

Testimony of E. Michelle Tupper
Board Member, DC Lawyers for Youth
Dickstein Shapiro LLP
Department of Corrections Oversight Hearing before the D.C. Council
October 29, 2007

Members of the Council, good afternoon.

My name is Michelle Tupper. I am an attorney with Dickstein Shapiro and a board member of the recently founded non-profit organization D.C. Lawyers for Youth (www.dcly.org), which consists of alumni of Georgetown University Law Center's Juvenile Justice Clinic. I am here today to encourage the Council to reexamine the process by which D.C. youth end up at D.C. Jail and whether placement at the D.C. Jail serves the interests of the youth and of the communities to which they will return. As residents of the District and lawyers who have worked closely with District youth in many capacities, we urge the Council to adopt a new policy for youth charged as adults, one that takes into account the science now available to us regarding youth behavior, the potential rehabilitation of juveniles, and the need to examine each case on its own individual merits.

I. CURRENT YOUTH IN D.C. JAIL

A. Two Methods of Transfer

Current statutory law in the District of Columbia provides two means by which juveniles may be charged as adults and detained at the D.C. Jail.

First, under the "judicial transfer" method, certain juveniles over the age of fifteen are charged as adults only after a hearing in which a family court judge determines the child should

face prosecution as an adult.¹ However, we cannot find any recent data indicating that a judicial transfer hearing led to adult charges against the youth now held at the D.C. Jail.

The second method allows the United States Attorney's Office for the District of Columbia to file a complaint directly in the adult criminal system against juveniles over the age of sixteen for certain crimes.² This "direct filing" method places the youth immediately in the custody of the Department of Corrections ("DOC") without any hearing by a judge.

Direct filing gives prosecutors and only prosecutors the unilateral power to divert certain juveniles to the adult system without any hearing whatsoever. Moreover, once charged as an adult, current law does not allow for a reverse waiver hearing before the criminal judge. The result is that the juvenile is treated as an adult from the moment the prosecutor decides to charge him with a particular crime, without any hearing by any judicial officer or any examination of the juvenile being charged, and without any potential for the juvenile to be returned to the family court system. This places discretion entirely in the hands of the prosecutor—the very opposing counsel to the youth and likely an individual who has never spoken with nor evaluated him—without any opportunity for judicial review of the prosecutor's decision.

Once discretion is removed from the judge and handed to the prosecutor it apparently disappears, as research shows that every youth who has been statutorily eligible for adult charges in the past eight years has in fact been charged as an adult. See Appendix A, Campaign for Youth Justice, *A Capital Offense: Youth in D.C.'s Adult Criminal Justice System and Strategies for Reform* (2007) ("Capital Offense") at 10. Applying such a blanket policy defeats the intent

¹ See D.C. Code § 16-2307.

² See D.C. Code § 16-2301(3). The D.C. Court of Appeals has held that § 16-2301(3) should be strictly construed in favor of juvenile treatment. *United States v. Tucker*, 407 A.2d 1067, 1071 (D.C. 1979).

of federal lawmakers by failing to take into consideration any individual needs and prospects for rehabilitation of youthful offenders.

Furthermore, the distinctions in those charges are often a simple matter of wording, as our amicus brief explains in the case of Palacio v. United States, which is currently on appeal before the D.C. Court of Appeals. See Appendix B, Brief of D.C. Lawyers for Youth as Amicus Curiae Supporting Appellant, Palacio v. United States, No. 98-CF-1871 (D.C. Sept. 18, 2007). In that case, the substitution of one charge for another closely related charge, chosen by the prosecutor, resulted in a minor's diversion to the adult criminal system without any judicial review. The youth ultimately was not convicted of the crime that resulted in his diversion to the adult system, but of a lesser included crime that could have and should have been heard by the Family Division.

B. Difference in Detention by Juvenile and Adult Systems

Juveniles charged as juveniles in D.C. who require secure detention enter the custody of the Department of Youth and Rehabilitation Services ("DYRS"), which holds them at the Youth Services Center in D.C. There, they receive a range of services, including academic programs provided by D.C. Public Schools, 24-hour onsite health and medical services provided by contracted medical staff, counseling and other extensive mental health care provided by the D.C. Department of Mental Health. If a charged juvenile is then found "involved" and requires commitment to the District's custody following conviction, DYRS places the child at Oak Hill Youth Center in nearby Laurel, Maryland, which is currently benefiting from major reform. There, convicted juveniles receive academic services through the Oak Hill Academy, operated by D.C. Public Schools, and the University of the District of Columbia provides pre-vocational and vocational programs. Importantly, youth who are not yet found involved are housed

separately from those whose cases have already been adjudicated, highlighting the recognition of a presumption of innocence and a policy of not wanting to associate those not yet adjudicated delinquent with those who have been labeled as such.

Youth charged as adults, on the other hand, face a far different situation when detained at the D.C. Jail, which is simply not equipped to provide anything resembling the services provided to youth in the juvenile system, nor is the facility designed to provide juveniles with recreational or programmatic space.

Juveniles charged as adults and detained in adult facilities are much more vulnerable to abuse, sexual assault, suicide, and death. For this reason, federal law requires the segregation of juveniles from the adult population.³ The D.C. Jail, however, is not equipped for the juvenile population. Though the boys are housed in a separate wing, apart from the adults, the facility cannot accommodate the special needs of the juvenile population there. A recent visit to the D.C. Jail revealed boys in administrative segregation or protective custody on lock down for as many as 23.5 hours a day, during which time they generally just slept in their cells. Girls do not have a separate wing. See Appendix A, *Capital Offense* at 8. The Washington Post recently reported that one female charged as an adult had been in D.C. Jail since August of 2006 and forced to spend 23.5 hours alone locked in her cell. See Appendix A, *Capital Offense* at 8.

Unlike juveniles in family court, once adult charges are brought, pre-trial youth are housed together with convicted youth at the D.C. Jail, even though many of those charged will never be convicted. Moreover, pre-trial youth often languish in the D.C. Jail for months – three months, on average, as reported by recent research. See Appendix A, *Capital Offense* at 10.

³ See 18 U.S.C. § 5039.

Most importantly, there is very little programming, educational services, or treatment at the D.C. Jail for this population of youth who are most in need of it. There is no indication that these teenagers receive any sort of regular education while detained at the D.C. Jail, nor are any mental health services available. You know of one program, Free Minds, and its success for the youth the book club is able to serve. But space limitations prevent Free Minds from hosting more than a dozen or so youth each week. This is no replacement for regular education.

Thus, the youth charged with the most serious crimes in the District and those most in need of guidance receive the least amount of services available in this city—and then the city returns them to their community, after months of spending hours alone in their cells, and expects them to somehow re-integrate into society in a productive way. The current system sets these kids up for failure before they ever return home, and their communities suffer for it along with the youth.

And the numbers of youth in this situation are staggering. Just two years ago, D.C. Jail housed approximately a dozen youth charged as adults. As of May of this year, that number has nearly quadrupled, with 42 youth at the D.C. Jail. See Appendix A, *Capital Offense* at 10. Only 9 of those youth were reported to be receiving any kind of education, let alone any sort of substance abuse counseling, mental health treatment, or vocational training. And already in 2007, the population of youth held at D.C. Jail is generally two to three times the size held there in 2006, despite data from the Metropolitan Police Department (“MPD”) that juvenile crime has dropped in 2007.⁴ This density of youth in the D.C. Jail without any kind of regular education or

⁴ According to an analysis by the Justice Policy Institute of data provided by the MPD, juvenile arrests for robbery from January to September 2007 are down 17.1 percent from the same time in 2006, and juvenile arrests for homicides are down from 6 in 2006 to 4 in 2007. Juveniles made up only 6.8 percent of all D.C. arrests from January to September 2007. For a national perspective, see the Office of Juvenile Justice and Delinquency Prevention’s 2006 National Report, which asserts that the “juvenile violent crime arrest rate is at its lowest level in a

other services is damaging to themselves, threatens the community to which they will eventually return, and inevitably strains the DOC charged with their custody.

II. RECOMMENDATIONS

The absence of programs and services for youth at the D.C. Jail means the child will return to the community without education, without job training, and without mental health treatment, yet with increased anger and apathy and the stigma of adult incarceration. It is no wonder to us, then, that the recidivism rate for juveniles tried as adults is high. This is especially troubling in light of extensive research that youth are amenable to rehabilitation – a fact largely unknown to lawmakers at the time current laws were enacted. The treatment of a youth as an adult by the criminal justice system does not change the psychology of that juvenile. We now know the effectiveness of rehabilitation for juveniles and we owe it to our youth and to the communities in which the youth will live as adults to ensure that children charged with crime are provided with the opportunity to become a productive part of our society. Research by the National Council on Crime and Delinquency (“NCCD”) further shows that the public strongly believes that rehabilitative services will help reduce crime, and the majority do not believe children under eighteen should be kept in adult facilities at all. See Appendix C, Attitudes of U.S. Voters toward Youth Crime and the Justice System (“NCCD Report”. Writing off our juveniles in adult detention and failing to provide services to them that are known to work is a grave disservice to our entire community.

To that end, we offer suggestions for the Council to consider as it addresses this crucial issue.

generation. The juvenile violent crime arrest rate in 2003 was below the levels of the 1980s.” Available online at <http://ojjdp.ncjrs.gov/ojstatbb/nr2006/index.html>.

First, all youth to be charged as adults first need a hearing before a family court judge to determine his or her potential for rehabilitation. That decision must be made by a trained judicial officer and neutral party – not a biased prosecutor.

Second, reverse waiver must become an option for youth in the adult system so that a criminal judge is empowered to return a child to receive appropriate rehabilitative services if the judge finds the adult criminal system is the wrong place for that child.⁵

Third, end the pre-trial detention of youth in the D.C. Jail. The research we provide you with today includes examples from other major metropolitan areas, including Los Angeles, where youth charged as adults are nonetheless housed in juvenile facilities, apart from the population charged as juveniles.

Fourth, end the detention of convicted youth at the D.C. Jail. With reforms under way at Oak Hill, now is the time to explore this option and encourage the Bureau of Prisons to contract with DYRS and provide a separate place for youth charged as adults to have the opportunity to complete an education and receive other basic services appropriate for their age group.

Finally, data needs to be collected and analyzed on an ongoing basis for youth tried and sentenced as adults.

The current process of charging youth as adults without judicial review and then detaining them without providing necessary services has eliminated any possible rehabilitation for many District teenagers – rehabilitation we have come to know works since these laws were passed. Instead, the system sends these youth back to their communities in a significantly worse position than at the time of their arrest. Investing in programs and legal reforms now will save

⁵ Public opinion supports this recommendation, as NCCD research shows the vast majority of the public (72%) believes that the decision to try a child in adult court should be made by a juvenile court judge. See Appendix C, NCCD Report.

tax dollars in the long run and will serve the youth population, the Department of Corrections, and the public, which greatly supports these changes and to which these young people will return.

We at DCLY, as a group of lawyers from all over the District with expertise in juveniles issues, are willing to engage in any further discussion on this important issue facing our city. If anyone on the Council or your staff has any additional questions or seeks any additional input, I or another member from our group will be happy to address any questions of the Council or be of additional service. Please feel free to contact me at tupperm@dclly.org or 202-420-3292. Thank you for your time.