STATE OF KANSAS

Office of the Attorney General

1st Floor, State Capitol Bldg. (913) 296-2215 Topeka, Kansas 66612

Curt T. Schneider
Attorney General

May 15, 1978

ATTORNEY GENERAL OPINION NO. 78-166

Mr. Perry Warren
Sherman County Attorney
Sherman County Courthouse
Goodland, Kansas 67735

Re: Juveniles--Procedure--Hearings

Synopsis: The two (2) weeks limitation of K.S.A. 38-817(a) is not tantamount to the Sixth Amendment Constitutional guarantee of a right to a speedy trial afforded the accused in a criminal action.

The two (2) weeks limitation is not jurisdictional in nature but is a procedural guideline for the courts to follow in juvenile matters.

The state is not foreclosed from refiling a juvenile matter which has been dismissed due to the fact that a hearing had not been set within the two (2) weeks limitation of K.S.A. 38-817(a).

* * *

Dear Mr. Warren:

As Sherman County Attorney, you request an opinion regarding the provisions of K.S.A. 1977 Supp. 38-817(a). The pertinent part of said statute provides:

> "Upon the filing of a petition to declare a child to be delinquent, miscreant, wayward, a traffic offender, a truant or dependent and neglected, the district court shall fix the time and place for the hearing thereon. The date set for hearing shall be

> within two (2) weeks following the date of the filing of such petition but the court may for good and sufficient cause grant a continuance when deemed necessary."

You state that prior to hearing the merits of a juvenile case, a motion to dismisss, which was granted by the court, was made by counsel for the juvenile. The basis of such motion was that the hearing was set seventeen (17) days after the filing of the petition, thereby violating the two (2) week limitation of K.S.A. 38-817(a). You state that defense counsel argued that the two (2) week limitation for setting a hearing was a jurisdictional matter and, once a case was dismissed due to the lack of setting said case for hearing within two (2) weeks, then the court lost all jurisdiction, and thus the case could not be refiled. You further state that it was the opinion of defense counsel that the two (2) week limitation was tantamount to the speedy trial provisions in the code of criminal procedure.

Based on the above factual situation, you inquire whether the State is foreclosed from refiling the above juvenile matter, which has been dismissed due to the fact that a hearing had not been set within the two (2) week limitation of K.S.A. 38-817(a).

The answer depends upon whether or not the two (2) weeks limitation of K.S.A. 38-817(a) is tantamount to the speedy trial provisions of the Sixth Amendment of the United States Constitution. In other words, is a juvenile charged under the provisions of the juvenile code entitled to the Constitutional guarantees of a speedy trial. If it be determined that the two (2) weeks limitation is tantamount to the speedy trial provisions, then you would be foreclosed from refiling. If not, you would be allowed to refile.

The Sixth Amendment to the United States Constitution provides in part:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . ." [Emphasis added.]

The Kansas counterpart to the Sixth Amendment is found at Kansas Constitution Bill of Rights § 10 and states in part:

> "In all prosecutions, the accused . . . and a speedy trial by an impartial jury. . . ."

Any analysis of the constitutional rights of juveniles must start with the case of In Re Gault, 387 U.S. 1, 18 L.Ed.2d 527, 87 S. Ct. 1428 (1967), where the U.S. Supreme Court held that in juvenile proceedings minors were entitled to the benefit of certain constitutional rights previously accorded only to adults in criminal proceedings. In Gault, the court held certain Bill of Rights safeguards, including notice, the right to counsel, and the right to confrontation guaranteed by the Sixth Amendment, along with the right against self-incrimination guaranteed by the Fifth Amendment, apply to protect a juvenile accused in a juvenile court on a charge which may lead to commitment to a state institution.

The Gault court was careful to point out that it was only adjudicating "due process" requirements to the particular set of facts of that case. As to other matters, the court expressly declined comment:

> "We do not, in this opinion, consider the impact of these constitutional provisions upon the totality of the relationship of the juvenile and the state." 387 U.S. at 14.

On the issue whether a juvenile should be accorded all the rights given to an adult accused of a crime, the court said:

> "We do not mean by this to indicate that the hearing to be held must conform with all the requirements of a criminal trial or even of the usual administrative hearing; but we do hold that the hearing must measure up to the essentials of due process and fair treatment." 387 U.S. at 30 quoting Kent vs. U.S., 383 U.S. 562 (1965).

In a subsequent 1970 case, the Court was presented the issue whether the "preponderance of the evidence" civil standard of the "beyond reasonable doubt" criminal standard governed the burden of proof in juvenile adjudicatory proceedings. The Court noted:

> "Gault decided that, although the Fourteenth Amendment does not require that the hearing at this stage conform with all requirements of a criminal trial. . . Due Process Clause does require application of 'essentials of due process

> and fair treatment' . . . ." In re Winship, 397 U.S. 358, 359 (1970).

Notwithstanding Gault and Winship, a number of specific safeguards applicable in criminal proceedings have been held not to be required in juvenile proceedings. For example, the Due Process Clause of the Fourteenth Amendment does not assure the right to trial by jury in the adjudicative phase of juvenile delinquency proceedings. McKeiver vs. Pennsylvania, 403 U.S. 528 (1976); M. vs. Superior Court of Shasta County, 4 Cal. 3d 370, 482 P.2d 664 (1971).

In light of the Gault and Winship precedent; the issue is whether the Sixth Amendment guarantee of a speedy trial is applicable to a juvenile charged under the Kansas Juvenile Code.

The U.S. Supreme Court in Smith vs. Hooey, 393 U.S. 374, 89 S. Ct. 575, 21 L.Ed.2d 607 (1969), in commenting on the Sixth Amendment guarantee of a speedy trial, had this to say:

> "The constitutional guarantee of a right to a speedy trial is an important safeguard to prevent undue and oppressive incarceration prior to trial, to minimize anxiety and concern accompanying public accusations and to limit possibilities that long delay will impair the ability of an accused to defend himself."

It is our opinion that the two week limitation of K.S.A. 38-817(a) is not tantamount to the Sixth Amendment constitutional guarantee of a right to a speedy trial. As evidenced by the Smith decision, supra, this constitutional guarantee was intended to protect the accused from undue and oppressive incarceration prior to trial. To argue that a juvenile incarcerated for a period of two weeks is being denied his constitutional right to a speedy trial or that this period of time impairs the juvenile's ability to defend himself is without foundation, in our judgment.

Instead, we are of the opinion that the legislature in enacting K.S.A. 38-817(a) intended the two (2) weeks limitation to be a procedural guideline for the courts to follow and that this guideline is not mandatory but directory, as indicated by the following language in said statute:

> ". . . but the court may for good and sufficient cause grant a continuance when deemed necessary."

In conclusion, it is our opinion that the State is not foreclosed from refiling a juvenile matter which has been dismissed due to the fact that a hearing had not been set within the two (2) weeks limitation of K.S.A. 38-817(a). This limitation is not jurisdictional but a procedural guideline and is not tantamount to the Sixth Amendment constitutional guarantee to a speedy trial afforded the accused in a criminal action.

Yours truly,

Curt Schneider

CURT T. SCHNEIDER
Attorney General

CTS:BEW:jj