

# **LIMITING TRANSFER TO ADULT COURT: ENHANCING JUDICIAL OVERSIGHT**

**Juvenile Sentencing Project  
Quinnipiac University School of Law**

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This memo addresses reforms that aim to keep children in the rehabilitation-focused juvenile justice system, rather than transfer them to adult criminal proceedings. They are: adopting child-focused transfer criteria for judges to consider in making transfer decisions; limiting or eliminating mandatory transfer to adult court for certain crimes and the statutory exclusion of some crimes from juvenile court; restricting prosecutors' unilateral discretion to "direct file" cases in adult court; and expanding reverse waiver opportunities that return children to juvenile court.

## **I. BACKGROUND: JUVENILE OFFENDERS ARE BEST SERVED BY THE JUVENILE JUSTICE SYSTEM**

Recent United States Supreme Court decisions that limit the sentences that may be imposed on children are grounded in children's reduced culpability and greater capacity for reform, an understanding gleaned in large part from developments in psychology and brain science showing "fundamental differences between juvenile and adult minds." *Miller v. Alabama*, 567 U.S. 460, 471-72 (2012) (citing *Graham v. Florida*, 560 U.S. 48, 68 (2010)).

These differences demand that youth be adjudicated in a rehabilitation-focused system that treats children holistically and age appropriately. Ideally—and in contrast to the adult criminal justice system—judges in the juvenile justice system are able to draw from a range of less restrictive, evidence-based options that incorporate both therapeutic and educational programming. In contrast to the adult system, the juvenile justice system may also give children the chance to keep proceedings and records confidential, thus avoiding the collateral consequences and stigma of a permanent criminal record.

The positive effects of adjudicating juveniles in juvenile court are underscored by research showing that transferring youth to the adult system only *increases* recidivism.<sup>1</sup> In one meta-analysis, children transferred to the adult court system from the juvenile system were found to be 34 percent more likely to reoffend.<sup>2</sup> Youth tried as adults are also more likely to reoffend with more serious offenses than youth charged with similar conduct in the juvenile justice system.<sup>3</sup>

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<sup>1</sup> U.S. Dept. of Health and Human Services, Centers for Disease Control and Prevention, *Effects on Violence of Laws and Policies Facilitating the Transfer of Youth from the Juvenile to the Adult Justice System: A Report on Recommendations of the Task Force on Community Preventive Services*, 56 Morbidity and Mortality Weekly RR-9 (Nov. 30, 2007), available at <http://www.cdc.gov/mmwr/pdf/rr/rr5609.pdf>.

<sup>2</sup> *Id.* at 6-7.

<sup>3</sup> *Id.*

Finally, data consistently show that transfer statutes that channel children into the adult criminal justice system—such as mandatory waiver and direct file—disproportionately affect children of color.<sup>4</sup> The staggering nature of this disparity in many states highlights the need for swift legislative action to address transfer provisions.

## II. INCREASING JUDICIAL OVERSIGHT OF THE TRANSFER DECISION AND MINIMIZING PATHWAYS TO ADULT COURT

States have adopted a variety of provisions aimed at minimizing the number of children transferred to adult court and increasing judicial oversight of the transfer decision.<sup>5</sup> We focus here on four types of reform that have gained significant traction in recent years.

### A. Adopting Individualized, Child-Focused Transfer Criteria

Although nearly every state gives judges discretion to transfer juveniles to the adult system, some states have codified detailed lists of individual factors judges must take into account in their transfer decisions. Factors include the age, maturity, and sophistication of the child; the effectiveness of services and dispositional alternatives available in the criminal justice versus the juvenile justice system; any mental, intellectual or physical disabilities of the child; the child's familial and community support network; and the child's history of trauma. The Campaign for Youth Justice provides a helpful overview of recent reforms in its March 2018 report, *Youth Transfer: The Importance of Individualized Transfer Review*.<sup>6</sup> Here are some examples of statutes that include individualized, child-focused criteria for transfer decisions:

- **California** recently eliminated a presumption that juveniles charged with crimes were “unfit” for juvenile court, and now requires judges to consider a robust list of factors in making a transfer decision and to make findings on the record.<sup>7</sup>

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<sup>4</sup> See, e.g., Campaign for Youth Justice & National Association of Social Workers, *The Color of Youth Transferred to the Adult Criminal Justice System: Policy & Practice Recommendations* (2017) (conducting case studies of Oregon, Florida and Missouri). In Florida, for example, data show that although 27.2 percent of boys arrested in 2014 were black, 51.4 percent of boys transferred to adult court were black; meanwhile, white boys made up 28 percent of children arrested and accounted for only 24.4 percent of youth tried in adult court. Human Rights Watch, *Branded for Life: Florida's Prosecution of Children as Adults under its "Direct File" Statute* (2014), <https://www.hrw.org/report/2014/04/10/branded-life/floridas-prosecution-children-adults-under-its-direct-file-statute>. While fewer youth are now transferred overall, the percentage of those transferred who are black continues to rise. See National Juvenile Court Data Archive, *Easy Access to Juvenile Court Statistics: 1985-2016* (2018), available at <https://www.ojjdp.gov/ojstatbb/ezajcs/> (indicating that 1,790 of 3,500 youth, or about 51 percent, of youth transferred in 2016 were African-American, compared with 2,473 of 6,400, or 38.6 percent, in 2005).

<sup>5</sup> For a comprehensive overview of states' recent transfer-related reforms, please see Campaign for Youth Justice, *Raising the Bar: State Trends in Keeping Youth Out of Adult Courts* (2015-2017) (2017), available at [http://www.campaignforyouthjustice.org/images/StateTrends\\_Report\\_FINAL.pdf](http://www.campaignforyouthjustice.org/images/StateTrends_Report_FINAL.pdf).

<sup>6</sup> Campaign for Youth Justice, *Youth Transfer: The Importance of Individualized Transfer Review* (March 2018), available at [http://www.campaignforyouthjustice.org/images/20180314\\_CFYJ\\_Youth\\_Transfer\\_Brief.pdf](http://www.campaignforyouthjustice.org/images/20180314_CFYJ_Youth_Transfer_Brief.pdf).

<sup>7</sup> Proposition 57 (Ca. 2016) (amending Cal. Welf. & Inst. Code § 707), <http://vig.cdn.sos.ca.gov/2016/general/en/pdf/text-proposed-laws.pdf#prop57>. The factors include, *inter alia*, “the minor’s age, maturity, intellectual capacity, and physical, mental, and emotional health at the time of the alleged offense, the minor’s impetuosity or failure to appreciate risks and consequences of criminal behavior, the effect of

- **Missouri**'s transfer statute (known as the "Juvenile Certification Statute") requires judges to consider 10 enumerated factors, including racial disparity in certification, when deciding whether to transfer the case to adult court.<sup>8</sup>
- **New Jersey** recently created an expansive list of factors that prosecutors must consider for the purposes of transferring a juvenile to the adult system,<sup>9</sup> which the New Jersey Supreme Court subsequently interpreted as reviewable by the adult court for abuse of discretion at the waiver hearing.<sup>10</sup>

## **B. Eliminating Mandatory Transfer / Limiting Statutory Exclusion**

Mandatory transfer statutes (also known as mandatory waiver) require automatic transfer of juveniles who commit certain offenses to the adult court system. Over the past decade, many states have limited—or altogether eliminated—mandatory transfer. Recent reforms include:

- **Rhode Island** ended mandatory transfer in 2018.<sup>11</sup>
- **Connecticut** recently amended its transfer laws to carve out certain Class B felonies from those that are mandatorily transferred from juvenile to adult court.<sup>12</sup>
- **Illinois**, in addition to ending mandatory transfer altogether for juveniles under the age of 16, has restricted the range of offenses that trigger automatic prosecution of older juveniles in adult court.<sup>13</sup>

Similarly, many states have curtailed provisions that statutorily exclude youth from the juvenile justice system for certain offenses. For example:

- **Utah** reduced the number of charges that are statutorily excluded from juvenile court jurisdiction.<sup>14</sup>

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familial, adult, or peer pressure on the minor's actions, and the effect of the minor's family and community environment and childhood trauma on the minor's criminal sophistication."

<sup>8</sup> Mo. Rev. Stat. § 211.071(6)(10).

<sup>9</sup> See S2003/A4299, 2014-2015 Leg. Sess. (N.J. 2015) (amending N.J. Stat. Ann. § 2A:4A-26.1), <https://legiscan.com/NJ/text/S2003/id/1260282>.

<sup>10</sup> See *State in Interest of N.H.*, 141 A.3d 1178, 1179 (N. J. 2016) ("At the [waiver] hearing, the trial court must not only find probable cause that the juvenile committed an act covered by the waiver statute; it must also be satisfied that the prosecutor did not abuse his discretion when considering a series of statutory factors to decide whether to seek a waiver.").

<sup>11</sup> SB 2458, 2018 Leg. Sess. (R.I. 2018) (amending R.I. Gen. Laws § 14-1-3 and 14-1-5), <http://webserver.rilin.state.ri.us/BillText/BillText18/SenateText18/S2458.pdf>. The legislation eliminated the remaining mandatory transfer provisions in the state, which required the mandatory transfer of 17-year-olds to adult court for murder, first degree assault, first degree child molestation, and assault with intent to commit murder.

<sup>12</sup> HB 7050, 2015 Leg. Sess. (Conn. 2015) (amending Conn. Gen. Stat. § 46b-127), <https://www.cga.ct.gov/2015/ACT/pa/pdf/2015PA-00183-R00HB-07050-PA.pdf>. In Connecticut, a Class B felony is returned to juvenile court upon motion of the prosecutor.

<sup>13</sup> HB 3718, 99th Gen. Assembly (Ill. 2015) (amending 705 Ill. Comp. Stat. 405/5-130, 5-407, 5-805, and 5-810) <http://www.ilga.gov/legislation/billstatus.asp?DocNum=3718&GAID=13&GA=99&DocTypeID=HB&LegID=89922&SessionID=88>.

<sup>14</sup> SB 167, 2015 Gen. Sess. (Utah 2015) (amending Utah Code § 78A-6-701), <https://le.utah.gov/~2015/bills/static/SB0167.html>.

- **Indiana** has narrowed the number of statutorily excluded offenses and also recently created a mechanism providing that when a youth is acquitted of a statutorily excluded offense (or the offense is dismissed) but the youth has been convicted of another offense, the adult court can withhold judgment and transfer the case back to juvenile court for adjudication.<sup>15</sup>

### C. Restricting “Direct File”

Direct file statutes give prosecutors exclusive discretion over whether to bring charges against juveniles in adult court. Many states have eliminated direct file entirely; others have severely curtailed its use. Currently, only 12 states and D.C. still allow direct file.<sup>16</sup> Recent examples of states limiting the practice include:

- **California** eliminated direct file and now requires that all juvenile offenders have a transfer hearing before a juvenile court judge.<sup>17</sup>
- **Vermont** passed legislation in 2016 to eliminate direct file (although juvenile offenders are excluded from juvenile court for certain crimes).<sup>18</sup>
- Over the past few years, **Nebraska** has severely curtailed direct file, replacing it with a structure that specifies the court in which a case should be filed, depending on the age of the juvenile and the nature of the alleged violation.<sup>19</sup>
- **Colorado** significantly restricted direct file in 2012, narrowing the scope of youth eligible for direct file to 16- and 17-year-olds charged with certain crimes, as well as creating a reverse waiver process as described below.<sup>20</sup>

### D. Expanding “Reverse Waiver” Opportunities

Reverse waiver is a mechanism by which cases in adult court can be moved—or returned—to juvenile court.<sup>21</sup> Reverse waiver statutes provide for judicial review of the decision to prosecute a child as an adult, typically by mandating that the adult court conduct a hearing on

<sup>15</sup> SB 160, 2016 Leg. Sess. (Ind. 2016) (amending Ind. Code § 31-30-1-4), <http://iga.in.gov/legislative/2016/bills/senate/160>.

<sup>16</sup> Campaign for Youth Justice, Fact Sheet: Direct File (February 2018), *available at* [http://www.campaignforyouthjustice.org/images/factsheets/Direct\\_file\\_fact\\_sheet\\_Final\\_1\\_2.pdf](http://www.campaignforyouthjustice.org/images/factsheets/Direct_file_fact_sheet_Final_1_2.pdf). Of the twelve states (along with D.C.) that still allow direct file, four states and D.C. additionally bar a defense challenge or judicial review of the decision. *Id.*

<sup>17</sup> Proposition 57 (Ca. 2016) (amending CA Welfare and Institutions Code § 602), <http://vig.cdn.sos.ca.gov/2016/general/en/pdf/text-proposed-laws.pdf#prop57>.

<sup>18</sup> HB 95, 2016 Leg. Sess. (Vt. 2016) (amending, *inter alia*, 33 V.S.A. §§ 5280 and 5203-04), <https://legislature.vermont.gov/bill/status/2016/H.95>. Vermont made further reforms in 2018. *See supra* note 24 and accompanying text.

<sup>19</sup> LB 464, 2014 Leg. Sess. (Neb. 2014) (amending Neb. Rev. Stat. § 29-1816), <https://nebraskalegislature.gov/FloorDocs/103/PDF/Slip/LB464.pdf>.

<sup>20</sup> HB 12-1271, 2012 Leg. Session (Co. 2012) (amending Colo. Rev. Stat. 19-2-517), [http://www.leg.state.co.us/clics/clics2012a/csl.nsf/fsbillcont3/D16EBFDF7AE1947487257981007E0D2C?open&file=1271\\_enr.pdf](http://www.leg.state.co.us/clics/clics2012a/csl.nsf/fsbillcont3/D16EBFDF7AE1947487257981007E0D2C?open&file=1271_enr.pdf). *See also* Colorado Juvenile Defender Coalition, *New Direct File Law 2012 Legislative Session*, *available at* <http://cjdco.org/wp/wp-content/uploads/2012/06/direct-file-bill-summary-2012.pdf>.

<sup>21</sup> *See generally* Campaign for Youth Justice, Reverse Waiver Factsheet, *available at* <http://www.campaignforyouthjustice.org/images/factsheets/Reverse%20Waiver%20fact%20sheet%20-CED.pdf>.

the issue at the outset, or by allowing a party to move for such a hearing. (In addition, some reverse waiver statutes allow courts to simply transfer children back to juvenile court without a hearing.) Currently, more than half the states have reverse waiver provisions in place.<sup>22</sup> Recent state efforts to expand reverse waiver include:

- **Delaware** provides judges in adult court with the discretion to waive youth back to adult court for certain crimes.<sup>23</sup>
- **Vermont**, which already required waiver back to the juvenile system for many offenses, has created an opportunity for reverse waiver for youth charged with specific serious offenses.<sup>24</sup>
- **Colorado** created a generalized reverse waiver process at the same time as it limited direct file; the adult court must set a reverse transfer hearing upon the child's request and consider the same enumerated factors as in a hearing in juvenile court regarding whether to waive to adult court.<sup>25</sup>

### III. MODEL LEGISLATION

The following are model legislative findings, adapted from recent legislation in Vermont (Sec. 1. 33 V.S.A. § 5280), that could be used to underscore efforts to restrict the numbers of juveniles in adult court:

#### *Juvenile Justice Findings*

*(a) The Legislature finds and declares as public policy that an effective juvenile justice system: protects public safety; connects youths and young adults to age-appropriate services that reduce the risk of reoffense; and shields youths from the adverse impact of a criminal record.*

*(b) In order to accomplish these goals, the system should be based on the implementation of data-driven evidence-based practices that keep youth out of the adult criminal justice system and offer a broad range of alternatives, such that the degree of intervention is commensurate with the low risk of re-offense and strong likelihood of rehabilitation.*

*(c) High-intensity interventions with low-risk offenders not only decrease program effectiveness, but are contrary to the goal of public safety in that they increase the risk of recidivism. An effective youth justice system not only seeks to maintain jurisdiction of offenses committed by juveniles within the juvenile court, but also includes precharge options that keep low-risk offenders out of the criminal justice system altogether.*

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<sup>22</sup> *Id.*, see also Office of Juvenile Justice and Delinquency Prevention, *Statistical Briefing Book: Juvenile Justice System Structure and Process* (2016), available at [https://www.ojjdp.gov/ojstatbb/structure\\_process/qa04115.asp](https://www.ojjdp.gov/ojstatbb/structure_process/qa04115.asp)

<sup>23</sup> HB 9, 2017 Leg. Session (Del. 2017) (amending Del. Code 1338(c)), <https://legis.delaware.gov/BillDetail?LegislationId=25766>.

<sup>24</sup> S 234, 2017-2018 Leg. Session (Vt. 2018) (amending 33 V.S.A. § 5203), <https://legislature.vermont.gov/assets/Documents/2018/Docs/ACTS/ACT201/ACT201%20As%20Enacted.pdf>.

<sup>25</sup> HB 12-1271, 2012 Leg. Session (Co. 2012) (amending Colo. Rev. Stat. § 19-2-517), [http://www.leg.state.co.us/clics/clics2012a/csl.nsf/fsbillcont3/D16EBFDF7AE1947487257981007E0D2C?open&file=1271\\_enr.pdf](http://www.leg.state.co.us/clics/clics2012a/csl.nsf/fsbillcont3/D16EBFDF7AE1947487257981007E0D2C?open&file=1271_enr.pdf).

The following is model legislation that eliminates direct file and automatic transfer practices, following that of California (Cal. Welf. & Inst. Code § 602):

*Any person who is under 18 years of age when he or she violates any law of this state or of the United States or any ordinance of any city or county of this state defining crime other than an ordinance establishing a curfew based solely on age, shall be presumed to be subject to the exclusive jurisdiction of the juvenile court.*

Finally, legislation allowing for discretionary transfer to adult court or reverse waiver could require judges to consider, and make findings regarding, the following factors:

*(a) The age of the juvenile, (b) the maturity of the juvenile, (c) consideration of the juvenile's ability to appreciate the nature and seriousness of his or her conduct, (d) any presence of an intellectual, emotional, or physical disability, (e) the juvenile's exposure to trauma, (f) available family and community supports, (g) the type of treatment such juvenile would most likely be amenable to and its accessibility in the criminal justice system versus the juvenile justice system, (h) relative access to rehabilitative programming, and (i) such other matters as the parties deem relevant to aid in the decision.*