SENATE JUDICIARY COMMITTEE

MINUTES OF MEETING HELD

7th DAY OF MARCH, 1973

The meeting was called to order at 9:20 a.m. Senator Close in the Chair.

PRESENT: Senator Foley
Senator Bryan
Senator Dodge
Senator Hecht
Senator Wilson

Mr. Gary Sharon, Public Defender, State of Nevada
Mr. Tom Beatty, Public Defender - Clark County
Judge Robert Mullins - Las Vegas Municipal Court
Judge John Mendoza, District Court Judge - Clark County
Judge John Barrett, District Court Judge - Washoe County
Mrs. Esther Nicholson, League of Women Voters
Mr. George Miller, Welfare Department
Mr. James Carmany, Clark County Juvenile Court

EXCUSED: Senator Swobe

S.B. 266 - Extends duties of public defenders to misdemeanor cases.

Mr. Gary Sharon testified that this bill would expand the duties of his office considerably. His concern was with the language in Section 171.188 which provides that if a justice of the peace feels that a defendant charged with a misdemeanor will have a jail sentence imposed, counsel must be appointed. He quarreled with that concept since every misdemeanor could carry a sentence of imprisonment, so every misdemeanor charge would require a public attorney.

Presently the justices of peace in the larger counties, and probably in smaller counties, do make a predetermination of whether or not the defendant will be put in jail, and if so will appoint an attorney. He suggested changing the wording from "believes that sentence of imprisonment may be imposed" to "predetermines that if found guilty or pleads quilty sentence will be imposed." Chairman Close asked how that could be determined before the evidence is heard. Mr. Sharon replied that this procedure is presently being done.

Mr. Sharon reminded the Committee to consider the expense involved in allowing an attorney for every misdemeanor, not only for the defense, but for the district attorney who would also be involved. The Public Defender's Office has budgeted $26,000 for 14 counties for the next fiscal year on the basis of the JP's making predeterminations of whether or not they will impose a sentence. If budgeted on the basis of providing counsel for every misdemeanor, that figure would have to be greatly expanded. There is also a collateral problem of appeals in every case since indigents who desire to appeal would not have to pay for the attorney.

Mr. Sharon felt that the Supreme Court left the language of their decision ambiguous enough to make it somewhat limited, rather than blanketing every misdemeanor.

Senator Dodge asked Mr. Sharon how far it would go to alleviate the problem if legislation was passed that would take traffic violations and public drunkenness out of the criminal law. Mr. Sharon replied that the legislature could either decriminalize to any degree they wanted, or change the language in the bill because with the language as it is, every misdemeanor would be entitled to an attorney.

Chairman Close asked what would happen if a judge made a predetermination not to jail a defendant, but after the trial it is determined that he should have been. Mr. Sharon replied that he thought this would be grounds for a mistrial for lack of an attorney.

Mr. Sharon suggested that in Section 180.060 on Page 2, where the bill would delete referral to "crime which constitutes a felony or gross misdemeanor" and substitute the words "public offense", that reference to a public offense should be subject to NRS 171.188 which refers to the offense as a misdemeanor. He felt that similar language should be added to the reference to NRS 260.030 mentioned in Section 3.

Mr. Tom Beatty quoted two excerpts from the U.S. Supreme Court decision determining this issue to clarify their intent. "Absent a knowing and intelligent waiver, no person may be imprisoned for any reason whether it be classified petty, misdemeanor, or felony, unless represented by counsel"; "every judge will know when the trial of a misdemeanor starts, that no imprisonment may be imposed, even though local law permits, unless the accused is represented by counsel."

The decision did not specify all misdemeanors, but says that before taking a man's liberty, he must have had the right to counsel for defense. The result at this point is that if there are no attornies available for appointment by the judge, and no system set up to handle the defense, the judge is emasculated. There are hundreds of misdemeanors which carry potential jail sentences. Without an attorney to handle these cases, large portions of those laws would be annulled and impossible to carry out. There is a small percentage of misdemeanors where the possibility of imprisonment is a very probable one.

Further difficulty arises since the alternative to a jail sentence is a fine, and another recent Supreme Court decision held that a judge cannot impose a fine when the person is an indigent and unable to pay a fine. The judge has no recourse if, because of indigency, the person is unable to pay a fine. In the average case a judge would appoint counsel and reserve the option to imprison after hearing evidence, or puts himself in a position where the only thing to do is levy a fine, which in most cases is uncollectable. The U.S. Supreme Court has ruled that in the case of indigents, a fine could not be converted to jail time or jail time extended by virtue of non-

payment of a fine. This means that a judge would be in a position of having to pre-judge cases. The judge also has the ability to delegate his authority to the district or city attorney by asking if the prosecutor has the intention to request jail time on the offense.

Recent legislation has been drawn which would impose minimum mandatory jail sentences, which could be served in 24 hour intervals so as not to interfere with a person's employment, for traffic offenses such as driving with a suspended license or DUI. The result of that legislation would be that for each minimum mandatory sentence in those cases, the defendant must have counsel.

Mr. Beatty did agree with the observation made earlier in the testimony by Mr. Sharon that the language in lines 18 and 19 should be changed to indicate that the judge make a determination on the face of the complaint as to whether the type of offense involved should carry a jail sentence.

Judge Robert Mullins speaking from his own court, sees a different view. When looking at a complaint, there are certain offenses where if the man is convicted he will be put in jail. Every case involving DUI, reckless driving, assault and battery, contributing to the delinquency of a minor, petty larceny, etc. there is a substantial chance that the individual, if convicted, is going to spend time in jail whether an indigent or not.

If the legislature authorizes this bill, the Public Defender's Office should be increased by two deputies, one of which would be permanently appointed to the municipal court in Las Vegas. The other deputy could conceivably cover the other three outlying areas with a staggered court system.

However, there is one other problem. That is, in 99% of the cases, the Public Defenders Office could handle the workload. However, in the other 1% of the cases outside counsel would have to be appointed, and then the problem arises of who is to pick up the tab? The legislature should determine whether the state, county of city should be responsible for the expense of outside counsel.

It is amazing how many people who claim indigency can come up with money for bail when a motion to release the individual on his own recognizance is denied. When that person claiming to be indigent is able to post bail, the court will withdraw the appointment of an attorney and instruct the individual to get private counsel.

The biggest problem with the concept of this bill is demanding that the courts follow this law and require the judge to determine before hand in what types of cases a person would be incarcerated.

At this stage of arraignment, it is necessary to have a deputy public defender present since most defendants have not been able to make bail and don't know how to plead. These people ask to talk to an attorney before they enter a plea. Another problem a judge faces is that when a defendant intelligently and knowingly waives his

right to an attorney, the judge has to determine whether the individual has actually done so intelligently. It is easier to allow him to talk to an attorney or he could come back on an appeal.

S.B. 253 - Provides extensive changes in juvenile court procedure and avoids unnecessary use of criminal labels for delinquent children.

Judge John Mendoza - This bill is the first major change in the juvenile procedure code since 1949. The history of the juvenile court act goes back to 1909. In that code the child was entitled to trial by jury, bail and an attorney. In 1949, legislation was passed to remove these provisions and went to parent's patriach doctrine that the State will protect the child. In 1967, a Supreme Court case decided that a child was entitled to an attorney in a transcript proceeding. The following year another case determined that parents were entitled to notice, child entitled to counsel, and entitled to cross examine and confront his accusers. As a result it changed the adjudicatory, or trial phase, of the juvenile procedure. Since that time there have been a series of cases, one which determined that a child charged with an act of deliquency for which he might be sent to a state institution must be proven he committed the offense beyond a reasonable doubt. Another determined that the courts did not have to apply the jury trial to a juvenile procedure. Another issue still open is the issue of bail.

Citizens throughout the State were called together to discuss the juvenile problem and code. Following that conference was another conference involving judges, school districts, police officers, senators, assemblymen; all phases of society were represented. An additional conference was held with probation officers. A vast majority of those involved felt that this bill effected good, substantial changes to protect society and the interests of children.

There will be concern that the juvenile court will become a criminal court, but this is not true. The U.S. Supreme Court has determined that these rights will be applied to the adjudicatory or trial phase. They do not apply to the intake phase, where informal adjustments can be made by probation officers, nor to the dispositional phase which is akin to the sentencing phase.

The problem presently facing the juvenile court, is that if a lawyer needs to become knowledgeable of the juvenile court system, he will find nothing about these constitutional provisions which were determined by the Supreme Court in the juvenile code. He would have to research each Supreme Court decision. This bill would embody those constitutional mandates into one article.

The major changes are explained below, all other changes are technical or were effected to gain continuity.

Section 62.040 establishes the areas where the court has original jurisdiction. Subparagraph a) covers jurisdiction in the areas of neglect. The rather nebulous definition of neglected child was left out of this statute because it was declared void. Subparagraph b) defines children in need of supervision as those who are run-

aways, are unmanageable, or do not attend school. We have tried to decriminalize these categories and removed them from the delinquency category so that we could treat them as a family problem the first time around. When the court enters its order, these children would be placed on probation. If working with the family is not successful, these categories would revert back to delinquency. Subparagraph c) is merely a repetition of the general delinquency statute.

Section 62.120 determines that the probation officer is the officer of the court. We have added a new section asking for every effort to be made to provide sufficient personnel so the probation officer can uphold the separation between branches of government. Presently, the probation officer is acting as policeman, prosecutor and is then making an effort to oversee and rehabilitate the child. This relationship is not functional.

Senator Wilson felt the wording used for this purpose in line 18 on Page 3, "separation of powers", is not appropriate to the court process.

Section 62.130 determines that any person with knowledge of the facts alleged may sign a petition for court action or revocation. However, in cases of children in need of supervision, we have eliminated the parent from those who may petition in the first instance since we will try working with the family at another stage.

It also directs the district attorney to be the charging party since probation officers should not bear the burden of presenting the case. A recent supreme court decision held that rather than pleading conclusions, the prosecutor must now plead the offense charged and all the statutes involved.

Section 62.140 provides that a summons advise the parties of their right to counsel.

Section 62.170 asks counties to make special efforts, without mandating them, to keep children in need of supervision and delinquent children apart, and if possible in separate facilities.

Section 62.275 provides that all juvenile records will be sealed when the person reaches the age of 24 years. The age of 24 was used because after 21 the person is no longer considered a juvenile and a three year buffer is provided. The provision does provide that the records will be available if the juveniles were certified up, or on petition to the court to determine prior information.

Section 12, subsection 2. Gives the public the right to have a petition reviewed by the district court in the event a probation officer does not feel a complaint is warranted. Subsections 3 and 4, provide that if a petition is not approved by the district attorney, a child in a detention home will be immediately released; and when a child is in a detention home for 10 days and no action was taken on a petition, the child will be dismissed with prejudice.

Section 13 is the same as the present law, but moved from one section to another. Senator Bryan questioned why no provision was made for a stenographic record. Judge Mendoza replied the Supreme Court did not decided the area of a stenographic transcript but implied that if a judge doesn't require a tape recording or court reporter, he leaves himself wide open to have the case immediately reversed (unless he remembers the testimony word for word). This section also includes those rights denominated in the Gault Decision at the trial phase.

Section 14 provides the child's right to counsel and imposes double jeopardy constitutional standards.

Section 15 was requested because judges have looked at the social studies made before the jurisdiction hearing and that is held to be reversible. It also gives the court power to request that parent's give their consent to undergo phychiatric tests in cases of neglect.

Section 16 was requested by law enforcement people, and they also requested that anyone who violated this provision would be guilty of a misdemeanor. This provision would cut down on abuses and establish a uniform procedure for fingerprinting a child 14 years of age or older. It provides that if a child is not referred to court, the fingerprint cards will not be sent to the FBI.

Judge John Barrett - Subsection 4 of Section 12 (Page 9, line 23) contains the wording "in the presence of objection" relating to the finding of delinquency and the immediate disposition of the case. An attorney could raise an objection just to delay a case. The wording could be changed to "if the court finds that a child committed the act, it may proceed to make proper disposition of the case" and leave the objectionable phrase out.

There is also some language contained throughout the bill which is inconsistent with the whole philosophy of treatment of juveniles. The wording used on Page 9, lines 10 and 11 "admit or deny such allegations" should be substituted in all cases where terms such as "pleads guilty" are used. Also the wording "child is convicted of an act" on lines 48 and 49 (page 10) should be changed to "child is found to have committed an act".

Another change suggested was in Section 16, Subsection 4 (page 11, lines 10 and 11) was the wording "transferred for criminal prosecution". Judge Mendoza agreed to Judge Barrett's suggestion to change the wording to "certified for criminal prosecution."

Mrs. Esther Nicholsen from the League of Women Voters strongly supports this bill. We were a part of the long series of seminars that were held. Various highlights of the bill are terribly important, and we urge this Committee and both houses to pass this bill.

Mr. George Miller objected to the term "children in need of supervision" because he felt that the Welfare Department would be asked to handle these children and they are not equipped for this. He stated that they have no objection to the bill other than this point.

Mr. Jim Carmany reviewed statistics of other States using this procedure and comparing those figures to Nevada's experience, he said the Welfare Department might receive an additional increase in children who are run-aways, truants and unmanagables of 1.4% or 11 children more a year. All other cases will be handled throughout the Probation Department as is presently done.

Mr. Carmany was asked if there would be an increase in their budget due to any of the changes effected. Mr. Carmany replied that there would not be any increased cost in their operation at all.

The Chairman excused the witnesses and thanked them for their testimony.

The meeting was adjourned at 11:00 a.m.

Respectfully submitted,

Eileen Wynkoop
Secretary

APPROVED:

Melvin D. Close, Jr., Chairman