Mail Message

Reply

Mail

From: Judge Larry Steele Thursday - January 31, 2008 11:47 AM
To: Carol Verdoia
Subject: Rule 25

Just for fun - I had three different delinquency cases this morning, ages 15-17, where the minor did not understand what a "trial" was and I had to paint the picture.

If things go well for me, I will be on time at our meeting. If not, I would like to preserve the ability to accept an Alford plea and I believe the majority agrees. The degree to which a minor understands Alford, elements, and other rights has to be more relaxed than with an adult. Does this 12 year old have a reasonable understanding of what I am talking about? We also receive comfort in the parent understanding what we are talking about. It would be nice to have some language in the rule that characterizes the difference with juveniles, but I don't know if we could agree on it.

With Alford we look for facts that would support a finding of guilty if the Def went to trial. I have also seen courts go further and accept pleas with facts to support the charged offense, but no facts to support the accepted plea. A somewhat humorous example I have seen, in a jurisdiction with no public urination ordinance, the State charges indecent exposure. To avoid an ugly record, the defendant prefers a littering charge (even though the facts would not meet the elements of littering.) It is argued to be better for def to accept the latter. I would like to hear what the group thinks on accepting pleas to a diff crime, but a better deal. In re-reading Alford, it appears to have language that would support this, but I do not see similar language in our rules.

It will be a fun discussion with our group. Good luck. Thank you.

- Dates
- one pet. form
- 1 per child

cal 2/13

Send out
note of next meeting
& reserve a room

11:22
11:40

MEMORANDUM

TO: Carol/Katie/Juvenile Rules Committee
FROM: Paul Wake
SUBJECT: February Meeting
DATE: February 1, 2008

In the event that snow prevents me from getting to Salt Lake, here are my thoughts about Rule 25. I'm dashing this off to send this up to Katie in case I get snowbound. If this whole memo is too boring to wade through, the second and fifth paragraphs have the highest ratio of productive comments to rants.

As I recall, when we first started to talk about Rule 25 months ago we were going to consider whether to expressly state when minors can withdraw admissions. *In re. K.M.* got us bogged down in a different direction, but the question of withdrawing admissions is still unresolved. I don't know whether that's something we want to spend time on, and I don't know what the correct direction is to go if we do spend time on it, but I offer the attached sheet as a possible point at which to begin discussions. It's a modification of the Code of Criminal Procedure standard, reworked with juvenile court language. I don't know whether this possible (g)(2) revision is too narrow for our tastes.

Regarding what we started last time, dealing with bringing Rule 25 in line with *In re. K.M.*, I think it's no secret that I dislike *In re. K.M.* The Supreme Court knows kids can't contract, vote, etc., but it acts as if it wants them to be as competent as adults. That's nuts. If the Court is going to argue that kids should be as competent as adults, then there's no point to having a juvenile court system for delinquency—we should treat everyone as the adults the Constitution (which constitution?) supposedly says they are. But if kids are kids, we shouldn't apply adult developmental standards to them. In my opinion the Court should stop dithering, and just say that kids don't have to effectively meet an adult competency standard before we can try to fix them. Certainly someone should understand the charges in any given case, but that person should be a parent or guardian if the kid isn't grown up enough to understand. Of course, that isn't possible now. In my view, by refusing to deal with the underlying issue the Court has put us in an untenable position.

As I've said, I don't believe in dealing with this mess by incorporating Rule 11 wholesale, because we would inevitably drag along a good deal of very cumbersome Rule 11 case law that would bog down juvenile court proceedings. The only reasons I can see to incorporate Rule 11 wholesale would be because one believes kids are adults (in which case we should scrap the system) or because one is a defense attorney who knows that under Rule 11 case law if one finds a single hypertechnical flaw in a plea colloquy, one can overturn an adjudication

(and I don't care to give defense attorneys additional tricks that do nothing to actually help a child mature responsibly). It would be better simply to adjust Rule 25 as necessary. If it were up to me, I'd just insert into the middle of 25(c)(3) "and the minor, or the minor's parent or guardian on behalf of the minor, has knowingly waived" and insert into (c)(5) "that there is a factual basis for the plea and the minor, or the minor's parent or guardian on behalf of the minor, understand the nature and elements of the offense; and" but I'm guessing that won't fly with the committee or the Court.

As near as I can tell, Rule 25 already has most of the requisite rights in it. It didn't have a nature and elements provision, but I think we added one last time. What I noticed it still doesn't have that it might be good to discuss are: the word "speedy" before "trial," an express statement about presumption of innocence, something about a limited right to appeal, and (mentioned on page 1 of this memo) something about time limits for withdrawing a plea. **I would make the following changes to Rule 25, and I think these are things the committee and the Court can agree on (although this certainly isn't the only way to do it): in (c)(3), change "the right to trial" to "the right to a speedy trial with a presumption of innocence" and also deal with the issue I mentioned in paragraph two above.**

Regarding the whole quasi-Alford plea question, it seems like 25(d) allows that sort of thing, and should stay. I don't want the system getting so hidebound that I can't offer a plea agreement that's better for a kid that what she's actually charged with (what she actually did). Maybe we should just do an advisory committee note?

Ms. Anderson indicated that the base budget totals $87,505,100. She reviewed the statewide ongoing adjustments, which include a 3.0% cost of living adjustment and a market comparability adjustment. She indicate that as part of their ongoing adjustments, they are proposing that they contract for Youth Services in Tooele. If JJS were to receive the funds needed for this, it would not include residential services. The community provider increase is approximately 5%. JJS is also requesting a one-time adjustment of $300,000 for an early intervention pilot program, which would be put towards creating another State Supervision program.

Ms. Anderson then went over a chart showing the time to juvenile convictions post State Supervision divided by program. Judge Nolan stated that there are long waiting lists for youth entering the State Supervision programs.

VIII. Old/New Business: (All)

The judges discussed their presentation to the Judicial Council. The Board discussed the need for additional law clerks.

Maile Verbica indicated that on December 4, 2007, the Utah Supreme Court issued its decision in *In re K.M.*, reversing the Utah Court of Appeals. In its decision, the Supreme Court concluded that Rule 25 is constitutionally deficient because it does not require that a Juvenile Court judge determine whether the juvenile understands the nature and elements of the crime to which he or she is admitting in a plea. Ms. Verbica indicated that the case really limits the way the Juvenile Court can accept admissions. Instead of simply advising the minor of his or her rights, the judge must insure that the minor fully understands the nature and elements of the offense. The Board had a discussion and questioned whether a youth is capable of fully understanding, and how a judge would be able to know the comprehension level of a youth in the matter of a few minutes.

Ms. Gregory indicated that the Utah Rules of Juvenile Procedure (URJP) committee will be meeting on February 1st and is looking into this issue. She stated that she will come back to the Board next month to review the committee's recommendations.

Adjourn

MEMORANDUM

To: Ray Wahl, Juvenile Court Administrator; Board of Juvenile Court Judges

From: Maile Verbica, Law Clerk

Date: January 9, 2008

RE: Admissions under *K.M.*

ISSUE: Whether, under *K.M.*, a juvenile court can accept an admission from a minor who is not mentally capable of understanding the nature of his or her admission, either because of age or lack of mental capacity, when it appears to be in the minor's best interest.

BRIEF ANSWER: Probably not, absent some change in caselaw, rule, or statute. *K.M.*'s categorical mandate is difficult to escape. Yet, as a due process issue, it extends only to deprivations. There may be a method by which admissions that are not fully knowing and voluntary could be accepted, if they were accepted solely for the purpose of extending services.

ANALYSIS: At issue is whether a juvenile court may accept an admission in order to benefit a minor who lacks a full comprehension of the nature and elements of the offense committed. Arguably, there is a fundamental difference in whether a court uses a minor's admission to impose punitive measures, or whether it uses the minor's admission solely for treatment purposes. This memorandum will discuss the *K.M.* admission rule, the desirability of entering admissions, capability versus culpability, and the feasibility of a statute or rule that would allow juvenile courts to accept admissions from minors who are not capable of fully comprehending the nature and elements of the offense, for the sole purpose of extending services.

K.M. rule. The Juvenile Court Act of 1996 requires the juvenile court to resolve matters "consistent with applicable constitutional and statutory requirements of due process." Utah Code Ann. § 78-3a-102(4) (2007). The Utah Supreme Court recently announced that, when accepting an admission, "due process requires a juvenile court judge to ensure that a juvenile understand the nature and elements of the crime." In re K.M., 2007 UT 93, ¶ 20. The court explained that in order for a plea to be knowing and voluntary, the minor must understand how the law relates to the facts of the offense. *Id.* at ¶ 22. Otherwise, the court "may not accept [the] plea," and the case must go to trial, or be dismissed. Utah R. Juv. P. Rules 25(c), 44(c).

The court previously adopted the "totality of the circumstances" test for determining the voluntariness of a minor's confession. State v. Hunt, 607 P.2d 297, 300 (Utah 1980). In *K.M.*, the court cited many of the same factors used in that test for determining whether an admission is voluntary:

> The wide spectrum of ages, educational attainment, developmental maturity, whether the child has cognitive disabilities, and the child's experience with the legal system contribute to making difficult the necessary work of seeing to it that a juvenile *fully comprehend* the nature and elements of the offenses before her admitted culpability is formally acknowledged.

In re K.M., 2007 UT 93, ¶ 30 (emphasis added); *see* State v. Bybee, 2000 UT 43, ¶ 17, 1 P.3d 1087 (*citing* Hunt, 607 P.2d at 300) (listing "totality of the circumstances" factors including age, intelligence, education, and experience).

The *K.M.* court placed responsibility squarely on the shoulders of the juvenile court "to ensure that a juvenile understand the nature and elements of the crime," and declared that any failure to do so offends due process. *Id.* at ¶ 25. The court expressed confidence that juvenile court judges could "see[] to it that a juvenile fully comprehend the nature and elements of the offense." *Id.* at ¶ 30. This suggests that the court did not anticipate a battle of experts over a minor's comprehension level, but believed that an adequate colloquy would normally suffice.[1] *See id.*

The *K.M.* court cited as the case's central dilemma the question: "If a juvenile is too young to enter into a legally binding contract to purchase a set of tires, how can that same juvenile validly waive rights and enter into a legally binding plea agreement?" In re K.M., 2007 UT 93, ¶ 12 (*citing* In re K.M., 2006 UT App 74, ¶ 30 n.1, 136 P.3d 1230 (Orme, J., dissenting)). The court failed to answer that question, but simply held that if the juvenile's admission is not knowing and voluntary, it is invalid. *Id.* at ¶¶ 15, 20. This, unfortunately, deprives some minors – especially the most vulnerable – of the benefit of the bargain in a plea agreement situation, or other benefits of pleading guilty, such as accepting responsibility and avoiding trial.

Desirability of plea bargains. Concurring in the result, Justice Wilkins pointed out that even though some minors cannot fully understand the nature and elements of their offenses, "it may be very much in their best interest to agree to a reduced charge." In re K.M., 2007 UT 93, ¶ 48

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[1] The court discussed amending rule 25 of the Utah Rules of Juvenile Procedure to ensure an adequate colloquy. In re K.M., 2007 UT 93, ¶ 30 n.4. Although the stated "purpose of this rule is to require that the parties be advised of their rights," Utah R. Juv. P. Rule 25 Advisory Committee Note, the *K.M.* court arguably expanded that purpose to include requiring juvenile courts to ensure that the parties fully comprehend their rights, *see* In re K.M., 2007 UT 93, ¶ 30 (describing the "necessary work of seeing to it that a juvenile fully comprehend that nature and elements of the offenses before her admitted culpability is formally acknowledged"). In response, the Advisory Committee on the Rules of Juvenile Procedure has proposed adding the following language to rule 25:

> (c)(5) that the minor understands the nature and elements of the offense to which the plea is entered, that upon trial the prosecution would have the burden of proving each of those elements beyond a reasonable doubt, and that the plea is an admission of all those elements; and
>
> (c)(6) that there is a factual basis for the plea. A factual basis is sufficient if it establishes that the charged offense was actually committed by the minor or, if the minor refuses or is otherwise unable to admit culpability, that the prosecution has sufficient evidence to establish a substantial risk that the offense would be found true.

E-mail from Katie Gregory, Assistant Juvenile Court Administrator, Staff for Supreme Court's Advisory Committee on the Rules of Juvenile Procedure, to Maile Verbica, Juvenile Court Law Clerk (Jan. 7, 2008, 12:44 MST) (on file with author).

(Wilkins, J., concurring). Indeed, because a "plea bargain" is a negotiated agreement that typically benefits both sides, defendants whose plea agreements are not ratified by a court have been known to sue for the right to benefit from their bargain. *See, e.g.,* State v. Montiel, 2005 UT 48, ¶¶ 1, 11, 122 P.3d 571 (*citing* Santobello v. New York, 404 U.S. 257, 262) (arguing, unsuccessfully, that "the trial court abused its discretion in rejecting a pretrial plea agreement"). This is also the reason why Alford pleas are sometimes called best-interest pleas.[2] *See* Stephanos Bibas, *Harmonizing Substantive-Criminal-Law Values and Criminal Procedure: The Case of Alford and Nolo Contendere Pleas*, 88 Cornell L. Rev. 1361, 1372 (2003).

Under the Juvenile Court Act of 1996, the purpose of the juvenile court includes "promot[ing] public safety and individual accountability by the imposition of appropriate sanctions on persons who have committed acts in violation of law; . . . [and to] act in the best interests of the minor in all cases." Utah Code Ann. § 78-3a-102(5)(a), (g); *accord* In re A.C.C., 2002 UT 22, ¶ 23, 44 P.3d 708 (noting that "[t]he primary goal of the juvenile system established in Utah is to act in the child's best interest," and that "[j]uvenile courts are obligated by statute" to further that goal). This argues in favor of allowing juvenile courts to accept an admission, if allowing the minor to admit to an offense is in his best interest. This is consistent with the legislative intent to allow a nonjudicial adjustment "*if the facts are admitted.*" *Id.* § 78-3a-502(2)(c) (emphasis added).

Capability versus culpability. Justice Wilkins declared that "[t]he distinction of greatest importance between adult and juvenile criminal justice process involves the role of adults acting for and on behalf of the accused." In re K.M., 2007 UT 93, ¶ 40 (Wilkins, J., concurring). As it stands, *K.M.* seems to require the child to shoulder full responsibility for decisions made in the case, instead of relying on trusted adults. *Id.* at ¶¶ 30-31. When it requires the juvenile court to reject the admission of any minor incapable of understanding the nature and elements of his offense, *K.M.* requires that minor to face a trial, whether he can handle the trauma and pressure of a trial or not. *See id.* at ¶¶ 20, 25; Utah R. Juv. P. 25(c). Justice Wilkins continued:

> Clearly, some children are incapable, because of their age, mental ability, maturity, social experience, or other reasons, of making sound and responsible decisions. That is a basic distinction between children and adults, and the single most important motivation for the establishment of a separate juvenile court system. . . . [W]e focus our efforts on protecting [children] from the life-long consequences of acts committed when *adult judgment and mature experience are as yet not available to them.*

Id. at ¶¶ 41-42 (Wilkins, J., concurring) (emphasis added).

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[2] Alford pleas are called best interest pleas because they allow a defendant to avoid a trial, and the probability of a worse outcome than that associated with the plea, while still maintaining that he is innocent. Stephanos Bibas, *Harmonizing Substantive-Criminal-Law Values and Criminal Procedure: The Case of Alford and Nolo Contendere Pleas*, 88 Cornell L. Rev. 1361, 1373 (2003) (adding that "nolo contendere pleas avoid estoppel in later civil litigation, while Alford pleas do not [and] defendants who plead nolo contendere simply refuse to admit guilt, while defendants making Alford pleas affirmatively protest their innocence").

A legislative presumption that children under eighteen are not fully capable of adult thought, discipline, and decision-making led to the creation of a juvenile court, in which children's offenses are dealt with civilly, rather than criminally, and free of civil disabilities. Utah Code Ann. §§ 78-3a-102, -117. There is a strong legislative presumption that children under sixteen years of age lack full comprehension of their actions and decisions, such that they cannot be tried as adults under the direct file or serious youth offender provisions, nor can they petition for emancipation. *Id.* §§ 78-3a-601, -602, -1003. There is a firm legislative mandate that children under fourteen are wholly incapable of committing crime. *Id.* §§ 76-2-301, 78-3a-603 (infancy defense and certification statutes).

There seems to be a logical disconnect in requiring children to fully comprehend the nature and elements of an offense before they can benefit from admitting it, yet to consider them incapable of committing it criminally. As one scholar put it, "[t]o the extent that minors are regarded as less than fully capable, they can also be regarded as less than fully culpable." Donald L. Beschle, *The Juvenile Justice Counterrevolution: Responding to Cognitive Dissonance in the Law's View of the Decision-Making Capacity of Minors*, 48 Emory L.J. 65, 67 (1999). And conversely, "[i]f teenagers are accorded autonomy rights on the assumption that they are capable of making choices as well as adults, then perhaps there is little justification for a separate juvenile justice system." *Id.* at 68.

Significantly, while the Legislature provided for an emancipated minor to be able to legally make contracts, deal in real property, sue and be sued, borrow money, and obtain healthcare independently, it prohibited considering the minor an adult for purposes of criminal prosecution, except under the direct file, serious youth offender, and certification statutes. Utah Code Ann. § 78-3a-1005(1)-(2)(a). Other statutes and rules require protections for minors within juvenile proceedings. *See, e.g.,* Utah Code Ann. § 78-3a-112(2) (requiring parents or guardians to appear in court with their children, and requiring employers to grant time off to facilitate such court attendance); § 78-3a-112(5) (allowing appointment of a guardian ad litem, "to protect the interest of a minor," in the absence of a parent or guardian, implying that the purpose in requiring a parent's presence is to protect the interest of the minor); Utah R. Juv. P. 25(e) (prohibiting prosecutors from discussing settlements with unrepresented minors unless a parent or guardian has been notified and invited to attend); Utah R. Juv. P. Rule 26(e) (implying that a minor under fourteen is presumed incapable of "intelligently comprehending and waiving" his right to counsel, and permitting him to do so only if a parent or guardian is present); Utah Code Ann. § 78-3a-115(1)(b) (recognizing parents' role in protecting the interest of their children, by allowing them to request the presence in delinquency proceedings of otherwise unauthorized persons).

Courts have often shared these concerns. *See, e.g.,* In re Gault, 387 U.S. 1, 55 (U.S. 1967) (internal citations omitted) (adopting the opinion that "the statements of adolescents under 18 years of age who are arrested and charged with violations of law are frequently untrustworthy and often distort the truth"); Haley v. Ohio, 332 U.S. 596, 599 (1948) (declaring that "[t]hat which would leave a man cold and unimpressed can overawe and overwhelm a lad in his early teens"); State v. T.G., 800 So. 2d 204, 211 (Fla. 2001) (internal citations and quotation marks omitted) (stating that "[i]t is extremely doubtful that any child of limited experience can possibly

comprehend the importance of counsel"); *but see* In re T.S.V., 607 P.2d 827, 828 (Utah 1980) ("[T]he simple fact of minority, at least at the age of this respondent [seventeen], does not automatically incapacitate him from the legal waiver.").

Utah's statutory requirements that minors be protected by parents or other adults are supported by a large body of literature suggesting that minors lack adult capacity. *See, e.g.,* Roper v. Simmons, 543 U.S. 551, 572-571 (U.S. 2005) (formally recognizing the "diminished culpability" of children under eighteen); D. Brian Woo, *Cudgel or Carrot: How Roper v. Simmons Will Affect Plea Bargaining in the Juvenile System*, 7 Pepp. Disp. Resol. L.J. 475, 499 n.40 (2007) (describing a study which established that psychosocial maturity is incomplete until it plateaus at age nineteen); Elizabeth S. Scott & Thomas Grisso, *Developmental Incompetence, Due Process, and Juvenile Justice Policy*, 83 N.C.L. Rev. 793, 822 (2005) (finding that minors' understanding of trial matters and reasoning differed significantly depending on age, between groups aged eleven to thirteen, fourteen to fifteen, and sixteen to seventeen).

If minors are not considered fully capable, the question becomes whether a "due process protection" can become an overly burdensome due process obligation. *See* In re K.M., 2007 UT 93, ¶ 23 ("We conclude that juveniles who appear in juvenile court are also entitled to benefit from this due process protection."). Indeed, it may require minors to convince the court that they possess an understanding beyond their years, in order to benefit from an admission.

Feasibility of statute or rule allowing less-than-fully knowing and voluntary admissions. The *K.M.* court declared: "We are sensitive to the practical reality that due process takes on an altered form in juvenile courts because of the rehabilitative focus of the juvenile court system." In re K.M., 2007 UT 93, ¶ 23. This practical reality may require a different approach in order to allow less capable minors to benefit from their admissions, and to benefit from the rehabilitative services available through the juvenile court system. The Utah Constitution provides that "[n]o person shall be deprived of life, liberty or property, without due process of law." Utah Const. Art. I, § 7. Similarly, the United States Constitution prohibits any State from "depriv[ing] any person of life, liberty, or property, without due process of law." USCS Const. Amend. 14, § 1. In both constitutions, it is a deprivation of "life, liberty, or property" that triggers the right to due process. Arguably, accepting an admission that will not result in any deprivation cannot violate due process.

This suggests that a method could be established in which admissions that are not fully knowing and voluntary could be accepted for treatment purposes only, in the best interest of the child. Although there seems to be a willingness on the part of the legislature to depart from the best interest standard in the case of "violent and chronic juvenile offenders," there is no indication of a different intent for other juveniles. *See* State ex rel. A.B., 936 P.2d 1091, 1099 n.5 (Utah Ct. App. 1997) (discussing the legislative intent of the serious youth offender statute).

The juvenile court would still have jurisdiction under section 78-3a-104(1)(a), but when it determined that the minor was incapable of a knowing and voluntary admission, the enabling statute or rule would authorize the court to convert the proceeding to a quasi-welfare one,

allowing the court to accept the admission for purposes of extending services to the minor. Under subsection 78-3a-118(2) of the Juvenile Court Act of 1996, no distinction is made between the dispositions available in delinquency cases and those available in child welfare cases. *See* §§ 78-3a-104, -118. This adjudication would need to be distinguished from a delinquency adjudication for purposes of due process, and the available dispositions would have to be limited to those that are treatment-oriented. Such a method would also require distinguishing the adjudication from a delinquency adjudication for purposes of subsection 78-3a-117(4), which allows enhanced offense levels for prior adjudications.[3]

CONCLUSION: Minors who lack the capacity to fully comprehend the nature of their offenses are prevented from effectively admitting them, under *K.M.* Because there are benefits associated with admissions, such as reduced charges, accepting responsibility, and avoiding trials, this seems inconsistent with the legislative mandate for the juvenile court to act in the best interest of the minors. Furthermore, it penalizes the most vulnerable minors – those with limited mental capacity due to their tender age or other factors. Rehabilitative services should be available to minors who, lacking full comprehension, commit acts that would be crimes if committed by an adult, and should not require a trial in every case. This memorandum advocates allowing admissions that are not fully knowing and voluntary, for purposes of extending services only. Since extending services would not involve any deprivation, accepting the admissions for this limited purpose would not violate due process.

[3] " 'Adjudication' means a finding by the court, incorporated in a decree, that the facts alleged in the petition have been proved." Utah Code Ann. § 78-3a-103(1)(b). Notably, this term does not incorporate only delinquency adjudications, so subsection 78-3a-117(4) would be more accurate if it referred to an adjudication under subsection 78-3a-104(1), for violation of a law or ordinance, instead of any "adjudication by a juvenile court that a minor is within its jurisdiction under Section 78-3a-104." Read strictly, subsection 78-3a-117(4) seems to state that an adjudication of juvenile court jurisdiction when a child welfare petition is found true "is considered a conviction" for enhancement purposes. *Id.* § 78-3a-117(4).