Navigating the
Legal Landscape towards
Juvenile Justice Transformation

youth law center

Part 2

A LEGAL MAP OF YOUTH DETENTION IN CALIFORNIA

This tool is part of a series designed to map key legal requirements at various stages in California's juvenile delinquency system. The purpose of these maps is to enable community members and system stakeholders to navigate the legal landscape of juvenile justice and move towards system transformation. For other maps in this series, please visit Youth Law Center's website, ylc.org/navigate-juvenile-justice-law.

This map provides an overview of California law related to the detention of youth in local juvenile hall facilities. With juvenile arrest rates dropping significantly over the past decade, numerous juvenile halls across the state are largely empty.[1] In addition, a growing body of research has documented the harmful impact of incarceration on youth, and the importance of avoiding detention in furtherance of the rehabilitative goals of the juvenile delinquency system.[2] As jurisdictions consider alternatives to their juvenile hall facilities, this tool maps the legal requirements related to the detention of youth. Below is a summary of the key legal guideposts of detention, followed by a detailed explanation of each point of law.[3]

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[1] Jill Tucker and Joaquin Palomino, Vanishing Violence: Juvenile Hall Costs Skyrocket, S.F. CHRONICLE, Apr. 26, 2019, available at: https://www.sfchronicle.com/news/article/Vanishing-Violence-Cost-of-locking-up-a-youth-in-13793488.php.

[2] See e.g., NAT'L JUVENILE DEFENDER CTR., CONFINED WITHOUT CAUSE 5-10 (May 2018), available at: https://njdc.info/wp-content/uploads/2018/05/Confined-Without-Cause.pdf.

[3] Disclaimer: The information provided in this tool does not constitute legal advice. All content is for general informational purposes only.

YOUTH DETENTION LAW
KEY GUIDEPOSTS FOR REFORM:

- There is no legal requirement that youth be detained in *a secure facility*. Rather, the law requires some youth to be *held in custody pending court review.*

- The law states that for a certain subset of cases, a youth must be held in custody until a judge can conduct a detention hearing. This subset includes youth who are 14 years of age or older and taken into custody for the personal use of a firearm in an attempt or commission of a felony or for any offense listed in Welf. & Inst. Code section 707(b).

  - Because of this law, the charges cited by law enforcement at arrest determine whether a youth must be held in custody or may be released.

  - Even for youth whose charges require law enforcement and Probation to hold them in custody, an expedited detention hearing could reduce or eliminate the need for custodial detention.

- For all other youth delivered to Probation's custody, *there is a legal presumption that they should be released.* Probation's decision to detain a youth must be individualized and based on the specific grounds set out in the statute. It also must be justified by actual evidence that overcomes the legal presumption that youth should be released.

  - Any Probation policies and practices that create a presumption in favor of detention or require detention in certain circumstances are out of compliance with this statutory structure.

  - Further, even where Probation has a lawful basis for detention, Probation's decision to detain is not inevitable or legally required. Probation can still decide not to detain and release the youth. Or, if Probation decides to detain, Probation can make use of alternative types of detention, such as Home Supervision or non-secure detention.

- For all detained youth, the court could hold immediate detention hearings to significantly reduce the amount of time that a youth is held in custody. California law requires that detention hearings be held "as soon as possible," but also allows detention hearings to be delayed for several days.

- Because California law allows detention hearings to be conducted several days after arrest, there is tension between state law and the federal constitutional requirement that a court must review an arrest within 48 hours. Under the Fourth Amendment, an arrest must be supported by evidence amounting to "probable cause" to believe that the person committed the offense charged. If a county does not have separate procedures for reviewing probable cause prior to the detention hearing, it is likely that the county is routinely violating this constitutional requirement.

- In many cases where the youth is initially detained, the young person is ultimately ordered by the court to be released back to the community, either home or to another community-based placement. For this reason, counties should consider whether detentions are actually serving their statutory purpose, particularly in light of recent research documenting the harms of detention to youth.

YOUTH DETENTION LAW

The law does not require *detention* of youth.

Nowhere does the California Welfare & Institutions Code require that a youth be held in detention in a secure facility. Instead, the law requires certain youth to be taken into *"custody."*[4] "Custody" generally means maintaining control over a youth's movement, such that he or she is not allowed to leave. Custody does not require that a youth be confined in a facility. In contrast, "detention," as the term is commonly used in the juvenile delinquency system, typically refers to confining a youth in a local secure juvenile hall facility, usually as a result of an arrest for a law violation.

The law specifies that youth who fall in a certain category cannot be released from *custody* until they are brought before a judicial officer for a "detention hearing," where a judge will decide whether the youth will be detained while his or her case is pending. Because of the way that California court systems work, youth in this category are typically booked into a juvenile detention facility and held for several days while they await their detention hearing in court. In this way, there is a *practice* of detaining certain arrested youth in juvenile hall, but the *law does not require* detention in these cases, only custody.

[4] *See* Welf. & Inst. Code §§ 625.3, 626.6, 629.1. Note that some youth may be taken into custody pursuant to court order (for example, as a result of a bench warrant). See Welf. & Inst. Code § 663. This type of custody is not subject to the discretion of law enforcement or Probation. Youth brought into custody pursuant to a court order must have a detention hearing within 48 hours. See Cal. Rules of Court, rule 5.752(e)(1).

The law does require law enforcement and Probation to hold in their custody those youth who are at least 14 years old and charged with certain more serious offenses. These youth cannot be released until a judge reviews their case and makes a decision on detention.

Under the law, law enforcement and Probation are required to hold certain youth in custody until a judge can review their case, depending on the youth's age and type of charge. Specifically, law enforcement[5] and Probation[6] cannot release a child who is:

At least 14 years old, and

Taken into custody for:

- Personal use of a firearm in the attempt or commission of a felony; or
- Any offense listed in Welfare and Institutions Code section 707(b).

Youth in these categories must be delivered by law enforcement to Probation for custody. They must be held in custody by Probation until a judge reviews their case in a hearing,[7] unless a judge finds that the arrest lacked probable cause[8] prior to the detention hearing.

The offenses that require youth to be held in custody are set out in Welfare and Institutions Code section 707(b), which contains a list of 30 categories of offenses. The list includes: murder or attempted murder, robbery, assault by force likely to produce great bodily injury, and carjacking while armed with a dangerous or deadly weapon, among others.[9] Whether an offense falls within this list—and therefore requires judicial review before a youth can be released—depends on the charges identified by law enforcement based on the facts at the time of the arrest.[10] Pursuant to the Fourth Amendment to the U.S. Constitution, law enforcement must have sufficient evidence constituting "probable cause" to believe that the minor has committed the offense charged.[11]

Outside of the categories listed above, Probation may release a youth delivered to its custody, and may detain a youth only when certain statutory requirements have been met, as detailed below in #5.

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[5] Welf. & Inst. Code §§ 625.3, 626.6

[6] Welf. & Inst. Code § 629.1.

[7] Welf. & Inst. Code §§ 629.1, 632.

[8] For an explanation of "probable cause" determinations by judges, see #7 below.

[9] Welf. & Inst. Code § 707(b).

[10] Welf. & Inst. Code § 625.3.

[11] *See Gerstein v. Pugh,* 420 U.S. 103, 111-114 (1975).

Pre-trial detention of youth cannot be used as punishment.

Youth who have been arrested are alleged to have committed a "delinquent act" (i.e. a "criminal offense"), but they are still entitled to a presumption of innocence, just like adults.[12] For this reason, a youth who is detained on the basis of pending charges (i.e. "pre-trial") cannot be detained as punishment. Rather, detention is permissible only when all of the following are true: there is evidence to believe that the minor committed the offense charged (i.e. "probable cause"), there is evidence that returning the minor home would be contrary to his or her welfare, and there is evidence that the detention is justified under the law.[13] Specifically, the law only permits detention for the following reasons: there is urgent necessity to protect the minor or reasonable necessity to protect the person or property of another; the minor is likely to flee the court's jurisdiction; or the minor has violated a previous court order (explained in more detail in #5, below).[14] Unfortunately, many counties have policies that result in youth being detained for reasons outside these three permitted categories.

For any youth delivered by law enforcement to Probation's custody, Probation must determine that there is reason to believe that the minor has committed a delinquent act.

Under state law, when law enforcement transports a minor to Probation's custody, law enforcement must provide Probation with a statement of the facts justifying the arrest.[15] This statement serves as the basis for Probation (and later the court) to determine whether there is sufficient "probable cause" to justify the arrest under the Fourth Amendment to the U.S. Constitution.

As part of its intake duties, Probation then makes an independent determination as to whether there is reason to believe a minor has committed a delinquent act (i.e. "criminal offense").[16] If Probation decides to detain a young person, the case is then referred to the District Attorney for the filing of a petition in delinquency court.[17] Thus, if Probation reviews an arrest and determines that there is not cause to believe that the young person has committed a delinquent act, that young person should be released.

Even when Probation finds that there is sufficient cause to detain a youth,[18] the evidence justifying the arrest still must be reviewed by the court. Under the Fourth Amendment to the U.S. Constitution, if Probation detains a youth, Probation must then request that a judge review the arrest for probable cause, unless the young person will be brought to court for a detention hearing within 48 hours of the arrest.[19] This judicial review of probable cause is described in more detail in #7, below.

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[12] *See Coffin v. United States,* 156 U.S. 432, 460 (1895); In re Winship, 397 U.S. 358, 363 (1970).

[13] *See* Welf. & Inst. Code § 628.

[14] *See id.*

[15] Welf. & Inst. Code §§ 626(d), 626.6.

[16] Welf. & Inst. Code § 652.

[17] Welf. & Inst. Code § 630(a).

[18] Welf. & Inst. Code §§ 630(a), 652.

[19] *See Cnty. of Riverside v. McLaughlin,* 500 U.S. 44, 56 (1991).

Except for the specific categories described in #2 above, for any other youth delivered by law enforcement to Probation's custody, Probation *shall immediately release* the minor unless there is sufficient evidence to justify detention under Welfare & Institutions code section 628.

Even when there is sufficient probable cause to justify the arrest, Probation has a statutory duty to release the youth, unless certain facts are present to justify detention.[20] Probation must *"immediately investigate"* the young person's case, and *"immediately release to a parent, legal guardian, or responsible relative,"* unless it finds evidence to conclude that:

- Continuance in the home is contrary to the minor's welfare, AND
- One of the following conditions exist:
  - Continued detention is a matter of immediate and urgent necessity for the protection of the minor, or reasonable necessity for the protection of the person or property of another; or
  - The minor is likely to flee the jurisdiction of the court; or
  - The minor has violated an order of the juvenile court.[21]

Unless there is actual evidence that these factors are present, Probation must release the minor.[22]

For youth not required by law to be held in custody, Probation has the discretion to release, even when the legal factors for detention are present.

Probation must release a minor from custody unless at least one of the factors under Welfare and Institutions Code section 628 is present, as detailed above in #5. And, even if one or more of these factors are present, Probation may still choose to release the minor. Holding a minor in custody is required only in the limited circumstances described above in #2.

Many Probation departments have policies of always detaining youth in certain categories outside of those described above in #2 (for example, when the youth is already on probation). Some of these policies and practices create a presumption in favor of detention in certain circumstances, and others outright require detention without any assessment of

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[20] Welf. & Inst. Code § 628(a).

[21] Welf. & Inst. Code § 628(a)(1).

[22] Note that if Probation decides to release a minor who is at least 14 years old and has been taken into custody for an attempt or commission of a felony, Probation must require the minor to sign a "Promise to Appear" before Probation at a specified place prior to release. Welf. & Inst. Code § 629(b).

the youth's individual circumstances. These types of departmental policies are not lawful. Probation does not have the authority to categorically require detention, or to consider factors that are not specified by statute. Probation may impose detention only with an individualized assessment. All detention decisions must be made on a case-by-case basis by individual officers, must include the required investigation into a youth's circumstances, and must be based on the criteria outlined in the statute.[23]

When Probation finds that a statutory factor is present permitting a young person to be detained, Probation still has options for release. Probation can release a young person under "Home Supervision" if 24-hour secure detention is not required to protect the minor or the person or property of another, or to ensure that the minor does not flee the jurisdiction of the court.[24] Home Supervision is a program that allows youth who would otherwise be detained in juvenile hall to remain in their homes, under the supervision of a deputy probation officer, probation aide, community worker, or probation volunteer.[25] The purpose of Home Supervision is to make sure that the young person shows up at court hearings and probation appointments, and to make sure that the young person obeys the conditions of release and commits no public offenses.[26] The law requires that, "whenever possible," the young person must be assigned to a deputy probation officer, probation aide, community worker, or volunteer *who resides in the "same community" as the minor.*[27] Probation aides and community workers may be compensated for their Home Supervision services, but do not qualify for peace officer status.[28]

While on Home Supervision, a youth can be required to follow certain conditions of release.[29] These conditions can be related to the protection of the minor or the person or property of another, or to the minor's appearances at court hearings.[30] If Probation releases a young person on Home Supervision, Probation must require the youth to sign a "Promise to Appear" before Probation at a specified time and place.[31] A youth released on "Home Supervision" is entitled to a detention hearing on the same timeline as if he or she were brought into detention.[32]

Probation can also release a young person to a non-secure detention facility.[33] Such facilities may be operated by Probation or through contract with a public or private agency.[34]

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[23] *See* Welf. & Inst. Code § 628(a).

[24] Welf. & Inst. Code § 628.1. This section is best read to require a release on Home Supervision whenever secure detention is not required, except in those limited cases when the home is deemed unsuitable to provide care and supervision to the youth. When this section was drafted, and at the time of the most recent amendments, the provisions of Welfare and Institutions Code section 628 (which are referenced in section 628.1) contained substantially different language aimed at ensuring suitability of a youth's home and caretaker prior to release on Home Supervision. As long as a youth's home is suitable, the law mandates that a youth who is otherwise eligible should be released on Home Supervision.

[25] Welf. & Inst. Code § 840.

[26] Welf. & Inst. Code § 841.

[27] *Id.*

[28] Welf. & Inst. Code § 842.

[29] Welf. & Inst. Code § 628.1.

[30] *Id.* Examples of Home Supervision conditions include curfew and school attendance requirements.

[31] Welf. & Inst. Code § 629(a).

[32] Welf. & Inst. Code § 628.1.

[33] Welf. & Inst. Code § 636.2.

[34] *Id.*

For all youth who are held in detention by Probation, a court must review the facts justifying the arrest within 48 hours, as required under the Fourth Amendment to the U.S. Constitution.

When a youth is detained in juvenile hall, the basis for the arrest must be reviewed by a court to ensure that the arrest complies with the Fourth Amendment. This requirement applies to all youth detentions, including when youth are held under the mandatory categories described above in #2.

In most cases, youth who are brought into detention have been arrested without a warrant for committing an offense. Arrests without a warrant must be reviewed by a court to determine whether there is enough evidence to satisfy the Fourth Amendment requirement that any "seizure" (i.e. "arrest") be justified by "probable cause" to believe the person committed the offense charged.[35] The U.S. Supreme Court has held that court review of an arrest must be "prompt," and take place no later than 48 hours after the arrest.[36] In 1994, the California Supreme Court determined that warrantless arrests in juvenile cases may be reviewed within 72 hours (rather than 48 hours).[37] However, there is reason to doubt that this approach meets federal constitutional standards.[38] The California Supreme Court issued this decision before important advances in research on adolescent development, and before several key U.S. Supreme Court decisions finding that the law requires additional protections for minors as compared to adults.[39] In addition, in 2012, the U.S. Department of Justice concluded that detaining youth for more than 48 hours without a court determination of probable cause is unconstitutional.[40] For these reasons, courts in California should comply with U.S. Supreme Court precedent and conduct a review of probable cause within 48 hours of a minor's arrest, as they do for adults.

It is important to note that, under either the 48-hour rule decided by the U.S. Supreme Court or the 72-hour rule decided by the California Supreme Court, the time period starts from the time of arrest and is not "paused" during weekends or holidays. In other words, judicial review of the basis for the arrest must take place within the time window, even if the arrest occurs over the weekend. As discussed below in #8, detention hearings often occur several days after an initial arrest, particularly for arrests taking place close to weekends or holidays. For this reason, it is frequently necessary for judges to review probable cause *before the detention hearing takes place.* Unfortunately, not all counties have procedures in place for this constitutionally required review.[41]

If, after reviewing the evidence, the court determines that there is not sufficient probable cause for the arrest, the minor must be released. Youth should receive notice and a copy of all probable cause determinations.[42]

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[35] *See Pugh,* 420 U.S. at 124-25.

[36] *See McLaughlin,* 500 U.S. at 56.

[37] *See Alfredo A. v. Superior Court,* 6 Cal. 4th 1212 (1994).

[38] For a full analysis of California's approach, see Sue Burrell, *The 48-Hour Rule and Overdetention in California Juvenile Proceedings*, 20 UC DAVIS J. JUV. L. & POL'Y 1, 35 (2016), *available* at: http://sjlr.law.ucdavis.edu/archives/vol-20-no-1/BURRELL.pdf.

[39] *See* NAT'L JUVENILE DEFENDER CTR., *supra* note 2, at 18-19.

[40] U.S. DEP'T OF JUSTICE, CIVIL RIGHTS DIV., INVESTIGATION OF THE SHELBY COUNTY JUVENILE COURT 17-18 (2012), *available* at: www.justice.gov/sites/default/files/crt/legacy/2012/04/26/shelbycountyjuv_findingsrpt_4-26-12.pdf. *See also,* NAT'L JUVENILE DEFENDER CTR., *supra* note 2, at 4.

[41] *See* Burell, *supra* note 34, at 16-17.

[42] *See* Welf. & Inst. Code § 248.5.

All youth who are held by Probation—whether as required or allowed by law—must be brought *as soon as possible* before a judicial officer for a detention hearing. If the detention hearing is not held within the required timeline, the youth must be released.

After a youth is detained, he or she must be brought before a judge or referee of the juvenile court for a hearing to decide whether the youth should continue to be detained (unless he or she is released before the hearing). *By law, the hearing must happen "as soon as possible."*[43]

Although the law states that the hearing must be held as soon as possible, the typical practice is to delay the hearing until the latest point allowed under the statute. According to the statute, the latest time to hold the hearing is the "next judicial day" after the District Attorney's office files a court petition alleging that the young person has committed a "delinquent act" (i.e. a "criminal offense").[44] Because "next judicial day" means that weekends and holidays do not count, and because the District Attorney's office has 48 hours from arrest to file the delinquency petition, the detention hearing often takes place several days after arrest.[45] It should be noted that the District Attorney *must* file the delinquency petition within 48 hours of arrest, excluding non-court days, or the minor will be released from detention.[46] For certain misdemeanor cases, the time period for the detention hearing is slightly shorter: if a youth is not on probation at the time of a warrantless arrest for a misdemeanor charge (that does not involve violence/threats of violence, and does not involve possession/use of a weapon), the youth must have a detention hearing within 48 hours of arrest, but, again holidays and weekends do not count.[47] If the detention hearing does not occur within the specified timeframes, the child must be released.[48]

The result of this procedure is that youth frequently spend several days in custody without any judicial review of Probation's decision to detain the youth. For example, when a youth is arrested on a Wednesday, a delinquency petition might not be filed by the District Attorney's office until Friday, and a detention hearing might not be held until the following Monday—meaning that the youth would spend five days in custody before judicial review of the detention decision. While state law permits this approach, it is in tension with the Supreme Court's holding, under the Fourth Amendment to the U.S. Constitution, that a judicial officer must make a determination of probable cause on all detentions no later than

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[43] Welf. & Inst. Code § 632(a).

[44] *Id.*

[45] *See id*.

[46] Welf. & Inst. Code § 631(a).

[47] Welf. & Inst. Code § 631(b).

[48] Welf. & Inst. Code § 632(c).

[49] *See Cnty. of Riverside v. McLaughlin,* 500 U.S. 44, 56, 58-59 (1991). In any case where Probation will not bring the minor to court for a hearing within 48 hours of arrest, there is still a requirement under federal constitutional law for a judge to review whether the detention complies with the Fourth Amendment's probable cause standard. *Id.* For a longer discussion of probable cause review, see #7 above.

48 hours after a warrantless arrest.[49] If a county delays its detention hearings until after the District Attorney's office files a delinquency petition, it will need an additional procedure for judicial review of probable cause in order to ensure that this review takes place within the constitutionally required time period.

Courts could expedite detention hearings to ensure that the constitutionally required probable cause review takes place, and also to comply with the statutory requirement that these hearings be held "as soon as possible."[50] Although courts typically delay the detention hearing until after a petition has been filed by the District Attorney's office, this practice is allowed by statute, but not required.[51] Instead, a court could hold an immediate detention hearing, even without a filed delinquency petition, for the sole purpose of reviewing the detention decision.

At the detention hearing, the court has the power to release any youth, regardless of the type of charge. However, before making an order for a youth to be detained, the court must first make certain findings about the need for detention.[52] For more information on the legal requirements for detention hearings, please see Youth Law Center's publication, *Navigating the Legal Landscape towards Juvenile Justice Transformation: A Legal Map of Youth Detention Hearings in California.*

[50] *See* Welf. & Inst. Code § 632.

[51] In fact, the Supreme Court's decision in *McLaughlin* indicated that it is permissible to delay court review of probable cause in order to combine it with other pre-trial proceedings, but only if these proceedings occur within 48 hours of arrest. *Id.*

[52] *See* Welf. & Inst. Code §§ 635-636.

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