred under so-called “waiver” statutes nationwide] and is charged with a felony, the court may transfer the juvenile to adult court after “notice, hearing and a finding of probable cause.” However, the statute then provides “If the alleged felony constitutes a Class A felony and the court finds probable cause, the court shall transfer the case to the superior court for trial as in the case of adults.” Therefore, a juvenile accused of first-degree murder is not afforded the right to a transfer hearing as is any other 13 year-old juvenile charged with a felony other than first-degree murder, as provided under §7B-2203.

Analysis

It is my opinion that this unequal treatment of juveniles would not stand Constitutional scrutiny as determined in *Kent*. Distilled to its essence, the *Kent* test provides that:

- If exclusive jurisdiction rests with juvenile court AND
- If the statute provides for a hearing, THEN
- Due process demands “fair treatment” and a “statement of reasons” as to why the juvenile court decided to transfer so as to provide for “meaningful review” by the reviewing court.

According to §7B-1600, exclusive, original jurisdiction rests with the juvenile court. That jurisdiction may only change, under §7B-2200, after “notice, hearing and a finding of probable cause.” So far, the statutes satisfy prongs one and two of the *Kent* test. As previously discussed, juveniles 13 years or older accused of first-degree murder are afforded a hearing, but under §7B-2202, this hearing is to “show that there is probable cause to believe that the offense charged has been committed, and that there is probable

cause to believe that the juvenile committed it.” However, there is no discussion at this hearing for a decision to transfer; this role is left for the transfer hearing. At the probable cause hearing, the juvenile’s counsel has no opportunity to examine any records or reports other than those pertaining strictly to the offense(s) charged. There is no “statement of reasons” by the juvenile court from which a reviewing court may make a “meaningful review” of the juvenile court’s ruling. Although the juvenile has the right to appeal the decision to transfer as is described in §7B-2603, the superior court may only review the record for “abuse of discretion,” and “shall not review the findings as to probable cause for the underlying offense.” Since the superior court cannot revisit the issue of probable cause, and has no “transfer decision” to consider, the juvenile has no “meaningful review” of the mandatory transfer. Because this last prong of the *Kent* test is not satisfied, I believe §7B-2200 could be found unconstitutional as it applies to juveniles 13 years or older accused of first-degree murder.

Jurisprudence

To my knowledge, §7B-2202 has never been directly challenged on this issue. Former NCGS §7A-610, which described the terms of discretionary transfer, was challenged in *State v. Green*, 348 N.C. 588, 502 S.E.2d 819 (1998) under a theory of vagueness, but the argument was unsuccessful. I then turned to other jurisdictions to see if this challenge had been made elsewhere. After consulting with the National Juvenile Defender Center, I was provided with the case of *State v. Lee*, 1998 Ohio App. LEXIS 4250. In *Lee*, the juvenile challenged the mandatory bind over of an aggravated robbery with a firearm charge after a probable cause hearing but no transfer hearing. The court determined that an “amenability hearing” is not required by *Kent*, and seems to equate a “decision to transfer” with that of a probable cause hearing. The court states that the statutes in question “were not adjudicated unconstitutional on any grounds,” but doesn’t cite any actual challenges to the statute. It appears from this (non-binding) case that an argument could be made that §7B-2202 satisfies *Kent* because it does provide for a hearing – a probable cause hearing. But as discussed earlier, the *Kent* language seems to really be describing what we consider our transfer hearing. This argument is given further support by noticing that the General Assembly essentially adopted the factors to consider as listed in the *Kent* appendix (see comparison attached to the end of this memo).

Conclusion

The argument that NCGS §7B-2200 is unconstitutional under the 6th and 14th Amendments as discerned under the *Kent v. U.S.* decision appears to have merit. Using the *Kent* test, the statute fails to provide for adequate due process or assistance of counsel for those juveniles who are 13 years or older and are charged with first-degree murder.

<i>Kent v. U.S.</i> , 383 U.S. 541, 86 S. Ct. 1045 (1966)	N.C. G.S. §7B-2203
1. The seriousness of the alleged offense to the community and whether the protection of the community requires waiver.	(8) The seriousness of the offense and whether the protection of the public requires that the juvenile be prosecuted as an adult.
2. Whether the alleged offense was committed in an aggressive, violent, premeditated or willful manner	(7) Whether the alleged offense was committed in an aggressive, violent, premeditated, or willful manner.
3. Whether the alleged offense was against persons or against property, greater weight being given to offenses against persons especially if personal injury resulted.	
4. The prosecutive merit of the complaint, i. e., whether there is evidence upon which a Grand Jury may be expected to return an indictment (to be determined by consultation with the United States Attorney).	Essentially the 7B-2202 probable cause hearing
5. The desirability of trial and disposition of the entire offense in one court when the juvenile's associates in the alleged offense are adults who will be charged with a crime in the U.S. District Court for the District of Columbia.	
6. The sophistication and maturity of the juvenile as determined by consideration of his home, environmental situation, emotional attitude and pattern of living.	(1) The age of the juvenile. (2) The maturity of the juvenile. (3) The intellectual functioning of the juvenile.
7. The record and previous history of the juvenile, including previous contacts with the Youth Aid Division, other law enforcement agencies, juvenile courts and other jurisdictions, prior periods of probation to this Court, or prior commitments to juvenile institutions.	(4) The prior record of the juvenile. (5) Prior attempts to rehabilitate the juvenile.
8. The prospects for adequate protection of the public and the likelihood of reasonable rehabilitation of the juvenile (if he is found to have committed the alleged offense) by the use of procedures, services and facilities currently available to the Juvenile Court.	(6) Facilities or programs available to the court prior to the expiration of the court's jurisdiction under this Subchapter and the likelihood that the juvenile would benefit from treatment or rehabilitative efforts.