ISSUES IN JUVENILE DELINQUENCY DISPOSITIONS

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I.

INTRODUCTION

In fashioning dispositions, the juvenile court's goal is ostensibly twofold: (1) to serve the "best interests" of the delinquent ward by providing care, treatment, and guidance to rehabilitate the ward and "enable him or her to be a law-abiding and productive member of his or her family and the community," and (2) to "provide for the protection and safety of the public . . . " (Welf. & Inst. Code, sec. 202, subd. (a); *In re Calvin S.* (2007) 150 Cal.App.4th 443, 449; *In re Charles G.* (2004) 115 Cal.App.4th 608, 614.) In furtherance of these goals, juvenile courts are authorized to order delinquent wards to receive "care, treatment, and guidance that is consistent with their best interests, that hold them accountable for their behavior, and that is appropriate for their circumstances. This guidance may include punishment that is consistent with "the rehabilitative objectives of [the juvenile court law] . . . " (Welf. & Inst. Code, sec. 202, subd. (b).) The forms this guidance can take are many and varied, ranging from probation without a declaration of wardship (Welf. & Inst. Code, sec. 725) to incarceration in the Division of Juvenile Justice (DJJ). (Welf. & Inst. Code, sec. 726.)

The juvenile court has broad discretion at disposition to implement the priorities codified in section 202. (*John L. v. Superior Court* (2004) 33 Cal.4th 158, 186.) Generally

speaking, the juvenile court's dispositional orders will only be reversed upon a showing of an abuse of discretion. (*In re Khamphouy S.* (1993) 12 Cal.App.4th 1130, 1135; *In re Darryl T.* (1978) 81 Cal.App.3d 874, 877.) It is not the responsibility of the reviewing court to determine what it believes would be the most appropriate placement for a minor. This is the duty of the trial court, whose determination is reversed only if it has acted beyond the scope of reason. (*People v. Giminez* (1975) 14 Cal.3d 68, 72.) It is the duty of appellate counsel to ensure that the juvenile court did not abuse its discretion and to try to obtain the least restrictive placement for the minor client.

II.

AVAILABLE DISPOSITIONS

A. Deferred Entry of Judgment

A minor is eligible for deferred entry of judgment if his case meets all of the criteria set forth in Welfare & Institutions Code section 790, subdivision (a):

(1) he or she has not previously been declared a ward of the court for the commission of a felony offense;

(2) the offense charged is not enumerated in Welfare & Institutions Code section 707, subdivision (b);

(3) he or she has not previously been committed to the custody of the Youth Authority;

(4) his or her record does not indicate that probation has ever been revoked without

being completed;

(5) he or she is at least 14 years old at the time of the hearing; and

(6) he or she is eligible for probation pursuant to Penal Code section 1203.06.

In addition to being statutorily eligible, the minor must also be deemed suitable. Welfare & Institutions Code section 791, subdivision (b) provides for an investigation by the probation department to determine whether the minor "is a person who would be benefitted by education, treatment, or rehabilitation." It is then up to the juvenile court to make the final determination regarding education, treatment, and rehabilitation of the minor. Thus, the juvenile court is not required to, but rather has discretion to grant DEJ to an eligible minor. Denial of DEJ is not an abuse of discretion merely because the minor has satisfied the eligibility requirement of section 790, subdivision (a). Instead, the court exercises its discretion based upon the standard of whether the minor will derive benefit from education, treatment, and rehabilitation rather than a more restrictive commitment. (*Martha C. v. Superior Court* (2003) 108 Cal.App.4th 556, 562; *In re Sergio R.* (2003) 106 Cal.App.4th 597, 607.) There is nothing in the statutory scheme to suggest that any consideration other than the minor's nonamenability to rehabilitation is a proper basis for denying DEJ. (*Martha C., supra,* at p. 561.) Thus, denial is proper only when the trial court finds the minor would not benefit from education, treatment and rehabilitation. (*Ibid.*)

A good example of an improper denial can be found in *Martha C.* There, the probation officer's report stated that the minor would benefit from the education, treatment

and rehabilitation pursuant to the DEJ procedure and that she would be acceptable to all appropriate programs. The juvenile court nevertheless denied admission to the DEJ program, stating: "It is the impression or the understanding and belief of the judges in this court, and probably in the community, that there are many young people who are engaged by others in the process of bringing drugs across the border. It is not an appropriate message to send to the kids who get engaged in this undertaking, or to the people who hire them, that they can simply come into court and be granted deferred entry of judgment and have no record whatsoever, and in order to deter this kind of use of young people, . . . I feel that the social policy concerns mitigate against granting the DEJ." (*Martha C., supra,* 108 Cal.App.4th at p. 560.) The Court of Appeal reversed, stating "[w]hile a court might find that the circumstances of a crime indicate a minor is not amenable to rehabilitation [citation], and on that basis deny DEJ, it may not do so as a means of deterring criminal activity by others." (*Id.,* at p. 562.) Thus, if the juvenile court states any reasons other than those indicating that this particular minor is not amenable to treatment under the DEJ program, appellate counsel should be alert for a potential abuse of discretion issue.

As is the case with most juvenile dispositions, the juvenile court's grant or denial of admission to the deferred entry of judgment program is reviewed under the deferential abuse of discretion standard. (*Sergio R., supra,* 106 Cal.App.4th at pp. 605-607.) The Court of Appeal will reverse only if the trial court's decision "was so irrational or arbitrary that no reasonable person could agree with it." (*People v. Carmony* (2004) 33 Cal.4th 367, 377.)

When faced with a case where the minor is denied admission to the DEJ program, appellate counsel should first determine whether the minor meets all the criteria of Welfare & Institutions Code section 790, subdivision (a). If so, the next area of inquiry is whether the minor is a person who would derive benefit from education, treatment, and rehabilitation rather than a more restrictive commitment. Pay close attention to the court's stated reasons for denying DEJ. If the court does not state a finding that the minor would not benefit from education, treatment and rehabilitation, you should argue that the denial of entry into the program was an abuse of discretion.

It is important to keep in mind that when DEJ is granted, there is not yet a judgment from which a minor can appeal because it has been deferred. If the minor successfully completes the DEJ program, the charges will be dismissed and no appeal would be necessary. If the minor fails to perform satisfactorily in the assigned program, is not benefitting from education, treatment, or rehabilitation, or engages in additional criminal behavior, "the court shall render a finding of guilty to the charge or charges pled, enter judgment, and schedule a sentencing hearing as otherwise provided in [the Penal Code]." (Pen. Code, sec. 1000.3.) Thus, a minor cannot appeal the denial of a motion to suppress evidence if he or she has been granted DEJ. (*People v. Mazurette* (2001) 24 Cal.4th 789, 793-794.)

B. Probation

1. Continued Placement in the Home With No Declaration of Wardship

After DEJ, the least restrictive alternative available in juvenile court is a grant of probation with placement of the minor in the home of his or her parent or guardian without a declaration of wardship, as authorized by Welfare & Institutions Code section 725, subdivision (a). The duration of this term of probation may not exceed six months. (Welf. & Inst. Code, sec. 725, subd. (a).) When the juvenile court chooses this option, it must order:

(a) the minor to attend a school program approved by the probation officer without absence;

(b) the parents or guardian to participate in a counseling or education program; and

(c) the minor to observe a curfew by being in his or her legal residence between the hours of 10:00 p.m. and 6:00 a.m. unless accompanied by a parent or legal guardian. (Welf. & Inst. Code, secs. 725, subd. (a), 729.2.) Of course, the juvenile court need not impose a particular condition if it makes a finding and states on the record its reasons that the condition would be inappropriate. (Welf. & Inst. Code, sec. 729.2.) The court may also impose conditions such as paying victim restitution and participating in drug or alcohol programs. (Welf. & Inst. Code, secs. 729.10, subd. (a); 730.6, subds. (a)(2)(B), (h).) The court may **not** order the minor to serve any time in juvenile hall, because section 725, subdivision (a) does not authorize the court to remove the minor from the custody of his or her parents. (*In re Trevor W.* (2001) 88 Cal.App.4th 833, 837-838.)

This least onerous of dispositions is unavailable where:

(a) the minor has been found to be a person described under Welfare & Institutions Code section 601 or 602 by reason of the commission of any offense listed in Welfare & Institutions Code section 707, subdivision (b);

(b) sale or possession for sale of a controlled substance;

(c) possession of a controlled substance at a public or private elementary, vocational, junior high, or high school, or commission of assault with a deadly weapon, firearm, stun gun, or taser on a school employee, or bringing onto or possessing certain weapons or a firearm on school grounds;

(d) any violation involving criminal street gang activity;

(e) the minor has previously participated in a program of informal supervision;

(f) the minor has previously been adjudged a ward of the court pursuant to Welfare & Institutions Code section 602;

(g) the minor has committed an offense in which restitution owed to the victim exceeds $1,000; or

(h) the minor is alleged to have committed a felony offense when he or she was at least 14 years of age.

(Welf. & Inst. Code, secs. 725, subd. (a); 654.3.) If a minor has been placed on probation without a wardship and any of the above conditions have been met, appellate counsel should immediately advise the minor of the potential adverse consequence of pursuing the appeal.

2. Continued Placement in the Home With a Declaration of Wardship

The juvenile court has the power to place a minor on probation at home for an indefinite period of time. (*In re John R.* (1979) 92 Cal.App.3d 566, 568-569; *In re Nathan W.* (1988) 205 Cal.App.3d 1496, 1500.) Minors do not have the right to refuse probation as do adult offenders. (*In re Tyrell J.* (1994) 8 Cal.4th 68, 81-82, disapproved on other grounds in *In re Jaime P.* (2006) 40 Cal.4th 128, 130; see *In re Sheena K.* (2007) 40 Cal.4th 875, 889.) Thus, a court may declare a minor a ward of the court and place him or her on probation, but allow him or her to stay in the home, often with intensive supervision by the probation officer. Appellate counsel should carefully scrutinize the conditions placed upon the minor and challenge them if they appear to be excessively restrictive and likely to lead to harassment rather than treatment and rehabilitation.

3. Declaration of Wardship With Placement Outside the Home

A minor who has been declared a ward of the court may not be removed from the home unless the court conducts a hearing and finds at least one of the following facts to be true:

a. the parent or guardian is incapable of providing or has failed or neglected to provide proper maintenance, training, and education;

b. the minor has been tried on probation in the custody of the parent or guardian and has failed to reform; or

c. the minor's welfare requires that custody be taken from the minor's

parent or guardian.

(Welf. & Inst. Code, sec. 726, subd. (a); Cal. Rules of Court, rule 5.790(d); *In re Kazuo G.* (1994) 22 Cal.App.4th 1, 6; *Nathan W., supra,* 205 Cal.App.3d at pp. 1499-1500.) If the minor is placed on probation and entrusted to the care of the probation officer, the probation officer may place the minor in a foster home, the home of a relative, a private institution, or a public agency. (Welf. & Inst. Code, sec. 727, subd. (a).)

A primary goal of appellate counsel where a minor has been placed on probation and placed outside the home is to seek reversal of the removal order and keep the child in the home if at all possible. Whenever a minor is removed from the home, appellate counsel should carefully scrutinize all findings made by the juvenile court. The first task is to make sure the appropriate findings were in fact stated for the record. If they were, the next step, if possible, is to challenge them if not supported by substantial evidence. A juvenile court's commitment order may be reversed on appeal only upon a showing the court abused its discretion. (*In re Todd W.* (1979) 96 Cal. App. 3d 408, 416.) Reviewing courts will indulge all reasonable inferences to support the decision of the juvenile court and will not disturb its findings when there is substantial evidence to support those inferences. (*In re Lorenza M.* (1989) 212 Cal.App.3d 49, 53.)

4. Conditions of Probation

The juvenile court has very broad discretion to impose whatever conditions of probation it deems appropriate "'to the end that justice may be done and the reformation and

rehabilitation of the ward enhanced.' [Citation.]" (*In re Byron B.* (2004) 119 Cal.App.4th 1013, 1015; see Welf. & Inst. Code, sec. 730, subd. (b).) The discretion granted to juvenile courts with respect to fashioning the conditions of probation is more broad than that permitted in adult court because of the rehabilitative function of the juvenile court. (See *In re Todd L.* (1980) 113 Cal.App.3d 14, 19; *In re Walter P.* (2009) 170 Cal.App.4th 95, 99.) This discretion is not unlimited, however. A condition of probation will not be held invalid unless it "(1) has no relationship to the crime of which the offender was convicted, (2) relates to conduct which is not in itself criminal, and (3) requires or forbids conduct which is not reasonably related to future criminality . . ." (*People v. Lent* (1975) 15 Cal.3d 481, 486; *People v. Dominguez* (1967) 256 Cal.App.2d 623, 627-628; *Byron B., supra,* at p. 1016.) As in adult court, juvenile probation conditions "must be sufficiently precise for the probationer to know what is required . . . and for the court to determine whether the condition has been violated." (*Sheena K., supra,* 40 Cal.4th at p. 890; *People v. Reinertson* (1986) 178 Cal.App.3d 320, 324-325.) A condition that is not sufficiently precise should be challenged for vagueness.

A probation condition is subject to the "void for vagueness" doctrine. (*People v. Lopez* (1998) 66 Cal.App.4th 615, 630.) This doctrine does not require "actual notice" but only "fair notice" of what conduct is proscribed. (See *Burg v. Municipal Court* (1983) 35 Cal.3d 257, 270, fn. 17.) Nevertheless, the probation condition must be sufficiently precise for the probationer to know what is required of him. (*People v. Hernandez* (1991) 226

Cal.App.3d 1374, 1380; *Reinertson*, *ibid.*) Only reasonable specificity is required. (*People ex. rel. Gallo v. Acuna* (1997) 14 Cal.4th 1090, 1117.) Thus, the condition will not be held void for vagueness if any reasonable and practical construction can be given its language or if its terms may be made reasonably certain by reference to other definable sources. (*Ibid*.)

Even within this framework, however, conditions that might be considered unreasonable for an adult may be reasonable for juveniles. Juvenile courts may infringe upon constitutional rights by imposing curfew conditions (see *In re Jason J.* (1991) 233 Cal.App.3d 710, 719, disapproved on other grounds in *People v. Welch* (1993) 5 Cal.4th 228, 237 [curfew "after dark" proper probation condition]), or testing for drug or alcohol use even if the offense or the minor's social history does not suggest substance abuse. (*In re Kacy S.* (1998) 68 Cal.App.4th 704.) Other conditions commonly upheld are requirements for attending school or treatment programs (See *In re Colleen S.* (2004) 115 Cal.App.4th 471); driving restrictions (See *In re Michael G.* (1977) 76 Cal.App.3d 872, 875); limits on associating with persons the minor knows are disapproved of by the probation officer (*Sheena K., supra*); prohibitions on gang-related activities, such as staying out of areas known to be places where gangs gather and wearing clothes associated with gang membership (see e.g., *In re Michael D.* (1989) 214 Cal.App.3d 1610, 1616-1617); and refraining from obtaining any tattoos, brands, burns, or voluntary scarring, or obtain any piercing with gang significance. (*In re Antonio C.* (2000) 83 Cal.App.4th 1029.) Gang conditions may be imposed even without actual membership in a particular gang. (*In re*

Laylah K. (1991) 229 Cal.App.3d 1496.) However, a probation condition that imposes limitations on a minor's constitutional rights must still closely tailor those limitations to the purpose of the condition to avoid being invalidated as unconstitutionally overbroad. (*Sheena K., supra,* 40 Cal.4th at p. 890.)

Challenging the conditions of probation in juvenile cases can be quite difficult in light of the wide latitude given juvenile courts in the professed effort to rehabilitate delinquent children. Nevertheless, conditions should always be carefully examined by appellate counsel for possible challenges. Constitutional challenges can generally be raised for the first time on appeal even absent an objection in the juvenile court provided that they present a pure question of law, i.e. a question that does not require scrutiny of individual facts and circumstances but instead requires the review of abstract and generalized legal concepts. (*Sheena K., supra,* 40 Cal.4th at p. 885.)

C. Commitment to the Division of Juvenile Facilities

1. Introduction

Obviously, the most onerous disposition that can be imposed on a youthful offender is commitment to the former California Youth Authority. The California Youth Authority was renamed, effective July 1, 2005, the Division of Juvenile Justice of the Department of Corrections and Rehabilitation (DJJ). (Gov. Code, secs. 12838, subd. (a), 12838.13; see *In re James H.* (2007) 154 Cal.App.4th 1078, 1081, fn. 2.) Commitment to the DJJ used to be considered the very last resort. In 1984, however, Welfare & Institutions Code section 202,

subdivision (b) was amended to place greater emphasis on punishment for rehabilitative purposes and on restrictive commitment as a means of protecting the public safety. (See *In re Eddie M.* (2003) 31 Cal.4th 480, 507; *In re Michael D.* (1987) 188 Cal.App.3d 1392, 1396.) Nevertheless, before a minor may be committed to the DJJ, there must be evidence demonstrating (1) the mental and physical condition and qualifications of the ward are such as to render it probable that he or she will benefit by the treatment provided by DJJ; and (2) that less restrictive alternatives are ineffective or inappropriate. (Welf. & Inst. Code, sec. 734; see, e.g. *In re Teofilio A.* (1989) 210 Cal.App.3d 571, 578.) Because of the amendment to section 202, however, this evidence must be considered together with the new legislative objectives of (1) punishment for the purpose of rehabilitation; and (2) restrictive commitment as a means of protecting the public safety. (*Michael D.,* supra, 188 Cal.App.3d at p. 1396; *In re Lorenza M.* (1989) 212 Cal.App.3d 49, 58.)

2. Length of Commitment

a. Introduction

Appellate counsel should always carefully review the length of commitment to make sure that a minor has not been committed for a greater period of time than is allowable. Errors in the calculation of the maximum term of confinement occur with stunning frequency so this is always a potential area for appellate issues.

b. Determining the Maximum Term of Confinement

Section 726, subdivision (c) states in relevant part that whenever a minor is removed

from the physical custody of his or her parent " . . . the order shall specify that the minor may not be held in physical confinement for a period in excess of the maximum term of imprisonment which could be imposed upon an adult convicted of the offense or offenses which brought or continued the minor under the jurisdiction of the juvenile court." The second paragraph of the statute states that as used in this section and in Welfare & Institutions Code section 731, subdivision (c), "maximum term of imprisonment" means "the longest of the three periods set forth in paragraph (2) of subdivision (a) of Section 1170 of the Penal Code, but without the need to follow the provisions of subdivision (b) of Section 1170 of the Penal Code . . . " Thus, the maximum term of confinement for a felony offense would be the upper term required by the statute governing the particular offense. (*In re James D.* (1981) 116 Cal.App.3d 810.)

In 2003, the Legislature passed Senate Bill No. 459 amending section 731. (Stats. 2003, ch. 4, sec. 1, eff. Apr. 8, 2003, operative Jan. 1, 2004.) The amendment mandated that juvenile courts exercise discretion in the setting of the maximum term of physical confinement based upon the facts and circumstances of the case. The amendment left in place the preexisting requirement that the minor may not be held in physical confinement for a period of time in excess of the maximum period of imprisonment that could be imposed upon an adult, which was defined in section 726, subdivision (c) as the longest of the three possible periods. However, it added a new requirement: "A ward committed to the Division of Juvenile Facilities also may not be held in physical confinement for a period of

time in excess of the maximum term of physical confinement set by the court *based upon the facts and circumstances of the matter or matters that brought or continued the ward under the jurisdiction of the juvenile court*, which may not exceed the maximum period of adult confinement as determined pursuant to this section." (Sec. 731, subd. (c), italics added; see also *In re Carlos E.* (2005) 127 Cal.App.4th 1529, 1538.)

1. Aggregations and Enhancements

Aggregations and enhancements to the maximum term of confinement are made by the juvenile court in the same way as they are made in adult court. They must be pleaded, proved, and calculated by the same method. If the enhancement specifies an upper, middle, and lower term, the maximum term to be included in the court's calculation is the upper term. (*In re George M.* (1993) 14 Cal.App.4th 376, 381-382.) Consecutive terms are calculated in the same way as in adult court (*In re Prentiss C.* (1993) 14 Cal.App.4th 1484, 1488) except that the juvenile court need not state reasons for imposing consecutive terms because it is only a statement of the theoretical maximum term of confinement. (*In re Jesse F.* (1982) 137 Cal.App.3d 164, 168-170.) The court may add one third of the maximum term allowable for misdemeanors, and one third of the midterm for felonies. The juvenile court does not have the discretion to disregard the minor's most recently sustained petition in determining the appropriate disposition. (*In re G.C.* (2007) 157 Cal.App.4th 405, 409.)

The court can aggregate the unused portion of a previous commitment to DJJ to the maximum period of confinement imposed for the current offense. (See *In re Michael B.* (1980) 28 Cal.3d 548, 553-555; *In re Bryant R.* (2003) 112 Cal.App.4th 1230.) However,

appellate counsel should make sure that the district attorney or probation department provided the appropriate notice. (Welf. & Inst. Code, sec. 777, subd. (a); *Michael B.,* supra, 28 Cal.3d at pp. 553-555.)

One of the ways in which calculating the maximum term of confinement in juvenile disposition differs from calculating the maximum possible sentence in adult court is that Penal Code section 654 does not apply if the aggregation of offenses does not increase the theoretical maximum length of a juvenile's confinement. (*In re Robert W.* (1991) 228 Cal.App.3d 32, 34.) Thus, while it does apply to juvenile wardship proceedings with respect to calculating the maximum theoretical term of confinement in cases involving consecutive sentencing, it has no application to determination of juvenile's theoretical maximum length of confinement if periods of confinement for multiple offenses are not aggregated, i.e. where concurrent terms are imposed. (*Michael B., supra*, 28 Cal.3d at p. 556, fn. 3; see *Robert W.*, supra, 228 Cal.App.3d at p. 34.)

2. Custody Credits

Just as in adult court, minors are entitled to credit for time served for any period of incarceration prior to disposition. (*In re Eric J.* (1979) 25 Cal.3d 522, 533-535; *In re John H.* (1992) 3 Cal.App.4th 1109, 1111-1112.) Unlike criminal court, a minor is not entitled to credit for time spent in juvenile hall or other detention facility which was imposed as a condition of probation. (*In re Michael W.* (1980) 102 Cal.App.3d 946, 953-954; *In re Randy J.* (1994) 22 Cal.App.4th 1497, 1504-1506.) Furthermore, minors are entitled to credits only

for time spent in secure facilities. (Welf. & Inst. Code, sec. 726, subd. (c).) Time spent on home arrest or other non-secure residential programs is not credited against a DJJ term. (*Randy J.,* supra, 22 Cal.App.4th at pp. 1504-1506.)

c. Is the Juvenile Court Required to Orally Pronounce the Maximum Term of Confinement and the Facts and Circumstances Considered in Setting That Term?

Penal Code section 1170, subdivision (b) expressly gives the sentencing court discretion to choose one of the three possible terms provided for most felony offenses and specifically requires it to "set forth on the record the reasons for imposing the term selected . . ." Thus, it is clear that prior to the 2004 amendment, the Legislature contemplated that the maximum term of confinement in juvenile cases was to be automatically set as the longest possible term that would be allowed in an adult criminal case, with no discretion to deviate from that term. Obviously, since courts had no discretion to select anything other than the theoretical maximum term, there was no need to compel them to adhere to the requirements of Penal Code section 1170, subdivision (b) mandating a statement of reasons for the term selected. For this reason, section 726, subdivision (c) provided an acceptable way of setting the maximum term of confinement. Since there was no discretion involved, a simple written order stating the maximum term of commitment was sufficient.

SDAP currently has a case pending before the California Supreme Court which presents the issue of whether Welfare & Institutions Code section 726, subdivision (c) requires juvenile courts to make an oral pronouncement on the record of the maximum term

of commitment. (*In re Julian R.*, review granted Feb. 27, 2008, S159282.) Until this case is decided, appellate counsel should argue that such a pronouncement is required by the statute, and that in making that pronouncement juvenile courts must also state the facts and circumstances considered in reaching the maximum term.

There is already some appellate court authority indicating that the statute has been so construed. In *In re Jacob J.* (2005) 130 Cal.App.4th 429, 435, the Third District stated that the plain language of the statute " . . . require[s] the court to set the maximum term of physical confinement based on the facts and circumstances of the matter or matters that brought or continued the minor under the jurisdiction of the juvenile court, so long as the term does not exceed the adult maximum period of imprisonment." Thus, the court concluded that the Legislature had amended the statute for the purpose of effecting a change in the law, since "'[w]hen the Legislature amends a statute, we will not presume lightly that it 'engaged in an idle act.' [Citations.]" (*Ibid.*)

The *Jacob J.* court noted that even assuming the plain meaning of the statutory language did not indicate a requirement that juvenile courts make a statement regarding the facts and circumstances considered, the legislative history did. (*Jacob J., supra,* 130 Cal.App.4th at pp. 436-437.) The court pointed out that the original committee bill analysis stated "This bill would authorize the court to *additionally* set maximum terms of physical confinement in the CYA based upon the facts and circumstances of the matter or matters which brought or continued the minor under the jurisdiction of the juvenile court. This *new*

provision would provide for court consideration of the factors about the offense and the offender's history which would be comparable to those employed now for the triad sentencing of adults, and have those considerations reflected in the CYA confinement term ordered by the court." (*Id.,* at pp. 436-437, citing Sen. Com. on Public Safety, Rep. on Sen. Bill No. 459 (2003-2004) Reg. Sess., italics added.) The use of the words "additionally" and "new provision would provide for" indicated that a change was contemplated by the Legislature. (*Id*., at p. 437.) A later committee report explained that the bill "[a]uthorizes the court to set a maximum term of confinement that is not necessarily the adult term maximum." (*Ibid.,* citing Sen. Rules Com., Off. of Sen. Floor Analyses, 3d reading analysis of Sen. Bill No. 459 (2003-2004 Reg. Sess.) as amended Mar. 17, 2003, p. 3.)

The *Jacob J.* Court was of the opinion that the legislative history left no doubt "that the amendments to section 731 were intended to give the juvenile court discretion to impose less than the adult maximum term of imprisonment when committing a minor to CYA and to require the court to set that term of confinement based on the facts and circumstances of each case. [Citation.]" (*Jacob J., supra,* 130 Cal.App.4th at p. 437.) It went on to state:

> "[g]iven the wording of the statute and its legislative history, where, as here the juvenile court sets the maximum term of physical confinement at CYA at the maximum term of an adult confinement, the record must show the court did so after considering the particular facts and circumstances of the matter before it. We reach this conclusion considering not only the wording of the amendment to the statute which we have discussed, but also the structure of the statute after its amendment. Before the statute was amended, it said the maximum term of physical confinement at CYA could not exceed the maximum period of imprisonment that could be imposed on an adult convicted of the same offense. After its amendment, the statute spoke of a

> second and separate, although perhaps not different, period of physical confinement, that is, confinement set by the court given the particular facts and circumstances of the case under consideration. When the court has stated only the maximum term of confinement that could have been imposed on an adult and is silent as to a maximum term based on the facts of the case, it has not spoken to the second, separate maximum called for by the amended statute. (*Id.,* at p. 438.)

The Court in *Jacob J.* did not reach the issue of precisely what procedure should be followed in setting the discretionarily determined maximum term of confinement, since the issue raised by the minor there was limited to whether the matter should be remanded for the juvenile court to set the maximum period of confinement based on the facts and circumstances of the case. Appellate counsel should argue that the statute should be construed to require an oral statement, particularly given the indications in the legislative history of the 2003 amendment that the intent was to provide juveniles with a scheme for maximum term selection comparable to that afforded adult criminal defendants being sentenced. (See *In re Jacob J., supra,* 130 Cal.App.4th at pp. 436-437, quoting Sen. Com. on Public Safety, Rep. on Sen. Bill No. 459 (2003-2004) Reg. Sess.) To achieve a system comparable to that utilized for adults, the statute must be construed not only to allow juvenile court judges to select a term less than the theoretical maximum, as judges in adult criminal court have the discretion to do, but also to require them to follow the provisions of Penal Code section 1170, subdivision (b) requiring the court to "set forth on the record the reasons for imposing the term selected." Permitting juvenile courts to choose among the three possible terms of imprisonment without requiring them to state the reasons therefor on

the record as is required in criminal court would not result in providing juveniles with a procedure comparable to that employed in sentencing adults. An oral statement of the facts and circumstances considered in determining the maximum period of confinement should be required so that the legislative intent to provide a maximum term selection comparable to adult criminal sentencing is effectuated.

d. The Right to Treatment

Allegedly, the purposes of juvenile court law are treatment and rehabilitation . (Welf. & Inst. Code, sec. 202; *In re Aline D.* (1975) 14 Cal.3d 557, 562.) When it appears to the court, or upon request of the prosecutor or counsel for the minor that a minor may have a serious mental disorder, is seriously emotionally disturbed, or has a developmental disability, the court may order a referral for evaluation. (Welf. & Inst. Code, sect. 711, subd. (a).) If after the evaluation the court determines that the minor meets any of the criteria set forth in section 711, the minor must be referred to a multidisciplinary team for dispositional review and recommendation. (Welf. & Inst. Code, sec. 713, subd. (b).) The end result is that the dispositional order must authorize placement of the minor in the least restrictive setting consistent with the protection of the public and the minor's treatment needs, with the treatment plan approved by the court. Preferential consideration must be given to the return of the minor to the home of his family or guardian. (Welf. & Inst. Code, sec. 713, subd. (e).)

When faced with a case in which the minor appears to be a person described in

Welfare & Institutions Code section 711, appellate counsel should immediately contact trial counsel, the minor, and the minor's parent or guardian in order to determine why the case was not dealt with pursuant to Welfare & Institutions Code sections 711, 712 and 713. For example, a minor, with the approval of counsel, may decline the referral for mental health evaluation at which point the case proceeds as any other juvenile case. (Welf. & Inst. Code, sec. 711, subd. (b).) Appellate counsel should be attentive to the possibility that a mentally ill minor is being placed in DJJ rather than a less restrictive placement where he or she will receive appropriate treatment.

III.

CONCLUSION

The representation of juveniles is becoming more and more important as they are more often being held accountable as if they were adults. Because there is no jury and because juvenile proceedings are quasi-criminal, courts and trial counsel are often less than diligent in following the law as opposed to getting the case disposed of quickly. Because of the increasingly onerous consequences being faced by our youngest clients, it is important that appellate counsel devote adequate time and care to these cases.