IN THE SUPREME COURT OF THE STATE OF NEVADA

IN THE MATTER OF WILLIAM M., A MINOR, WILLIAM M., Appellant, vs. THE STATE OF NEVADA, Respondent.	No. 48649
IN THE MATTER OF MARQUES B., A MINOR, MARQUES B., Appellant, vs. THE STATE OF NEVADA, Respondent.	No. 48650

BRIEF OF *AMICUS CURIAE* NATIONAL JUVENILE DEFENDER CENTER IN SUPPORT OF APPELLANTS

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I. INTEREST OF *AMICUS CURIAE* NATIONAL JUVENILE DEFENDER CENTER.

In November 2007, seventeen-year-old Marques B. and seventeen-year-old William M. were certified for prosecution in adult criminal court pursuant to Nevada's presumptive certification statute, Nev. Rev. Stat. §§ 62B.390(2) and (3).[1] At the request of this Court, the National Juvenile Defender Center ("NJDC") submits this brief as *amicus curiae* in the appeals of Marques and William.[2] (*See* Order Requesting *Amici Curiae* Participation And Directing Additional Briefing, dated October 18, 2007.)

The NJDC was created to ensure excellence in juvenile defense and promote justice for all children. The NJDC responds to the critical need to build the capacity of the juvenile defense bar in order to improve access to counsel and quality of representation for children in the justice system. The NJDC gives juvenile defense attorneys a more permanent capacity to address important practice and policy issues, improve advocacy skills, build partnerships, exchange information and participate in the national debate over juvenile justice.

The NJDC provides support to public defenders, appointed counsel, child advocates, law school clinical programs and non-profit law centers to ensure quality representation and justice for youth in urban, suburban, rural and tribal areas. It offers a wide range of integrated services to juvenile defenders and advocates. The NJDC has significant experience assisting in cases such as Marques' and William's, where the ability of counsel to adequately represent their child clients has been eviscerated or significantly compromised.

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[1] On October 3, 2006, Marques was charged with conspiracy to commit robbery, two counts of robbery with the use of a deadly weapon, discharging a firearm endangering a person, and possession of a firearm. (*See* Appellant Marques' Brief, Appendix at 10-13.) On October 11, 2006, William was charged with conspiracy to commit robbery, burglary while in possession of a firearm, and robbery while in possession of a deadly weapon. (*See* Appellant William's Brief, Appendix at 40-42.) Marques and William are not co-defendants.

[2] Twenty-three juvenile and youth advocacy groups have joined the NJDC's Brief. Their statements of interest are attached to their Motion for Leave to Join Amicus Brief filed contemporaneously with this Brief and included in the Appendix to this Brief at 1-23.

This Court requested *amici* to address the constitutionality of Sections 62B.390(2) and (3) on several grounds, (*See* Order). The NJDC, along with the other *amici* who have requested permission to sign onto this Brief, will address whether Sections 62B.390 (2) and (3) violate a juvenile's rights to due process and to effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution.[3] *Amici* contend that Sections 62B.390(2) and (3) violate Appellants' rights to effective assistance of counsel because the provisions impermissibly interfere with counsel's representation of the juvenile client.

In addressing these Constitutional violations, *amici* augment their arguments with a discussion of current social science and adolescent development research, which demonstrate the statute's misguided approach to addressing youth crime, as well as the disproportionate effect certification has on communities of color. While *Amici* vehemently oppose any presumptive certification scheme that denies youth fundamental constitutional rights, the challenged provisions also fail to take account of widely accepted research describing the factors that are most closely associated with juvenile delinquency, thus denying youth – and the courts – the opportunity to present and consider evidence most relevant to the propriety of transfer. In stark contrast to the statute's ostensible goals, Sections 62B.390(2) and (3) actually lead to the increased transfer of children like Marques and William to adult criminal court, contribute to the erosion of public safety, increase the likelihood of physical and emotional harm to children certified to adult criminal court and exacerbate racial disparities in the juvenile justice system.

[3] *Amici* incorporate the arguments made by the American Civil Liberties Union in their brief filed on January 31, 2008, as if set forth herein. *Amicus* ACLU addresses the questions of whether the provisions violate a juvenile's constitutional rights under the Sixth Amendment, in violation of his right not to incriminate himself, and under the Due Process Clause of the Fifth and Fourteenth Amendments, in light of the burden-shifting provision.

II. NEVADA'S CERTIFICATION STATUTE VIOLATES A CHILD'S CONSTITUTIONAL RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION.

Nevada's presumptive certification statute contravenes the Constitutional right to effective assistance of counsel extended to children accused of crimes because it impedes counsel's role as the child's legal advisor. The statute has the practical effect of requiring counsel to direct the child facing presumptive certification to admit guilt in order to keep the child in juvenile court and avoid adult criminal proceedings. Rather than providing "the guiding hand of [defense] counsel at every step in the proceedings," the statute ties counsel's hands behind his back.[4] *In re Gault*, 387 U.S. 1, 36 (1967).

A. Nevada's Presumptive Certification Statute Unconstitutionally Interferes With The Child's Right to Effective Assistance of Counsel During Certification Proceedings.

Sections 62B.390(2) and (3) of Nevada's juvenile code dictate the criteria for presumptive certification:

> [U]pon a motion by the district attorney and after a full investigation, the juvenile court shall certify a child for proper criminal proceedings as an adult to any court that would have jurisdiction to try the offense if committed by an adult, if the child:
>
> (a) Is charged with:
>
> (1) A sexual assault involving the use or threatened use of force or violence against the victim; or
>
> (2) An offense or attempted offense involving the use or threatened use of a firearm; and
>
> (b) Was 14 years of age or older at the time the child allegedly committed the offense.

[4] In extending the right to effective assistance of counsel to juveniles, *Gault* drew on long-standing United States Supreme Court precedent emphasizing the importance of a criminal defendant's right to the "guiding hand" of defense counsel. *Ferguson v. Georgia*, 365 U.S. 570, 572 (1961); *Powell v. State*, 287 U.S. 45, 69 (1932).

Nev. Rev. Stat. 62B.390(2). An accused child can overcome this presumption only by proving, by clear and convincing evidence, that the child either is incompetent to stand trial or committed the crime as a result of emotional, behavioral or substance abuse problems:

> The juvenile court shall not certify a child for criminal proceedings as an adult . . . if the juvenile court specifically finds by clear and convincing evidence that:
>
> (a) The child is developmentally or mentally incompetent to understand his situation and the proceedings of the court or to aid his attorney in those proceedings; or
>
> (b) The actions of the child were substantially the result of the substance abuse or emotional or behavioral problems of the child and the substance abuse or emotional or behavioral problems may be appropriately treated through the jurisdiction of the juvenile court.

Nev. Rev. Stat. 62B.390(3).

This Court has interpreted Section 62B.390(3)(b) to require that the child's emotional, behavioral or substance abuse problems "substantially influenced or contributed to the juvenile's criminal actions." *Anthony Lee R. v. State*, 952 P.2d 1, 7-8 (Nev. 1997). Section 62B.390(3), as interpreted by this Court, forces the child facing presumptive certification into a constitutional quandary. Under Section 62B.390(3)(b), the child must forfeit his Fifth Amendment right against self-incrimination by offering a confession linking his actions to the emotional, behavioral or substance abuse problems that caused the alleged crime. Failure to meet this burden forces the child to face trial, conviction and sentencing as an adult. *See id.*

This untenable statutory scheme severely compromises counsel's obligation and ability to zealously represent his client. In order to remain in juvenile court – where the benefits are very significant under Nevada law[5] – counsel must actually help his client implicate himself in the

[5] Conviction and sentencing in adult court bars the child's access to the juvenile court system, which is designed "to promote the establishment, supervision and implementation of preventive programs that are designed to prevent a child from becoming subject to the jurisdiction of the juvenile court" and to return children to full citizenship. *See* Nev. Rev. Stat. 62A.360. The impact of transfer to adult court is devastating: (1) Once certified for adult court, the

illegal behavior at the certification hearing, thereby waiving his Fifth Amendment rights. If the sacrifice of his Fifth Amendment rights fails to rebut presumptive certification, the child loses his only chance to remain in juvenile court.

Such minimalization of defense counsel's role as the child's legal adviser runs afoul of the seminal case *In re Gault*, 387 U.S. 1 (1967). *Gault* held that juveniles facing delinquency proceedings have the right to counsel under the Due Process Clause of the United States Constitution, applied to the states through the Fourteenth Amendment. *Id.* at 41. In extending the right to counsel to children, the *Gault* Court observed that juveniles need "'the guiding hand of counsel at every step in the proceedings against [them].'" *Id.* at 36. The child's right to counsel means the right to effective assistance of counsel – juveniles need legal representation: "to cope with problems of law, to make skilled inquiry into facts, to insist upon regularity of the proceedings, and to ascertain whether he has a defense and to prepare and submit it."[6] *Id.* at 36.

The introduction of defense attorneys to the juvenile court system was meant to infuse the informal juvenile court process with more of the zealously-guarded constitutional protections of adult criminal court and their attendant adversarial tenor. In addition to the right to counsel and the privilege against self-incrimination, *Gault* also extended to youth the right to notice of the

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juvenile court must also certify the child for adult criminal proceedings "for any other related offense arising out of the same facts as the offense for which the child was certified, regardless of the nature of the related offense." Nev. Rev. Stat. 62B.390(4); (2) If convicted in adult court, the child thereafter will be subject to adult court regardless of the nature or severity of any subsequent alleged crime. Nev. Rev. Stat. 62B.330(e); (3) An adult criminal felony conviction can affect eligibility for financial aid for higher education, for the military, and for public housing and benefits; and (4) Certain convicted felons are ineligible for automatic restoration of the right to vote even after release from prison, completion of probation and after honorable discharge from parole. Nev. Rev. Stat. 213.155; 213.157.

[6] The United States Supreme Court grounded the extension of the right to counsel in two Sixth Amendment cases: *Gideon v. Wainwright*, 372 U.S. 335 (1963), and *Powell v. State*, 287 U.S. 45 (1932), that require counsel to be effective. In *Powell*, the United States Supreme Court reversed the convictions of three African American men who were charged and convicted of rape, then a capital crime, because they had not received effective assistance of counsel. Unlike *Gideon*, in which the defendant represented himself, the *Powell* defendants had been assigned attorneys; in fact, the court had assigned every attorney in the courtroom. However, the mere presence of counsel did not amount to the exercise of the right to counsel. Indeed, the defendants in *Powell* were entitled to counsel who would offer zealous representation, and on whose judgment they could rely.

charges against them and the right to confront and cross-examine adverse witnesses. *Gault*, 387 U.S. at 56-57. The United States Supreme Court has similarly extended other critical rights to children in the juvenile justice system: (1) a youth cannot be adjudicated delinquent unless the state proves his guilt beyond a reasonable doubt, *In re Winship*, 397 U.S. 358 (1970); (2) a delinquency proceeding constitutes being placed "in jeopardy" and bars future prosecution for the same allegations. *Breed v. Jones*, 421 U.S. 519 (1975). Most important to the case before this Court, the rights afforded to children facing potential transfer to adult criminal court "must measure up to the essentials of due process and fair treatment." *Kent v. U.S.*, 383 U.S. 541, 562 (1966).

Effective assistance requires that defense counsel have the "opportunity to participate fully and fairly in the adversary fact-finding process." *Herring v. New York*, 422 U.S. 853, 857 (1975). In *Herring*, the Supreme Court emphasized the importance of broadly construing the right to counsel to preclude the government from imposing restrictions on the functions of defense counsel:

> *[T]he right to the assistance of counsel has been understood to mean that there can be no restrictions upon the function of counsel in defending a criminal prosecution* in accord with the traditions of the adversary fact-finding process that has been constitutionalized in the Sixth and Fourteenth Amendments.

Herring, 422 U.S. at 857 (emphasis added). A state violates the right to effective assistance of counsel when it "interferes in certain ways with the ability of counsel to make independent decisions about how to conduct the defense." *Strickland v. Washington*, 466 U.S. 668, 686 (1984) (citing *Geders v. U.S.*, 425 U.S. 80 (1976) (state attempted to bar attorney-client consultation during overnight recess); *Herring*, 422 U.S. at 857-865 (state attempted to bar summation by defense in bench trial); *Brooks v. Tennessee*, 406 U.S. 605, 612-13 (1972) (state

attempted to require defendant to be first defense witness); *Ferguson v. Georgia*, 365 U.S. 570, 593-96 (1961) (state attempted to bar direct examination of defendant)).[7]

Accordingly, the United States Supreme Court consistently has reined in state abuses of power that interfere with the constitutional right to effective assistance of counsel. In *Brooks*, the United States Supreme Court found unconstitutional a Tennessee statute that eliminated defense counsel's right to decide when the accused should take the stand. 406 U.S. at 613. The statute provided that a "defendant desiring to testify shall do so before any other testimony for the defense is heard by the court trying the case." *Id.* at 606. Under the statute, if the defendant did not take the stand at the beginning of the defense, he effectively waived his right to testify.

The United States Supreme Court reasoned that requiring the accused and his counsel to decide whether to testify without the opportunity to evaluate the worth of all other evidence "restricts the defense – particularly counsel – in the planning of its case." *Id.* The Tennessee statute not only violated the defendant's right to remain silent and right to due process, but it also violated the Sixth Amendment right to effective assistance of counsel because it deprived the defendant of the "'guiding hand of counsel' in the timing of this critical element of defense." *Id.* at 611-612. Thus, the statute was unconstitutional because a state may not restrict the decision of

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[7] Prejudice is presumed where a state establishes a procedural mechanism limiting defense counsel's ability to advise a client. *See Geders*, 425 U.S. at 88-92 (where right to effective assistance of counsel was infringed by a state court order barring defendant from overnight consultation with counsel, defendant need not demonstrate, or even claim, prejudice); *see also U.S. v. Green*, 680 F.2d 183 (D.C. Cir. 1982) (defendant need not show prejudice where the government interferes to restrict effective representation). This presumption is a protective measure designed to deter any state action that might hinder effective representation. *Washington v. Strickland*, 693 F.2d 1243, 1259 (5th Cir. 1982) ("Although such limited interference is not inherently prejudicial, a rule of automatic reversal serves to deter the state from engaging in action that poses a direct threat to the defendant's right to effective assistance of counsel."), *rev'd on other grounds by Strickland v. Washington*, 466 U.S. 668 (1984) (citing *U.S. v. Decoster*, 624 F.2d 196, 201 (D.C. Cir. 1976) ("Because these impediments constitute direct state interference with the exercise of a fundamental right, and because they are susceptible to easy correction by prophylactic rules, a categorical approach is appropriate."), *on rehearing different result based on other grounds*, 624 F.2d 196 (1979), *cert. denied*, 444 U.S. 944 (1979)). Undeniably, an accused child suffers prejudice *per se* and need not demonstrate or claim prejudice when the State acts to restrict counsel's representation of that child.

counsel and the accused as to whether and when the accused should take the stand in the course of presenting his defense. *Id.* at 613.

Following the reasoning of *Brooks*, in *Ferguson* the United States Supreme Court found unconstitutional a Georgia law that precluded defense counsel from eliciting the defendant's testimony through direct examination. *Ferguson*, 365 U.S. at 593-96. Again, the state's interference with counsel's ability to advise the client regarding the presentation of his version of the facts was unconstitutional, because the statute deprived the defendant of "'the guiding hand of counsel at every step in the proceedings.'" [8] *Id.* at 572 (quoting *Powell*, 287 U.S. at 69).

Nevada's statute is more egregious than the statutes invalidated in *Brooks* and *Ferguson* because it effectively requires counsel to direct a child facing adult court proceedings to *testify to his guilt before trial even begins*. Not only does it control when and whether the child testifies, it also prescribes the substance of the testimony long before the prosecution has met its obligation to prove guilt beyond a reasonable doubt. In order to remain under juvenile court jurisdiction and eligible for juvenile court sanctions and rehabilitation, the child must admit guilt. Admitting guilt before trial even starts denies the child the fundamental right to present many valid defenses – most importantly, an innocence defense. The statute offers no protection or immunity for the pre-trial admission; it does not restrict its use in any subsequent proceeding.

The statute controverts the now widely understood tenet after *Gault* – that defense attorneys owe their juvenile clients the same duty of loyalty as adult clients. *See,* Kristin Henning, *Loyalty, Paternalism, and Rights: Client Counseling Theory and the Role of Child's*

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[8] Similarly in *Herring v. New York*, the United States Supreme Court found unconstitutional New York's state law that gave the trial judge discretion to deny counsel an opportunity to make a summation of evidence before the court rendered its judgment. 422 U.S. 853 (1975). The Court found that a total denial of counsel's ability to make a closing argument is a denial of the basic right of the accused to present his defense. *Id.* at 859. New York's interference with counsel's ability to fully defend his client through presentation of a closing argument was an impermissible interference with counsel's representation of the defendant and constituted a denial of the defendant's Sixth Amendment guarantees. *See id.* at 865.

Counsel in Delinquency Cases, 81 Notre Dame L. Rev. 245, 255-56 (2005). This duty of loyalty requires counsel to zealously represent the "expressed interests" of their juvenile clients, and not the "best interests" as determined by the attorney. *Id.* By effectively forcing defense counsel to create inculpatory evidence, which the prosecution may use in later proceedings against the child, the statute prevents counsel from representing the "expressed interests" of their client.

Moreover, the required admission effectively nullifies the prosecution's burden to prove guilt beyond a reasonable doubt. Whether the statements are offered under oath at the hearing, or as part of a court-ordered evaluation, such an admission of involvement, in the child's own words, is the most damaging type of evidence against a defendant. *See Arizona v. Fulminante,* 499 U.S. 279, 296 (1991) ("A confession is like no other evidence. Indeed, the defendant's own confession is probably the most probative and damaging evidence that can be admitted against him.").

This breakdown in the adversarial process violates the right to effective assistance of counsel: "The right to the effective assistance of counsel is thus the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing. . . . [I]f the process loses its character as a confrontation between adversaries, the [Sixth Amendment] constitutional guarantee is violated." *U.S. v. Cronic*, 466 U.S. 648, 657 (1984) (adding that "[w]hile a criminal trial is not a game in which the participants are expected to enter the ring with a near match in skills, neither is it a sacrifice of unarmed prisoners to gladiators") (internal quotations omitted).

Nevada's presumptive certification statute is an unconstitutional state interference with effective assistance of counsel because it infringes on children's' privilege against self-incrimination and, in so doing, thrusts the state in the middle of defense counsel's decision-

making process. *See Brooks*, 406 U.S. at 612-13, *Ferguson*, 365 U.S. at 593-96. Defense counsel has no choice but to create evidence of guilt by proffering his client's own incriminating testimony to the juvenile court in a transfer hearing in the hope of remaining in juvenile court. The admission of guilt during the transfer hearing is all the more harmful because such admission does not guarantee juvenile court jurisdiction.

The Nevada statute restricts defense counsel's ability to plan the case and eliminates defense counsel's "opportunity to participate fully and fairly in the adversary fact-finding process." *Brooks*, 406 U.S. at 612. The statute has established a certification proceeding that fails to measure up to the essentials of due process and fair treatment. *See Kent*, 383 U.S. at 562. Thus, Section 62B.390 is a patent violation of a child's constitutional right to effective assistance of counsel. This Court should hold that Section 62B.390 is unconstitutional.

B. Trampling On Constitutional Protections For Children Subject To Transfer Is Improper Because Certification Erodes Public Safety.

The Nevada statute's unconstitutional interference with the child's right to counsel makes it more likely that children will be transferred to adult court, actually eroding public safety. Because the statute requires accused children to implicate themselves in order to prove that they are appropriate candidates for juvenile treatment, innocent children who have been wrongly accused will likely be unsuccessful in meeting the statute's requirement that their actions be linked to behavioral and substance abuses. Thus, innocent children will be transferred to adult criminal court.[9] Children who fail to understand the statute's nexus requirement also will fail to convince a court to keep them in juvenile court custody. Others who fail to make persuasive statements for fear of crippling their chances of success at trial by making an incriminatory admission will fail to meet the requirements of Sections 62B.390(2) and (3). The result is more

[9] For example, in William's case, the judge transferred him because he could not demonstrate a nexus between the mitigating conduct and the alleged crime since he maintained his innocence. *See* William's App. at 82-106.

children transferred to adult court for reasons that the statute could never have intended. If convicted and sentenced in adult court, studies show that these children are more likely to recidivate – sooner, more frequently and with more violent crimes – than those retained in the juvenile justice system.

In 2007, the Centers for Disease Control and Prevention's Task Force on Community Preventive Services reviewed the effects of transfer laws on violent crime and found "insufficient evidence" to determine whether transfer laws are effective in preventing or reducing violence in the general juvenile population. Angela McGowan et al., Center for Disease Control and Prevention, Task Force on Community Preventive Services, *Effects on Violence of Laws and Policies Facilitating the Transfer of Juveniles from the Juvenile Justice System to the Adult Justice System*, 32(4S) Am. J. Preventive Med. S7, S17 (2007), included in Appendix at 38-59. The Task Force reviewed existing studies conducted in geographically diverse localities to determine whether transfer laws and policies have had a deterrent effect (both specific and general) on the perpetration of violent crime. Thus, the Task Force concluded that the findings are inconsistent with respect to one of the primary goals of criminal statutes – general deterrence.

The majority of the studies showed that transferred juveniles had a higher rate of recidivism. The Task Force identified six studies that examine the possibility of specific deterrence. Appendix at 43. To evaluate whether a specific deterrent effect exists, the examination focused on the difference in the rate of recidivism and the reported incidents of harm to those juveniles transferred to adult court as compared to those who remained in juvenile court. Of the six studies, only one found any evidence that transfer deters re-offending. *Id.* at 45. One study found no effect. *Id.* The remaining four studies all found evidence that juveniles certified to criminal court committed more violent crimes, and a larger number of crimes, than

juveniles retained in the juvenile system. *Id.* Based on "strong evidence that juveniles transferred to the adult justice system have greater rates of subsequent violence than juveniles retained in the juvenile justice system," the Task Force concluded that "strengthened transfer policies are harmful for those juveniles who experience transfer," and that "[t]ransferring juveniles to the adult justice system is counterproductive as a strategy for deterring subsequent violence."[10] *Id.* at 46.

Increased recidivism rates by transferred youth should not be a surprise. Because the adult system provides punishment in lieu of rehabilitation, transferred youth in the adult prison system, also called "crime college," necessarily learn recidivist behavior. *See* John Roman, *Putting Juveniles in Adult Jails Doesn't Work*, Washington Examiner, January 5, 2008. Incarcerated juveniles are more likely to "learn social rules and norms that legitimate[sic] domination, exploitation, and retaliation" from adult inmates. Donna Bishop & Charles Frazier, *Consequences of Waiver*, The Changing Borders of Juvenile Justice: Transfer of Adolescents to the Criminal Court at 261-64 (Jeffrey Fagan & Franklin E. Zimring, eds., 2000). Upon release from prison as adults they are less likely to grow into productive, law-abiding members of society.[11] A criminal conviction may also foster recidivism by foreclosing a transferred youth's

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[10] Several other studies show that youth transferred to criminal court re-offend at a higher rate than youths retained in the juvenile justice system. For example, a 1996 study from Florida, where thousands of juveniles are tried in adult courts, showed that transferred youth re-offend at a higher rate and with graver offenses than youths who were retained in the juvenile justice system. Donna Bishop *et al.*, *The Transfer of Juveniles to Adult Criminal Court: Does It Make A Difference?*, 42 Crime & Delinq. 171 (1996); Donna Bishop, *Juvenile Offenders in the Adult Criminal Justice System*, 17 Crime & Just. 81 (2000) (reaffirming results of the 1996 study that recidivism was more likely and more serious for transferred youth). Similar results were found in a comparison of 15- and 16-year olds with identical charges in New York and New Jersey. After release, youths who had been processed in criminal court had higher recidivism rate that those in juvenile court. Simon I. Singer, Jeffrey Fagan, & Akiva Liberman, *The Reproduction of Juvenile Justice in Criminal Court: A Case Study of New York's Juvenile Offender Law*, The Changing Borders of Juvenile Justice: Transfer of Adolescents to the Criminal Court (Jeffrey Fagan & Franklin E. Zimring, eds., 2000).

[11] Additional research concludes that the interests of community are not served by putting juveniles in adult prison. Richard E. Redding, *The Effects of Adjudicating and Sentencing Juveniles as Adults*, 1 Youth Violence and Juvenile Justice 128 (2003); Donna Bishop, et al., *The Transfer of Juveniles to Criminal Court: Reexamining Recidivism Over the Long Term*, 43 Crime & Delinquency 548 (1997).

future opportunities, *e.g.*, eligibility for financial aid, eligibility to enlist in the military and eligibility for public housing and benefits. *Id.* at 260.[12] The transferred child also forgoes the opportunities for treatment available in juvenile system that dramatically reduce recidivism. *See* Affidavit of Marty Beyer, ¶16, Appendix at 35-36.

C. Because Presumptive Certification Provisions May Have Harmful, Long-Lasting Effects On Children, The Need For Effective Assistance Of Counsel Is Essential.

1. The Prosecution of Youth as Adults Ignores the Well-established Developmental Differences Between Juvenile and Adult Offenders Most Recently Relied Upon by the United States Supreme Court in Placing Limitations on Juvenile Sentencing.

Juveniles and adults have developmental differences substantial enough to mandate differential treatment in a myriad of legal contexts. [13] In *Roper v. Simmons*, 543 U.S. 551 (2005), a sentencing case that relied on developmental research to strike down the juvenile death penalty as a violation of the Eighth Amendment's cruel and unusual punishment clause, the United States Supreme Court concluded that "the differences between juvenile and adult offenders are too marked and too well understood to risk allowing a youthful person to receive

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[12] *See also* Michael Pinard, *The Logistical And Ethical Difficulties Of Informing Juveniles About The Collateral Consequences Of Adjudications*, 6 Nev. L.J. 1111 (2006) (describing the need to catalog the range of consequences of juvenile adjudications); Michael Pinard, *Offender Reentry And The Collateral Consequences Of Criminal Convictions: An Introduction*, 30 N.Y.U. Rev. of L. & Soc. Change 585 (2006).

[13] As the growth in the population of youth in the adult system continues largely unabated, understanding the effects of transfer on young offenders is critical. In the early 1990s, concern about rising violent crime led lawmakers nationwide to both narrow the jurisdiction of juvenile court and mandate adult sentences for younger and younger youth. Although juvenile violent crime arrests subsequently plummeted 46% from 1994 to 2005, the effects of these legislative changes have been far-reaching. In 1980, only two juveniles in the U.S. were sentenced to life without parole; by 1996, 152 young people were sent to prison for life for crimes they had committed before they were 18 years old. Amnesty International & Human Rights Watch, *The Rest of Their Lives: Life without Parole for Child Offenders in the United States* at 32 (2005). As of 2005, there were 2,225 juveniles serving life without parole in adult prisons in 38 states. *Id.* at 35. Over half (59%) of juveniles sentenced to life without parole are first-time offenders, and African-American juveniles are ten times more likely to be given a sentence of life without parole. *Id.* at 28, 39. The U.S. is only one of two countries in the world sentencing juveniles to life without parole; the other is Israel (Israel has 7 juveniles serving life without parole and has not issued such a sentence since 2004). *See* Michelle Leighton & Connie de la Vega, University of San Francisco School of Law, *Sentencing Children to Die in Prison* at 2 (2007). Between 1990 and 2004, the number of offenders under 18 in adult jails in the U.S. increased 208%. *Id.* at 6.

the death penalty despite insufficient culpability." *Roper*, 543 U.S. at 572-73. Specifically, the *Roper* Court found that juveniles are less culpable than the average adult offender for three reasons: (1) juveniles lack maturity and responsibility, (2) juveniles are more vulnerable and susceptible to outside influences, particularly negative peer influences, and (3) compared to adults, juveniles are not as well formed in character and personality, and have a much greater potential for rehabilitation.[14] *Id.* at 569-70. Although the United States Supreme Court recognized these distinctive characteristics of adolescence in the context of considering a challenge to the juvenile death penalty, the research findings apply generally to all adolescents under the age of eighteen, not just those facing the possibility of a death sentence. *See Roper*, 543 U.S. 569-70. Nevada's presumptive certification statute does not permit a juvenile court to fully consider a child's developmental differences as mitigation evidence in certification proceedings.[15]

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[14] The United States Supreme Court noted that juveniles of all ages are not as well formed in character and personality as adults. *Roper*, 543 U.S. at 570 (citing Erik Erikson, *Identity: Youth And Crisis* (1968)). The relevance of youth as a mitigating factor "derives from the fact that the signature qualities of youth are transient; as individuals mature, the impetuousness and recklessness that may dominate in younger years can subside." *Id.* (citing *Johnson v. Texas*, 509 U.S 350, 368 (1993)); *see also* Laurence Steinberg & Elizabeth S. Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 Am. Psychologist 1009, 1014 (2003). New research into the structure and function of the teenage brain suggests that significant brain development occurs during adolescence through the late teens and into the early twenties. Mary Beckman, *Crime, Culpability and the Adolescent Brain*, 305 Science 596 (2004). The resulting immaturity in the adolescent brain contributes to the poor decision making capacity of all juveniles. Thomas Grisso, *Double Jeopardy: Adolescent Offenders With Mental Disorders*, University of Chicago Press at 105 (2004). Such research gives a medical and "hard evidence" edge to the information above describing the distinct psychological development of teens. The United States Supreme Court acknowledged that even experts in psychology struggle to differentiate between "transient immaturity" and "irreparable corruption" in juvenile offenders. *Roper*, 543 U.S. at 573. In fact, the vast majority of offenders age out of delinquent behavior and go on to lead productive, law-abiding lives. Alfred Blumstein, Jacqueline Cohen, & David Farrington, *Criminal Career Research: Its Value for Criminology* 26 Criminology 1 (1988); *see also* David Farrington, *Age and Crime?* 7 Crime and Justice: An Annual Review of Research 189 (Michael Tonry & Norval Morris eds., 1986).

[15] Affidavit of Marty Beyer Appendix at 24-37. An expert in research on juvenile offending as well as a practicing clinician, Dr. Beyer states that the immaturity of youth, as well as trauma and/or disabilities that youth may be suffering from are closely associated with delinquent behavior. By limiting the court's consideration of mitigating evidence to "substance abuse or emotional or behavioral problems," the statute falls far short of the mark. Failure to take account specifically of the immaturity of youth – a key component of the *Roper* decision – or their physical or emotional trauma or their educational or mental disabilities leaves the court with an incomplete picture of delinquency and its contributing factors, potentially sweeping many more youth into the adult system than properly

Consistent with the United States Supreme Court's finding that juveniles lack maturity and responsibility, Nevada law recognizes that "the age of 18 is the point where society draws the line for many purposes between childhood and adulthood." *See Roper*, 543 U.S. at 574. For example, individuals younger than eighteen in Nevada cannot vote, Nev. Rev. Stat. 293.485; youths sixteen and seventeen years old must get parental consent to be married, Nev. Rev. Stat. 122.020; youths under twenty one years old may not drink or purchase alcohol, Nev. Rev. Stat. 202.020 and 202.055; and unmarried youths under nineteen years old cannot enter into a binding legal contract. Nev. Rev. Stat. 43-2101, Nev. Rev. Stat. 3-305. Thus, Nevada's presumptive certification statute runs contrary to *Roper* and the bulk of Nevada law.

The cases before this Court also illustrate the *Roper* Court's second finding, that "juveniles are more vulnerable or susceptible to negative influences and outside pressures including peer pressure." *Roper*, 543 U.S. at 569; *see Eddings v. Oklahoma*, 455 U.S. 110, 115 (1982); Steinberg, *Less Guilty by Reason of Adolescence* at 1014. Here, Marques is charged with another juvenile, and William is charged with two other suspects. The issue of peer influence is squarely presented and underscores the need for effective assistance of counsel to consider and present evidence related to peer influence at the certification hearing.

2. Prosecuting Youth as Adults Places Them at Significant Risk of Physical and Emotional Injury.

Young people detained or incarcerated with adults face an increased risk of severe mental health problems that often lead to suicide. Juveniles in the adult system experience greater rates of mental disorders and related problems, such as substance abuse, impulsive aggression, parental depression and substance abuse, and a dysfunctional family setting – factors that are

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belong there. The statute thus utterly fails in its ostensible purpose to establish some rational sorting mechanism for distinguishing among and between youth charged with delinquent acts. By identifying only a fraction of youth most likely to benefit from juvenile court jurisdiction and intervention, the presumptive certification provision disserves both the children and the communities in which they live.

generally believed to contribute to suicidal behavior in the general population. *See* Campaign for Youth Justice, *Jailing Juveniles: The Dangers of Incarcerating Youth in Adult Jails In America* 10 (2007). These problems are exacerbated by the fact that most adult facilities are not equipped to deal with the unique needs of youth, lacking the screening, assessment and treatment tools that would allow staff to identify and address mental health problems in youth. *Id.* at 11.

Although the exact suicide rates of youth held in adult facilities remains incomplete, the CDC has estimated that youth held in adult jails are thirty-six times more likely to commit suicide than their counterparts in juvenile facilities. *See id.* at 10. For every successful suicide among inmates between fifteen and twenty-four years-old, there are 100 to 200 attempted suicides. *Id.* The U.S. Department of Justice's Bureau of Justice Statistics has found that jail inmates under eighteen had the highest suicide rate of all inmates (101 per 100,000 during 2000-2002). *Id.* These statistics do not improve for youth held in adult facilities for even a short period of time. The Bureau of Justice Statistics found that almost a quarter of suicides take place on the day of admission to jail or the following day, and almost half of suicides occur within the first week. *Id.*

In addition to an increased risk of self-harm, youth detained or incarcerated in adult facilities face a heightened probability of suffering rape and physical assault by adult prisoners. In 2005 and 2006, youth under the age of eighteen were the victims in 21% and 13% respectively of all substantiated, reported incidents of inmate sexual violence, particularly stark numbers because youth typically make up only 1% of inmates in adult facilities. *Id.* at 13. Without appropriate or feasible alternatives, corrections staff often react to this increased risk by isolating youth from the general population, further aggravating their mental health issues. *Id.* at 14. In light of these increased risks of suicide and physical harm, it is all the more important for

juveniles facing presumptive certification to have a meaningful right to effective assistance of counsel to challenge the state's case.

3. Because of Well-Established Racial Disparities in the Justice System, the Presumptive Certification Provision at Issue is Likely to Infringe Disproportionately Upon the Constitutional Rights of Youth of Color.

The overrepresentation of youth of color in the justice system across the country has been well documented. Overrepresentation refers to "a situation in which a larger proportion of a particular group is present at various stages within the juvenile justice system . . . than would be expected based on its proportion in the general population." Howard Snyder & Melissa Sickmund, Office of Juvenile Justice and Delinquency Prevention, *Juvenile Offenders and Victims: 2006 National Report* 188 (2006). At each stage of the juvenile justice process, including intake, detention, referral, and disposition, most studies find that youth of color are more likely than their white counterparts to be involved in the system. National Council on Crime and Delinquency, *And Justice for Some: Differential Treatment of Youth of Color in the Justice System* (2007), *available at* http://www.nccd-crc.org/nccd/pubs/2007jan_justice_for_some.pdf; *see also* Amanda Burgess-Proctor, Kendal Holtrop, & Francisco A. Villarruel, Campaign for Youth Justice, *Youth Transferred to Adult Court: Racial Disparities* 2, 7-9 (2006) (summarizing research that suggests that "race does matter" in juvenile justice processing).

Transfer statutes, in particular, disproportionately affect youth of color. Jessica Short & Christy Sharp, *Disproportionate Minority Contact in the Juvenile Justice System* at 7 (2005).[16] Youth of color are more likely to be prosecuted in adult criminal courts than white youth. Burgess-Proctor et al., *supra*, at 9 (noting that, while not many studies on racial disparities in

[16] *See also* Mike Males & Dan Macallair, *The Color of Justice: An Analysis of Juvenile Adult Court Transfers in California* (2000), *available at* http://www.buildingblocksforyouth.org/colorofjustice/coj.html; Jason Ziedenberg, *Drugs and Disparity: The Racial Impact of Illinois' Practice of Transferring Young Drug Offenders to Adult Court* (2001), *available at* http://www.buildingblocksforyouth.org/illinois/illinois.html).

transfer exist, those that have been done have documented overrepresentation at this stage of the process). In the instant case, Marques is African American, and William M. is Hispanic. According to statistics from the Office of Juvenile Justice and Delinquency Prevention ("OJJDP"), between 1985-1995, African American youth were more likely than white youths to be transferred to criminal court across all offenses, age categories and years. *Id.*

Racial disparities are often most pronounced in cases involving drug or gun charges, like the charges in Marques' and William's cases, which may lead to transfer to adult court.[17] In 2003, for example, white youth were 69% of the petitioned drug cases nationwide, but 58% of the transferred drug cases. In contrast, African American youth comprised only 29% of the petitioned drug cases, but 41% of the transferred drug cases. NCCD, *supra*, at 2 (describing this disparity as youth enjoying an 11% "waiver advantage" while African American youth carry a 12% "waiver disadvantage" for drug cases); *see also* Burgess-Proctor et al., *supra*, at 9 (black males charged with drug offenses were substantially more likely to be tried as adults than white counterparts).

Given these disparities, it is not surprising that youth of color are significantly more likely to be incarcerated in adult prisons than white youth. *See* Campaign for Youth Justice, *The Consequences Aren't Minor: The Impact of Trying Youth as Adults and Strategies for Reform* 11 (2007). In fact, approximately three out of four new admissions of children under age eighteen to adult prisons in the United States are children of color. *And Justice for Some* at 34.

Statistics on the demographics of the juvenile justice population in Nevada mirror racial disparities nationwide. At the decision point of detention, for example, youth of color were detained at greater rates than white youth in the state in 2003. To analyze disproportionality,

[17] Section 62B.390(2)(a)(2) places all offenses "involving the use or threatened use of a firearm" in the class of cases that are presumptively certified.

OJJDP measures Disproportionate Minority Contact by creating a "relative rate index," which is used to compare the detention rates for racial and ethnic groups to the rate for whites. A ratio greater than 1.0 for a group of minority youth compared to white youth indicates overrepresentation. In Nevada, the relative rate index for detention was 3.5 for African Americans and 1.2 for Hispanics, suggesting overrepresentation. *Id.* at 23-24. When data is analyzed for youth of color in the aggregate, the statewide detention ratio of youth of color to white youth custody rates was 1.7; the ratio for youth committed in public facilities was 1.5; and the ratio for youth committed in private facilities was 1.2. Howard N. Snyder & Melissa Sickmund, National Center for Juvenile Justice, *Juvenile Offenders and Victims: 2006 National Report* 214 (2006).

Nevada's custody rates also reveal disproportionality for youth of color in Nevada. The custody rates for each group detained in juvenile proceedings were as follows (calculated in 2003 as the number of juvenile offenders in detention per 100,000 juveniles): 289 for white youth, 958 for African American youth, 332 for Hispanic youth, and 405 for American Indian youth. *Id.* at 213. Disparities for youth in adult facilities in Nevada are similarly striking. While the rate of new commitments to adult prison in 2002 (calculated per 100,000 youth aged 10-17 years in the general population) of white youth is 6.4, the rate for African American youth is 8.5, and that for Hispanic youth is 22.7. *And Justice for Some* at 36.

In Clark County, where the instant cases originated, statistics from 2004 and 2005 confirm overrepresentation of youth of color in the county's juvenile justice system. Clark County, Nevada, Department of Juvenile Justice Services, *Disparate Treatment Based on Race and Economics 2005 Report, Report for Senate Bill 232* at 13 ("2005 Clark County Report"); Clark County, Nevada, Department of Juvenile Justice Services, *Disparate Treatment Based on*

Race and Economics 2004 Report, Report for Senate Bill 232 at 13 ("2004 Clark County Report"). African American youth comprised about 14% of the Clark County School District ("CCSD") population, but 31% of the arrests in 2005, whereas white youth comprised 41% of the population and 31% of arrests. 2005 Clark County Report at 5. Similarly, African Americans represented 38% of all detained youths in Clark County, 42% of the commitments to Spring Mountain Youth Camp ("SMYC"), and 35% of commitments to state correctional facilities, where as white youth constituted 27% of youth detained, 23% of commitments to SMYC, 30% of youth committed to state facilities. *Id.* at 12. More telling are the statistics relating to transfer – of the 64 Clark County youth certified to adult status, 39% were African American and only 17% were white youth in 2005.[18] *Id.*

Effective assistance of counsel is a significant check on a system that allows racial disproportionality. Nevada's transfer statute, which interferes with counsel's representation, makes it more likely that youth of color also will continue to be disproportionately impacted by the statute.

D. National Standards Support The Premise That Children Facing Transfer To Adult Court Need Effective Assistance of Counsel.

Several national organizations have developed standards and best practices that protect the child's constitutional rights in transfer or certification proceedings. As detailed below, the Nevada presumptive certification statute fails to comport with the guidelines suggested by experts in the field.

The IJA/ABA Juvenile Justice Standards on Transfer Between Courts offers a balanced approach to ensuring that juveniles facing certification enjoy full due process protections. In

[18] Although overrepresentation for Clark County's Hispanic youth, who comprised approximately 35% of the CCSD population in 2005, was not apparent at all stages of the system, overrepresentation was evident at the certification stage. In that year, 41% of youth certified to adult status in the Clark County were Hispanic. 2005 Clark County Report at 12.

1971, the Institute of Judicial Administration (IJA) and the American Bar Association (ABA)[19] formed a Joint Commission on Juvenile Justice Standards, with a goal of researching, developing, and producing comprehensive juvenile justice standards, annotated with explicit policies and guidelines.[20] First published in 1980, the IJA/ABA *Juvenile Justice Standards* were the result of critical thought, discussion, writing and editing by over 300 experts, representing a spectrum of disciplines including juvenile defense practitioners, the judiciary, social work, corrections, law enforcement, and education across the country over a ten-year period.

The Standards most pertinent to this case offer specific guidance for court's making transfer decisions, including several that address the due process concerns raised by Nev. Rev. Stat. 62B.390. *See* IJA/ABA, *Juvenile Justice Standards, Standards Relating to Transfer Between Courts* 2 (Robert E. Shepherd, ed., 1996), included in Appendix at 60-104. As an initial matter, in stark contrast to Sections 62B.390(2) and (3), Standards 1.1 A and 1.1 C create a rebuttable presumption that fifteen-, sixteen-, and seventeen-year-olds should be treated as *juveniles*, instead of adults. Appendix at 74-78. The Standards echo *Kent's* admonishment about the serious nature of certification proceedings, staking the unequivocal position that, "only juveniles in extraordinary factual situations with extraordinary histories should be transferred to the criminal court," and even then, only in accordance with procedures designed to accord maximum procedural protections to the juvenile and in compliance with precise and exacting behavioral standards. *Id.* at 70.

Central to the issue in this case, Standard 2.3 explicitly addresses children's rights at the certification hearing. The Standard differs from Nevada's presumptive certification provisions in

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[19] The ABA is the world's largest voluntary professional membership organization, and for over 125 years it has placed a high priority on promoting justice that requires fair treatment and is based on sound reason. Its Juvenile Justice Committee works specifically to improve the administration of justice for youth.

[20] For a description of the project, *see IJA/ABA Juvenile Justice Standards Annotated: A Balanced Approach* xvi-xviii (Robert E. Shepherd, ed., 1996).

several respects. Standard 2.3 E provides that "the prosecuting attorney should bear the burden of proving that probable cause exists to believe that the juvenile has committed a class one or class two juvenile offense and that the juvenile is not a proper person to be handled by the juvenile court." *Id.* at 73. Sections 62B.390(2) and (3) conversely place the burden of proving amenability to treatment on the defense.

Standards 2.3 I and 2.3 J address Fifth Amendment protections at the certification hearing. Standard 2.3 I provides that "[t]he juvenile may remain silent at the waiver hearing. No admission by the juvenile during the waiver hearing should be admissible to establish guilt or to impeach testimony in any subsequent proceeding, except a perjury proceeding." *Id.* at 73. The Comments to the Standard emphasize that the privilege against self-incrimination should be available at the hearing which serves as the bridge between the juvenile and adult systems. *Id.* at 99. Further, the Standard controls the use of statements by giving "the juvenile power to bar the introduction in any subsequent criminal trial or other proceeding, except for perjury, of admissions made during the waiver hearing," because "[s]uch statutes encourage candor at the waiver hearing," so "[a] better-informed waiver decision should result." *Id.* at 99-100.

Standard 2.3 J further protects the child's rights by empowering the child to seek the recusal of the presiding officer at the waiver hearing from presiding at any subsequent criminal trial or juvenile court adjudicatory hearing relating to allegations in the petition initiating juvenile court proceedings. *Id.* at 73. Although Standard 2.3 J is recommended whether or not the juvenile testifies, it operates to limit the effects of admission of damaging testimony in subsequent proceedings following the certification hearing. *Id.* at 100-101.

Similarly, a subsequent Task Force convened by the American Bar Association Criminal Justice Section Standards and Juvenile Justice Committees addressed the policy and procedural

implications of the growing number of juveniles being transferred to criminal court to be prosecuted and sentenced as adults as a result of legislative changes in the 1990s. This broad cross-section of juvenile and criminal justice representatives produced a White Paper that provided desired and needed guidance to those involved with youth in the criminal justice system. American Bar Association, *Youth in the Criminal Justice System: Guidelines for Policymakers and Practitioners* 1-2 (2000). The White Paper establishes a developmental framework for dealing with youth from the time of arrest through incarceration and is firmly rooted in current research. *Id.*

The White Paper discusses several critical points that bear on transfer decisions. First, it describes adolescence as a developmental period characterized by rapid and dramatic change and roiling unpredictability – the most intense period of change in human behavior other than infancy. *Id.* at 39. Physical maturity and appearance may not correspond readily to intellectual, emotional, social, or moral maturity, so that children who look, for all intents and purposes, like adults, still have the maturity of children. This incongruence is particularly true with respect to black and Hispanic youth, who, studies show, mature physically earlier than other youth. *Id.* There also will often be wide variability among and within individuals. That is, teenagers of the same age may be quite different developmentally, and an individual youth may act in a mature manner one day, and be completely immature the next. *See* Affidavit of Marty Beyer, ¶ 12, Appendix at 28.

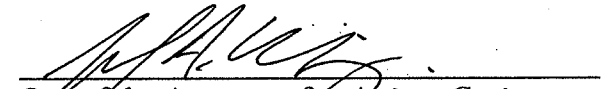
Because adolescence is a period of great malleability, youth also are the most amenable to significant and lasting life change. Experts describe adolescence as "a period of tremendous plasticity in response to features of the environment." *Youth in the Criminal Justice System* at 40. Adolescents facing transfer stand before the court not only fully capable of rehabilitation,

but also uniquely vulnerable to far-reaching damage if they are transferred to the criminal justice system. *See* Affidavit of Marty Beyer, ¶16, Appendix at 35-36.

CONCLUSION

Nevada's presumptive certification statute places an unconstitutional burden on the child's right to effective assistance of counsel during certification proceedings. Counsel is placed in the untenable position of directing the client to forfeit his constitutional right against self-incrimination in order to argue that the child should remain in juvenile court. Because Sections 62B.390(2) and (3) impermissibly interfere in counsel's representation of the child, making it more likely that the harmful effects of certification to adult court will be realized, this Court should hold that Nevada's presumptive certification statute is unconstitutional and reverse the certification of Marques and William to adult court.

Respectfully submitted,



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CERTIFICATE OF COMPLIANCE

I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular N.R.A.P. 28(e), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

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I, Joel Eisenberg, certify that on January 30, 2008, a true and correct copy of the foregoing, **Brief Of *Amicus Curiae* National Juvenile Defender Center In Support Of Appellants** was served, via Federal Express, to:

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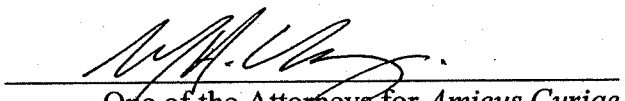

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IN THE SUPREME COURT OF THE STATE OF NEVADA

IN THE MATTER OF WILLIAM M., A MINOR, WILLIAM M., Appellant, vs. THE STATE OF NEVADA, Respondent.	No. 48649
IN THE MATTER OF MARQUES B., A MINOR, MARQUES B., Appellant, vs. THE STATE OF NEVADA, Respondent.	No. 48650

APPENDIX TO BRIEF OF *AMICUS CURIAE* NATIONAL JUVENILE DEFENDER CENTER IN SUPPORT OF APPELLANTS

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Campaign for Youth Justice

The Campaign for Youth Justice (CFYJ) is a national organization created to provide a voice for youth prosecuted in the adult criminal system. The organization is dedicated to ending the practice of trying, sentencing, and incarcerating youthful offenders under the age of 18 in the adult criminal justice system; and working to improve conditions within the juvenile justice system. The Campaign for Youth Justice raises awareness of the negative impact of prosecuting youth in the adult criminal justice system and of incarcerating youth in adult jails and prisons and promotes researched-based, developmentally-appropriate rehabilitative programs and services for youth as an alternative. The Campaign for Youth Justice provides research, training and technical assistance to juvenile and criminal justice system stakeholders, policymakers, researchers, nonprofit organizations, and family members interested in addressing the unique needs of youth prosecuted in the adult system.

Center for Children's Law and Policy

The Center for Children's Law and Policy (CCLP) is a public interest law and policy organization focused on reform of juvenile justice and other systems that affect troubled and at-risk children, and protection of the rights of children in such systems. The Center's work covers a range of activities including research, writing, public education, media advocacy, training, technical assistance, administrative and legislative advocacy, and litigation. CCLP works in the Washington, D.C. area on juvenile justice and education reform efforts in DC, Maryland, and Virginia; partners with other Washington-based national system reform and advocacy organizations; and engages in legislative advocacy with Congress. CCLP also supports systems reform in other states and provides technical assistance for jurisdictions involved with national initiatives such as the John D. and Catherine T. MacArthur Foundation's Models for Change initiative, which promotes juvenile justice reforms, and the Annie E. Casey Foundation's Juvenile Detention Alternatives Initiative, which aims to reduce the use of locked detention and ensure safe and humane conditions of confinement for children. CCLP helps counties and states develop collaboratives that engage in data-driven strategies to identify and reduce racial and ethnic disparities in their juvenile justice systems. CCLP staff also work with jurisdictions to identify and remediate conditions in locked facilities that are dangerous or fail to rehabilitate youth.

Center for Research on Youth and Social Policy

The Center for Research on Youth and Social Policy (CRYSP) at the University of Pennsylvania's School of Social Policy and Practice works to bring about positive social change by improving the way human services are developed, delivered, and evaluated. CRYSP seeks to have a major impact on the issues and systems affecting vulnerable populations, particularly children, while promoting social justice and social change through applied research, planning, and technical assistance. As requests for CRYSP's research and evaluation services increase, the Center has made it a high priority to find a way to offer less-resourced nonprofits access to these services. CRYSP also provides high-quality training opportunities for MSW interns through their involvement in applied research projects.

Center on Juvenile and Criminal Justice

The Center on Juvenile and Criminal Justice (CJCJ) fully supports this amicus brief. CJCJ is a Nongovernmental organization that provides direct services, technical assistance and policy analysis in the juvenile and criminal justice fields. Our mission is to promote a more effective and humane criminal justice system. Our support of this amicus brief is based on our commitment to ensuring that sentencing practices for children serve the interest of society. The evidence is overwhelming that placing children in adult prisons is contrary to the interests of public safety.

Central Juvenile Defender Center

The Central Juvenile Defender Center, a training, technical assistance and resource development project, is housed at the Children's Law Center, Inc. In this context, it provides assistance on indigent juvenile defense issues in Ohio, Kentucky, Tennessee, Indiana, Arkansas, Missouri, and Kansas.

The Justice Policy Institute (JPI)

The Justice Policy Institute (JPI) is a Washington D.C. based think tank and advocacy organization dedicated to promoting effective solutions to social problems and ending society's reliance on incarceration. Since 1997, the Justice Policy Institute has worked to enhance the public dialog on incarceration and justice policy through accessible research, public education, and communications advocacy. In the last twenty years, our nation has witnessed an unprecedented growth in its prison population, making the country's incarceration rates the highest in the world. As politicians promised to get "tough-on-crime", prison beds filled, often with people with social problems like mental health or addiction issues that could be better treated elsewhere. Now, the country struggles to pay for over two million people in prison-including an unprecedented number of children held in adult prisons-most of whom will eventually be released.

Throughout the country, JPI supports its partners who are engaged in juvenile justice reform efforts through timely and targeted policy briefs, reports and research projects, strategic communications and media advocacy, technical assistance and strategic consultation to allies and campaigns, and trainings on research and communications.

Mid-Atlantic Juvenile Defender Center

The Mid-Atlantic Juvenile Defender Center is a multi-faceted juvenile defense resource center that has served the District of Columbia, Maryland, Puerto Rico, Virginia and West Virginia since 2000. We are committed to working within communities to ensure excellence in juvenile defense and promote justice for all children. MAJDC promotes research and policy development throughout the region by conducting state-based assessments of juvenile indigent defense delivery systems. Following the assessment, MAJDC staff work to ensure the report is used to educate the public about issues related to the delivery of indigent defense services for juveniles and assists the public defender systems in responding to assessment recommendations. MAJDC also responds to the needs of juvenile defenders by coordinating training programs, providing technical assistance and maintaining a list serve of juvenile defenders to respond to defender questions. MAJDC is a 501(c)(3) non-profit organization.

Midwest Juvenile Defender Center

The Midwest Juvenile Defender Center (MJDC) is an eight state regional network of defense attorneys representing juveniles in the justice system. It was created to increase the capacity of juvenile defenders in the Midwest. MJDC gives juvenile defense attorneys a more permanent capacity to address practice issues, improve advocacy skills, build partnerships, exchange information, and participate in the national debate over juvenile crime. MJDC provides support to juvenile defenders to ensure that youth are treated fairly in the justice system.

National Association of Criminal Defense Lawyers

The National Association of Criminal Defense Lawyers is the preeminent organization advancing the mission of the criminal defense bar to ensure justice and due process for persons accused of crime or wrongdoing. A professional bar association founded in 1958, NACDL's 12,000-plus direct members in 28 countries - and 90 state, provincial and local affiliate organizations totaling more than 40,000 attorneys - include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges committed to preserving fairness and promoting a rational and humane criminal justice system. The American Bar Association recognizes NACDL as an affiliate organization and awards it full representation in its House of Delegates.

The issue of defense counsel's ability to fully and effectively represent a juvenile defendant is of obvious importance to NACDL and its members. Requiring counsel to either recommend that a juvenile client plead guilty to remain in juvenile court or accept the transfer of the juvenile's case to adult criminal court in order to assert possible defenses is a Hobson's choice that too often impedes the ability of the attorney to obtain true justice for the client. NACDL members are thus uniquely positioned to inform the Court of the harms caused by this practice and arguments in support of its termination.

National Center for Youth Law

The National Center for Youth Law (NCYL) is a private, non-profit organization devoted to using the law to improve the lives of poor children nation-wide. For more than 30 years, NCYL has worked to protect the rights of low-income children and to ensure that they have the resources, support and opportunities they need to become self-sufficient adults. NCYL provides representation to children and youth in cases that have a broad impact. NCYL also engages in legislative and administrative advocacy to provide children a voice in policy decisions that affect their lives. NCYL supports the advocacy of others around the country through its legal journal, Youth Law News, and by providing trainings and technical assistance. NCYL has participated in litigation that has improved the quality of foster care in numerous states, expanded access to children's health and mental health care, and reduced reliance on the juvenile justice system to address the needs of youth in trouble with the law. One of the primary goals of NCYL's juvenile justice advocacy is to ensure that youth in trouble with the law are treated as adolescents and not adults and in a manner that is consistent with their developmental stage and capacity to change. NCYL also works to ensure that youth involved in either the juvenile or criminal justice system are treated fairly and provided adequate representation.

National Council on Crime and Delinquency

The National Council on Crime and Delinquency is the nation's oldest and most respected justice research and policy organization. Founded in 1907, the NCCD has always advocated for the importance of a separate justice system for young people. As our former board chair and noted Harvard Law School dean, Roscoe Pound, observed, the American Juvenile Court was the greatest step forward in Anglo- American jurisprudence since the Magna Carta.

Today, the NCCD conducts research, training and provides assistance to dozens of states. We believe that a strong and effective juvenile justice system is far superior to handling young people in the criminal justice system. Our research has consistently shown that youth placed in adult facilities are at greater risk of victimization and suicide, and have higher rates of recidivism. We have recently conducted national public opinion polls that show that the citizenry overwhemingly rejects the routine transfer of youth to the criminal court system.

National Juvenile Justice Network

The National Juvenile Justice Network (NJJN) is a membership organization for state-based juvenile justice advocacy organizations. NJJN supports its members in their efforts to create a more just, humane and equitable juvenile justice system. NJJN and its members believe that youth who come into conflict with the law should be treated in a developmentally appropriate manner, and should therefore be kept within the juvenile justice system, rather than being transferred into the adult system. NJJN believes that transferring youth into the adult system harms youth, contradicts the current and growing body of research on adolescent brain development and is adverse to public safety.

National Legal Aid and Defender Association

The National Legal Aid and Defender Association (NLADA) is proud to be the oldest and largest national, nonprofit membership association devoting 100 percent of its resources to serving the broad equal justice community. NLADA serves the equal justice community in two major ways: providing advocates with excellent training opportunities and as a leading national advocate in public policy debates on the many issues affecting the equal justice community. We also serve as a resource for those seeking more information on equal justice in the United States. NLADA's members are primarily advocates from public defense services and civil legal assistance programs. NLADA's American Council of Chief Defenders is a leadership council that is dedicated to promoting fair justice systems and ensuring that citizens who are accused of crimes have adequate representation. NLADA's members include programs and individuals who represent juveniles in delinquency proceedings. NLADA is strongly opposed to any statute or policy that compromises the ability of counsel to adequately represent juveniles accused in delinquency or criminal proceedings. Therefore, we join this amicus to respectfully urge this Court to find the statute at issue to be an unconstitutional infringement on the appellants' rights to counsel.

New England Juvenile Defender Center

The New England Juvenile Defender Center, Inc. was created in 2000 to ensure excellence in juvenile defense and promote justice for children in the justice systems of Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island and Vermont. The Center focuses primarily on supporting defenders to provide the best possible services to court-involved children and to ensure that the juvenile justice systems in New England treat children like children and provide them with real opportunities for care and treatment where appropriate. The Center has also created a Juvenile Impact Litigation Fund to support solo practitioners and organized groups of attorneys to challenge conditions of confinement in the region. The NEJDC is a non-profit public interest organization.

Northwestern University School of Law Bluhm Legal Clinic

The Northwestern University School of Law Bluhm Legal Clinic has provided representation to poor children in juvenile and criminal proceedings since the Clinic's founding in 1969. The Bluhm Legal Clinic's Children and Family Justice Center (CFJC) was established in 1992 as a legal service provider for children and families, as well as a research and policy center. Clinical faculty, and law students under their supervision, provide legal representation to children and families in a variety of areas, including juvenile delinquency, juvenile transfer, criminal, special education, school suspension and expulsion, immigration, and political asylum. The faculty at the Children and Family Justice Center has participated in a number of statewide assessments of access to, and quality of, counsel for youth charged in delinquency court. The faculty has also conducted training sessions throughout the country for lawyers who represent children in delinquency and adult court and has been engaged in policy reform efforts nationwide.

The Children and Family Justice Center has seen the benefits that having a separate juvenile court has yielded for the youth under its jurisdiction. In juvenile courts each child is given an opportunity to overcome errant youthful behavior without the stigma or long lasting effects of a criminal conviction. A separate juvenile court system takes into account the scientifically confirmed fact that youth continue to develop socially and psychologically into their early twenties and that a child's stage of development may impact his judgment, his ability to engage in long-term planning and his ability to fully appreciate the consequences of his actions. Thus, a minor is biologically less culpable for his actions and more amenable to rehabilitation. Minors "outgrow" the behaviors that lead to their involvement in the juvenile court. The Children and Family Justice Center believes that statutes that place the burden on a child to prove why the should remain in juvenile court, often at the expense of maintaining his Constitutional rights to silence, the presumption of innocence and effective assistance of counsel, are at odds with the Constitution and generally do not serve the interests of the youth or the community.

Pacific Juvenile Defender Center

The Pacific Juvenile Defender Center is housed at Legal Services for Children. The Defender Center provides support, training and technical assistance for juvenile defenders throughout California and Hawaii. It is the mission of the Defender Center to improve the quality of juvenile defense in our region and ensure that juveniles are provided with holistic representation that meets their needs.

The Sentencing Project

The Sentencing Project is a national non-profit organization engaged in research and education regarding criminal justice policy. The organization has produced a series of books, policy reports, and journal articles assessing the impact of incarceration on public safety and its consequences for racial/ethnic populations. Staff of The Sentencing Project are frequently called upon to testify before legislative bodies and to provide technical assistance to policymakers and practitioners. The organization has also been engaged in analysis of the effects of trying juveniles in the adult court system, including assessing the racially disproportionate impact of such policies.

Southern Juvenile Defender Center

The Southern Juvenile Defender Center (SJDC) works to ensure excellence in juvenile defense and secure justice for children in delinquency and criminal proceedings in seven southeastern states: Alabama, Florida, Georgia, Louisiana, Mississippi, North Carolina, and South Carolina. SJDC provides training and resources to juvenile defenders, and advocates for systemic reforms designed to give children the greatest opportunities to grow and thrive. Through public education and advocacy, SJDC encourages attorneys and judges to rely upon scientific research in cases involving youthful defendants.

Southern Poverty Law Center

Founded in 1971 and located in Montgomery, Alabama, the Southern Poverty Law Center has litigated numerous civil rights cases on behalf of prisoners, people of color, incarcerated children, and other targets of discrimination and abuse. Although the Center's work is concentrated in the South, its attorneys appear in courts throughout the country to ensure that all people receive equal and just treatment under federal and state law.

Southwest Juvenile Defender Center

The Southwest Juvenile Defender Center, housed at the University of Houston Law Center, brings together juvenile defenders, mental health professionals, educators, legislators, and other juvenile justice professionals. Through this collaboration, the Center strives to improve advocacy for children. The Center has collaborated with the American Bar Association Juvenile Justice Center, the National Juvenile Defender Center, Texas Appleseed, and other advocacy organizations to complete an assessment of the Texas juvenile justice system. That report, Selling Justice Short: Juvenile Indigent Defense in Texas, played an important role in passing the Fair Defense Act, which reformed both juvenile and criminal indigent defense in Texas. The Center provides training and technical support for defense attorneys representing youth. The Center also educates the general public, including citizens and multidisciplinary professionals, to promote justice for children.

Western Juvenile Defender Center

The Western Juvenile Defender Center is the regional affiliate of the National Juvenile Defender Center located in Washington D.C. It was created to ensure excellence in juvenile defense and promote justice for all children. The Western Juvenile Defender Center works to build the capacity of the juvenile defense bar and to improve access to counsel and quality of representation for children in the justice system. We strive to support juvenile defenders through training, networking and assessment; we seek to educate a broad range of juvenile justice professionals and the general public; and we strive to create a society that treats all children with respect, dignity, and fairness.

The Western Juvenile Defender Center goals include ensuring that all children in the justice system must have ready and timely access to capable, well- resourced, well-trained legal counsel. Further, we believe that all children are entitled to legal representation that is individualized; developmentally and age appropriate; and free of racial, ethnic, gender, social, and economic bias.

Youth Law Center

The Youth Law Center is a San Francisco-based national public interest law firm working to protect the rights of at-risk children, especially those at risk of or involved in the juvenile justice or child welfare systems. Since 1978, Youth Law Center attorneys have represented children in civil rights and juvenile court cases in California and two dozen other states. The Center's attorneys are often consulted on juvenile policy matters, and have participated as amicus curiae in cases around the country involving important juvenile system issues. Youth Law Center attorneys have written widely on a range of juvenile justice, child welfare, health and education issues, and have provided research, training, and technical assistance on legal standards and juvenile policy issues to public officials in almost every State. The Center has long been involved in public policy discussions, legislation and court challenges involving due process and the treatment of juveniles as adults. Center attorneys were consultants on the national MacArthur Foundation study of adolescent development, and have recently authored a law review article on juvenile competence issues. This case, challenging state law provisions that force juveniles to admit the alleged offense in order to raise mental issues that could defeat transfer into the adult system, fits squarely within the Center's long-term interest and expertise.

IN THE SUPREME COURT OF THE STATE OF NEVADA

IN THE MATTER OF WILLIAM M., A MINOR, WILLIAM M., Appellant, vs. THE STATE OF NEVADA, Respondent.	)	No. 48649
IN THE MATTER OF MARQUES B., A MINOR, MARQUES B., Appellant, vs. THE STATE OF NEVADA, Respondent.	)	No. 48650

AFFIDAVIT OF MARTY BEYER, Ph. D.

Marty Beyer, Ph. D., being first duly sworn, hereby deposes and says:

1. My name is Marty Beyer. I am a clinical psychologist licensed in the District of Columbia, Virginia, Washington and Alaska.

2. I have a Ph.D. in clinical/community psychology from Yale University. I am an independent child welfare and juvenile justice consultant. My expertise is adolescent development: how a young person's cognitive, moral and identity development, trauma and disabilities are relevant to the offense and how these factors should be considered in designing rehabilitative services. I have assessed more than 100 juveniles accused of serious offenses. I have been involved in improving services for delinquents in several states and assisted in federal Department of Justice investigations of juvenile facilities. I have also been involved in the reform of foster care practices in several states and serve as a clinical consultant to child welfare workers and supervisors making decisions about children who have been physically and sexually abused. I

frequently provide training on child and adolescent development for judges, lawyers, and staff in the child welfare and juvenile justice systems.

3. I have testified more than 30 times as an expert witness assessing the factors articulated by the United States Supreme Court in juvenile transfer/waiver cases, including maturity, amenability to treatment and rehabilitation and protection of the public. (*Kent v. United States*, 383 U.S. 541 (1966); *Stanford v. Kentucky*, 492 U.S. 361 (1989)). I have also provided expert testimony concerning the adolescent development research on which the United States Supreme Court relied in striking down the death penalty for juveniles (*Roper v. Simmons*, 543 U.S. 551 (2005)).

4. My publications include "Immaturity, Culpability and Competency in Juveniles" (2000), "What's Behind Behavior Matters: The Effects of Disabilities, Trauma and Immaturity on Juvenile Intent and Ability to Assist Counsel" (2001), Best Practices in Juvenile Accountability (U.S. Department of Justice, 2003), "Health Services for Youth in Juvenile Justice Programs" (co-authored with Michael Cohen, M.D. and Larry Burd, Ph.D., in Clinical Practice in Correctional Medicine, 2006), and "Fifty Delinquents in Juvenile and Adult Court" (2006).

5. I understand that the National Juvenile Defender Center has been invited by this Court to participate as *amicus curiae* in a challenge to Nevada's presumptive certification statute, Nevada Revised Statutes §§62B.390(2) and (3)(b). I submit this affidavit in support of the brief filed by the National Juvenile Defender Center, both to augment its ineffective assistance of counsel argument and to place NRS §62B.390(3)(b) in the context of current developmental research.

6. This affidavit is based on my clinical experience in working with delinquents and families, my education, training, and articles and books I have read.

7. Much of the delinquent behavior of adolescents can be explained by the continuing growth of key areas of their brains and their characteristically immature thinking. Some teenagers also have disabilities, developmental delays or suffer emotional problems from trauma. Whether it is normal behavior, such as skateboarding, not preparing for an exam, or reacting to an unfair call in sports, or more serious behavior such as drinking at a party or having unprotected sex, or even more troubling behavior such as carrying a gun or committing another delinquent act, a teenager's behavior can be

understood only in the context of his/her unique combination of immaturity, disabilities and trauma. For this reason, it is essential for courts to review each young person's unique social, psychological and educational development when deciding whether to transfer the child to adult court or determining the child's capacity for rehabilitation. Presumptive certification statutes that limit the court's ability to take all of these factors into account for each young person cannot be developmentally-sound to the extent they ignore well-accepted research that has consistently found that teenagers think and behave differently from adults and are less culpable. Four noteworthy examples of this research are described below.

8. AMA Brief. In an *amici curiae* brief in *Roper v. Simmons* (the United States Supreme Court 2005 opinion ruling the juvenile death penalty unconstitutional), the American Medical Association and the American Academy of Child and Adolescent Psychiatry (with other organizations) distinguished the brain development and maturity of 17 year olds from adults, based on numerous studies cited in the brief:

> "Older adolescents behave differently than adults because their minds operate differently, their emotions are more volatile and their brains are anatomically immature...These behavioral differences are pervasive and scientifically documented...Their judgments, thought patterns, and emotions are different from adults, and their brains are physiologically underdeveloped in the areas that control impulses, foresee consequences, and temper emotions. They handle information processing and the management of emotions differently from adults.
>
> Adolescents are inherently more prone to risk-taking behavior and less capable of resisting impulses...Adolescents as a group are risk takers [and] ... exhibit a disproportionate amount of reckless behavior, sensation seeking and risk taking...it is statistically aberrant to refrain from such [risk-taking] behavior during adolescence. In short, teenagers are prone to making bad judgments.
>
> Cognitive experts have shown that the difference between teenage and adult behavior is not the adolescent's inability to distinguish right from wrong...Rather, the difference lies in what scientists have characterized as deficiencies in the way adolescents think, an inability to perceive and weigh risks and benefits accurately... psychosocial maturity is incomplete until age 19, at which point it plateaus. Adolescents score lower on measures of self-reliance and other aspects of personal responsibility, they have more difficulty seeing things in long-term perspective, they are less likely to look at things from the perspective of others, and they have more difficulty restraining their aggressive impulses. Researchers have found that the deficiencies in the adolescent mind and emotional and social development

are especially pronounced when other factors—such as stress, emotions and peer pressure—enter the equation. These factors affect everyone's cognitive functioning, but they operate on the adolescent differently and with special force...

Normal adolescents cannot be expected to operate with the level of maturity, judgment, risk aversion or impulse control of an adult... an adolescent who has suffered brain trauma, a dysfunctional family life, violence, or abuse cannot be presumed to operate even at standard levels for adolescents."[1]

9. Teen Brain Research. Even intelligent adolescents are not capable of adult decision-making in part because their brains continue to develop beyond age 18.

"Brain studies establish an anatomical basis for adolescent behavior. Adolescents' behavioral immaturity mirrors the anatomical immaturity of their brains. To a degree never before understood, scientists can now demonstrate that adolescents are immature, not only to the observer's naked eyes, but in the very fibers of their brains...First, adolescents rely for certain tasks, more than adults, on the amygdala, the area of the brain associated with primitive impulses of aggression, anger, and fear. Adults, on the other hand, tend to process similar information through the frontal cortex, a cerebral area associated with impulse control and good judgment. Second, the regions of the brain associated with impulse control, risk assessment, and moral reasoning develop last, after late adolescence...as teenagers grow into adults, they increasingly shift the overall focus of brain activity to the frontal lobes...[responsible for] decision making, risk assessment, ability to judge future consequences, evaluating reward and punishment, behavioral inhibition, impulse control...and making moral judgments."[2]

10. As one expert, Dr. Ruben Gur, has summarized: "The cortical regions [are involved] in the control of aggression and other impulses, the process of abstraction and mental flexibility, and aspects of memory. If the neural substrates of these behaviors have not reached maturity before adulthood, it is unreasonable to expect the behaviors themselves to reflect mature thought processes."[3]

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[1] American Medical Association (2005), *Amici curiae* brief, *Roper v. Simmons*, 543 U.S. 551 (2005).

[2] *Ibid.*

[3] Declaration of Ruben C. Gur, Ph.D., *Patterson v. Texas*. Petition for Writ of *Certiori* to US Supreme Court (www.abanet.org/crimjust/juvjus/patterson.html). See also Gruber, S.A. and Yurgelum-Todd, D. (2006), "Neurobiology and the Law: A Role in Juvenile Justice?" OHIO STATE J CRIMINAL LAW, 3, 321. For a description of adolescent brain development, *see* Claudia Wallis, "What Makes Teens Tick?", *Time*, May 10, 2004.

11. MacArthur Foundation Research Network on Adolescent Development and Juvenile Justice. Evidence suggests that even if a youngster perceived a situation as risky or morally wrong, his/her ability to act on that perception—and thus his/her culpability—is different from an adult's. Recent studies by the MacArthur Foundation concluded that adolescents do not put facts together and draw conclusions the same way adults do. The researchers recommended that juveniles be treated differently by the courts than adults because they have limited cognitive and emotional capacities and their development follows a generally predictable course to maturity.[4]

12. In addition to considering general research on adolescent development, the court must also consider the particular juvenile standing before it. What developmental information about this young person explains his/her involvement in a delinquent act? How can this developmental framework be applied to assessing the young person's likely response to rehabilitative services?

Increasingly, the delinquent act alone has become the primary basis for certification statutes and determining which youth should remain in Juvenile Court, but behavior by itself tells us so little about the individual. It is likely that two youth of the same age charged with the same offense will have unique characteristics which in turn will have different effects on their decision-making.[5]

13. The capacity of a juvenile to plan or to stop an action may be limited by a variety of disabilities, as well as trauma and developmental delay. For each individual juvenile, it is important to assess the maturity of their judgment, risk assessment, and anticipation of consequences, as well as their susceptibility to peer pressure and ability to handle stress. A teen could know it is wrong to do a particular act (and also know that when other youth did the same thing, they got punished), but at the time of the offense

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[4] MacArthur Research Network on Adolescent Development and Juvenile Justice, National Conference on Juvenile Justice and Adolescent Development, September 2006; *see also* Grisso, T. (1996). Society's retributive response to juvenile violence: A developmental perspective, LAW AND HUMAN BEHAVIOR, Volume 20, pp. 229-248.

[5] Nowhere is this more troubling than the dramatic increase of youth charged for sexual behaviors. A 13-year old having sex with a 12-year old neighbor that both thought was consensual has little in common with a developmentally delayed 11-year old reenacting her own sexual abuse with the 4-year old she is babysitting, and entirely different treatment services would be necessary, but both the 11-year old and 13-year old will be charged with felony sex offenses and sent to juvenile sex offender programs likely modeled after programs for adult rapists and pedophiles (and in many states both could be put on a registry).

their immaturity, disabilities or reaction to trauma may get in the way of his/her taking this knowledge into account. For example, a teenager could push a teacher because of a disability that causes the child to misunderstand something the teacher has said or done, or because of past physical abuse making them think the teacher was being abusive, or because of immaturity and an emotional reaction that overcame rational thought.

To understand an individual teenager's behavior and amenability to rehabilitative services requires a thorough assessment of the possible contribution of disabilities, trauma and immaturity unique to him/her.

14. Immaturity. Adolescent development is not a smooth linear progression--.there are maturity differences between individuals of the same age and within the particular child. A 17-year old could have a job or drive a car yet think irrationally under stress. A 16-year old could be a good student or athlete and have poor judgment around peers.

(a) Cognitive Development

Adolescents think differently from adults. Even late in their teens young people usually have immature thought processes, including:

1. *Not anticipating*: Adolescents often do not plan or do not follow their plan and get caught up in unanticipated events. They usually view as "accidental" the unintended consequences of actions that adults would predict could have a bad outcome. Carrying, and even using, a weapon does not mean that a teen pictured an injured victim and intended harm. Learning to have a long-term perspective develops slowly.

2. *Fear interferes with the adolescent's ability to make choices*: Decision-making can be very immature when a teen is scared, particularly if they have been mistreated in the past. A common form of immature cognitive processes in adolescents is reacting to a threat that adults might consider exaggerated. Their fear has to be evaluated from the teenager's perspective at the time.

3. *Minimizing danger*: Risk-taking, typical of adolescents, reduces their use of mature cognitive strategies--they seldom consider the worst possible outcomes of their actions. Poor impulse control is a normal characteristic of teenagers. Drugs and alcohol lower inhibitions and reduce the young person's ability to use mature judgment, and thus frequently contribute to delinquent acts.

4. *Having only one choice*: In situations where adults see several choices, adolescents may believe they have only one option. It is not unusual, even for intelligent adolescents, to imagine only one scenario. When things do not unfold as they imagined, because of their immaturity, they behave as if they are incapable of adapting with another reasonable choice. Adolescents only gradually develop the advanced cognitive ability to weigh alternative choices simultaneously.

(b) Identity Development

Adolescents gradually refine a stable definition of themselves. Becoming good at something is an essential aspect of identity development. Doing well in school, arts, sports, or a hobby is how adolescents define themselves and feel appreciated by others. Many youth have not experienced success, particularly in school, and still have an unformed identity, making them more vulnerable to involvement with delinquent peers.

Belonging to family is the framework for identity and remains powerful for teenagers. Identifying with peers is another important aspect of self-definition--group membership is necessary for a young person to feel valued. Lacking stable identities, young people need considerable approval from family and peers. Conflicting identifications--between two groups of peers or between family and peers may cause unpredictable behavior in a teenager, especially under stress. "The typical adolescent is also more vulnerable to peer pressure than an adult... Adolescents spend twice as much time with peers as with adults. The pronounced importance of approval and acceptance by friends will make an already risk-prone or impulsive adolescent even more so. Adolescents not only are more susceptible to peer pressure, but they gravitate toward peers who reinforce their own predilections...an adolescent who spends time with risk-prone friends is more likely to engage in risky behavior."[6]

(c) Moral Development

Adolescents are moralistic, insisting on what should be and intolerant of anything that seems unfair. They may become involved in an offense naively in order to right wrongs, often out of loyalty. They usually know right from wrong and are frustrated that they cannot explain why they used poor moral reasoning during the offense. As a result,

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[6] American Medical Association (2005), *Amici curiae* brief, *Roper v. Simmons*, 543 U.S. 551 (2005).

they may not express an adult understanding of the effect of their offense on victims, despite the fact that their capacity for empathy with others may not be impaired.

Immaturity is typical of adolescents, although fortunately for most teenagers their risk-taking, susceptibility to peer influence and poor moral reasoning under stress, do not result in serious delinquent acts.[7] For each individual juvenile, it is necessary for an expert to present to the court how immature thinking, immature identity, and immature moral reasoning affected this young person's behavior and what services would be necessary to reduce the young person's risky behavior by increasing his/her maturity.

15. Disabilities. Studies estimate that anywhere from about 17% to 53% of delinquents have learning disabilities, in comparison to 2-10% in the overall child population.[8] Learning disabilities affect young people not only in school, but at home and in the community, particularly in comprehending what others are saying and in following directions. Learning disabilities can lead to problems in listening, thinking, memory, reading, writing, spelling, doing calculations, organizing, prioritizing, and strategizing.

Delinquents "have higher rates of neuropsychological deficits as reflected in language, verbal intelligence, working memory, and reading. Of special interest are deficiencies in 'executive' functions that are served primarily by the frontal lobes of the brain...[including] abstract reasoning, goal setting, anticipating and planning, self-monitoring and self-awareness, inhibiting of impulsive behavior, and interrupting and ongoing sequence of behavior in order to initiate a more adaptive behavior."[9]

Attention deficit disorder (ADD) and attention deficit hyperactivity disorder (ADHD) are the most frequently diagnosed behavior disorders of childhood.[10] About 19-

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[7] Many youth who do not get arrested pay other high costs for their normal adolescent risk-taking: car accidents are the leading cause of death in adolescence; half of all new HIV infections and sexually transmitted diseases in the U.S. are teens, and a quarter of U.S. high school students report binge drinking. [CITE]

[8] Kazdin, Alan, "Adolescent Development, Mental Disorders, and Decision Making of Delinquent Youth" in YOUTH ON TRIAL (Thomas Grisso and Robert Schwartz, eds.), Chicago, University of Chicago Press, 2000. Estimates of prevalence are based on multiple sources and are likely to be underestimates of the significant impairment of disorders in delinquent youth.

[9] Kazdin, op cit, p. 53. See also Pennington, B.F. and S. Ozonoff, "Executive Functions and Developmental Psychopathology," J CHILD PSYCHOL PSYCHIATRY, 37:51-87, 1996.

[10] Goldman, L.S., M Genel, R.J. Bezman, and P.J. Slanetz, "Diagnosis and treatment of Attention-deficit/Hyperactivity Disorder in Children and Adolescents," JAMA, 279:1100-7, 1998. Tannock, R.,

46% of delinquents are diagnosed with attention deficit disorders, in comparison to 2-10% in the overall child population.[11] Distractibility and impulsiveness are prominent characteristics of attention deficit disorders, making these young people less able to stop behaviors, which may contribute to delinquency (especially when they have immature cognitive processes and are unable to see alternative choices at the time of an offense). Social skill problems are also common among children with attention deficits.

By the time the learning disability is identified, many children are lacking in basic skills necessary to comprehend schoolwork. Often the child with disabilities gets into a negative cycle with self-dislike and attention-seeking, from feeling stupid, interfering with school participation.[12] Truancy—due to feeling picked on by teachers and/or students and embarrassment for not being able to comprehend the material--can begin early in children with disabilities, and not attending school can lead to delinquency.

For each individual juvenile, it is necessary for an expert to address if and how disabilities affected this young person's behavior and what services would be necessary to build his/her compensatory skills in order to support school success and improve social skills and comprehension of others.

15. Trauma. Many youth arrested for delinquent acts have been traumatized. In a study of 50 delinquents all but two had experienced severe trauma, including repeated abuse and/or parent death and/or abandonment since early childhood (at least a third were physically abused and a quarter were sexually abused, and more than half of the girls had been sexually and/or physically abused). [13]

Trauma typically slows down development in children and, depending on the individual, can interfere with all aspects of the child's functioning. Children who were physically or sexually abused or lost an important person in their lives may be

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"Attention-deficit/Hyperactivity Disorder: Advances in Cognitive, Neurobiological and Genetic Research," J CHILD PSYCHOL PSYCHIATRY, 39: 65-99, 1998.

[11] Kazdin, op cit.

[12] Some children's problem-solving skills are compromised by not accurately perceiving cues from peers and adults, typically attributing hostility to others and believing that aggressive acts will result in peer approval. Dodge, K.A. (2003). Do social information processing patterns mediate aggressive behavior? In B. Lahey, T. Moffitt, & A. Caspi (Eds.), CAUSES OF CONDUCT DISORDER AND JUVENILE DELINQUENCY (pp. 254-274). New York: Guilford Press.

[13] Beyer, Marty. "Fifty Delinquents in Juvenile and Adult Court." AMERICAN J ORTHOPSYCHIATRY, 76(2), Apr 2006, 206-214.

functioning emotionally close to the age when the trauma occurred. Children who have been exposed to violence often have trouble concentrating in school, are fearful, have nightmares and may seem emotionally detached and pessimistic about the future.[14] Children who have been traumatized often blame themselves and have trouble trusting others. Children who are chronically picked on often have low self-esteem and depression which can continue into adulthood. Sometimes victimized children become bullies themselves, and they tend to have more emotional problems than those who are victims only.[15] Research has shown that children who are bullied have academic and peer difficulties in school, leading to more teasing and bullying.[16] One study found that 32% of delinquents had Post Traumatic Stress Disorder, in comparison to 3% or fewer in the overall child population.[17] Reactions to trauma may significantly interfere with the young person's life and put him/her at risk of delinquency, even those whose symptoms do not meet the criteria for Post Traumatic Stress Disorder.[18]

Depression is a common reaction to trauma, but often is not diagnosed in delinquents: usually their problem behavior at school and home are the focus of professionals and family rather than their underlying sadness. Depression is associated with irritability, self-dislike and distorted thinking in teenagers. Depressed children

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[14] Pynoos, R., Steinberg, A., & Goenjian, A. (1996) Traumatic stress in chilhood and adolescence. In B. van der Kolk, A.McFarlane, & I. Weisaeth (Eds.), *TRAUMATIC STRESS.* New York: Guilford, pp. 331-58.

[15] Olweus, D. (1993). Victimization by peers: Antecedents and long-term outcomes. In K. H. Rubin & J. B. Asendorf (Eds.), SOCIAL WITHDRAWAL, INHIBITION, AND SHYNESS (pp. 315-341). Hillsdale, NJ: Erlbaum. See also Arseneault, Louise, Elizabeth Walsh, Kali Trzesniewski, Rhiannon Newcombe, Avshalom Caspi, and Terrie E. Moffitt. (2006) "Bullying victimization uniquely contributes to adjustment problems in young children." PEDIATRICS, 130(9), 118.

[16] Horowitz, June A., Judith A.Vessey, Karen L. Carlson, Joan F. Bradley, Carolyn Montoya, Bill McCullough, and Joyce David (2004). "Teasing and Bullying Experiences of Middle School Students," JOURNAL OF THE AMERICAN PSYCHIATRIC NURSES ASSOCIATION, 10(4),165-172.

[17] Steiner, H., I.G. Garcia and Z. Mathews, "Posttraumatic Stress Disorder in Incarcerated Delinquents," J AMERICAN ACADEMY OF CHILD AND ADOLESCENT PSYCHIATRY, 1997, 36: 3357-65. Giaconia, R. M., Reinherz, H. Z., Paradis, A. D., & Stashwick, C. K. (2003). Comorbidity of substance use disorders and posttraumatic stress disorder in adolescents. In P. Ouimette & P. J. Brown (Eds.), TRAUMA AND SUBSTANCE ABUSE (pp. 227-242). Washington, DC: American Psychological Association. Prevalence in community sample reported in Kazdin, op cit.

[18] Widom, C.S. "Child Victimization and Adolescent Problem Behavior," in ADOLESCENT PROBLEM BEHAVIOR: ISSUES AND RESEARCH (R.D. Ketterlinus and M.E. Lamb, eds.), Hillsdale, N.J.: Erlbaum, 1994.

appear to have a greater dependence on peers, but being depressed is correlated with teacher and peer ratings of unpopularity.[19]

Poor coping strategies learned in childhood re-emerge when traumatized adolescents face new stressors, particularly if feelings of helplessness reminiscent of the past are provoked. Adolescents with a history of trauma have been found to be at risk of alcohol and substance abuse; these youth rely on substances to escape sad feelings and bad memories.[20]

Aggression can be a defense against the helplessness common among traumatized children. Young people who have been abused often respond self-protectively like younger children when they feel threatened. Traumatized youth may manage their fears with combative self-preservation and see no alternative to aggression for resolving disagreements.

Trauma exposure plays a key role in the development of behavior problems in adolescents—the effects of trauma account for impulsivity and anger associated with school difficulties, substance abuse and gang involvement.[21] "We are beginning to move from the mere recognition that juvenile delinquents have often faced extreme adversity in

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[19] While moodiness and self-doubt are viewed as typical in teenagers, depression can be a serious, impairing disorder in adolescents. Cicchetti, D. and Toth, S.L. (1998). "The development of depression in children and adolescents." AMERICAN PSYCHOLOGIST, 53, 221-241. Garber, J. and Horowitz, J.L. (2002). "Depression in children." In I.H. Gotlib and C.L. Hammen (Eds.), HANDBOOK OF DEPRESSION (p. 510-540). New York: Guilford Press. An integrative model of adolescent depression incorporates the complex interplay among genetic, biological, cognitive, interpersonal, family and environmental factors and developmental challenges; family disruption contributes to negative self-image, poor relationships and maladaptive regulation of emotion and behavior. Hammen, C. and Rudolph, K.D. (2003), "Childhood mood disorders" in E.J. Mash and R.A. Barkley (Eds.). CHILD PSYCHOPATHOLOGY (pp. 233-278). New York: Guilford Press.Hammen, C. and K.D. Rudolf, "Childhood Depression," in CHILD PSYCHOPATHOLOGY (E.J. Mash and R.A. Barkley, eds.), New York: Guilford, 1996. A. Peterson, B. Compas, J. Brooks-Gunn, M. Stemmler, S. Ey & K.Grant, "Depression in Adolescence," AMERICAN PSYCHOLOGIST, 1993, 48, 155-168.

[20] Ouimette, P. and Brown, P. (2003). TRAUMA AND SUBSTANCE ABUSE. Washington, D.C.: American Psychological Association.

[21] Wolfe, David, Rawana, Jennine, & Chiodo, Debbie (2006). "Abuse and Trauma," in David Wolfe & Eric Mash (eds.), BEHAVIORAL AND EMOTIONAL DISORDERS IN ADOLESCENTS. New York: Guilford. Cohen, Judith, Mannarino, Anthony and Deblinger, Esther. TREATING TRAUMA AND TRAUMATIC GRIEF IN CHILDREN AND ADOLESCENTS. Guilford Press, forthcoming

their childhood, to the understanding that such adversity has had specific effects which contribute to the delinquency lifestyle."[22]

For each individual juvenile, it is necessary for an expert to present how trauma affected this young person's behavior and what services would be necessary to help the young person recover from trauma and be less prone to depression, substance abuse, self-harming, over-reacting to threat, and aggression.

16. Effectiveness of Juvenile Rehabilitation Services. When a young person's involvement in an offense is linked to immature thought processes, emotional problems resulting from trauma, intoxication, and/or being led by an older criminal, the prognosis for treatment may be good. Most young people's trauma, immaturity, and disabilities can be effectively treated. A young person's capacity to be rehabilitated does not turn on the severity of the offense.

Researchers have identified the characteristics of juveniles who are unlikely to offend again. These are young people who will "age out" of juvenile delinquency because their behavior is the result of immature judgment rather than persistent antisocial tendencies. Juveniles involved in "adolescent-limited delinquency" (in contrast to those likely to become adult offenders) have the following characteristics:

- First delinquency is in adolescence (not before age 13)
- Involved in positive behavior as well as delinquent act
- Delinquent act with others, in which juvenile plays a small part in relation to others
- Acts result from bad judgment leading to dangerous situations[23]

For violent juveniles and those who use substances, intensive treatment in the community has been documented to dramatically reduce recidivism. [24] Juvenile

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[22] Greenwald, Ricky (2002). TRAUMA AND JUVENILE DELINQUENCY. Binghamton, N.Y.: Hayworth. Ford, Julian (2002), "Traumatic Victimization in Childhood and Persistent Problems with Oppositional-Defiance," in Greenwald, Ricky (ed.), TRAUMA AND JUVENILE DELINQUENCY. New York: Haworth.

[23] Moffitt, T. "Adolescence-Limited and Life-Course-Persistent Antisocial Behavior," PSYCHOLOGICAL REVIEW, 1993, 100:674.

[24] Burns, B.J., & Hoagwood, K. (2002). COMMUNITY TREATMENT FOR YOUTH: EVIDENCE-BASED INTERVENTIONS FOR SEVERE EMOTIONAL AND BEHAVIORAL DISORDERS. New York, NY: Oxford University Press. See also Chamberlain, P., & Mihalic, S.F. (1998). Multidimensional treatment foster care. In. D.S. Elliott (Ed.), BOOK EIGHT: BLUEPRINTS FOR VIOLENCE PREVENTION. Boulder, CO: University of Colorado. Henggeler, S.W., Schoenwald, S.K., Borduin, C.M., Rowland, M.D., & Cunningham, P.B. (1998).

rehabilitation programs—including secure juvenile facilities—across the country are training staff in Positive Youth Development, a treatment approach based on research about teens who are resilient despite poverty, illness and significant family and other problems. The evidence indicates that what most contributes to the effective rehabilitation of a young person is a relationship with a caring adult and support for success in school and work – characteristics of most juvenile justice programs but not typically available to youth in prison.[25] Rather than assuming that a juvenile facility will not be effective, an expert should describe the particular youth's needs and what services would meet them and indicate to the court what juvenile facility would offer those services.

A national poll, commissioned by the MacArthur Foundation and the Center for Children's Law and Policy found widespread public support for rehabilitating teens rather than locking them up. Most favored shifting some money states spend on incarcerating youth and using it for counseling, education and job training.[26] The MacArthur Foundation found that at least half the states are involved in juvenile justice reforms - among them, taking more youth under 18 out of the adult system and providing more mental health and community based-services. The services are based on emerging brain findings and adolescent development research which have concluded that teens think differently than adults, are less culpable, and more likely to stop their delinquent acts as they mature if offered developmentally appropriate services.

MULTISYSTEMIC TREATMENT OF ANTISOCIAL BEHAVIOR IN CHILDREN AND ADOLESCENTS. New York, NY: Guilford Press.

[25] Lerner, R., Taylor, C. & von Eye, A., Eds. (2002). PATHWAYS TO POSITIVE DEVELOPMENT AMONG DIVERSE YOUTH. Indianapolis: Wiley. See also Catalano, R., Berglund, M., Ryan, J., Lonczak, J. & Hawkins, J. (1998), RESEARCH FINDINGS ON EVALUATIONS OF POSITIVE YOUTH DEVELOPMENT PROGRAMS. U.S. Department of Health and Human Services.

[26] MacArthur Foundation, September 21 and 22, 2006, Washington, D.C

Further affiant sayeth not.

I declare under penalty of perjury that the foregoing affidavit is true and correct.

Marty Beyer Executed on January 25, 2008.

Sworn to me and subscribed in my presence on January 25, 2008.

Kathryn E. Slack
NOTARY PUBLIC

OFFICIAL SEAL
KATHRYN E. SLACK
NOTARY PUBLIC-OREGON
COMMISSION NO. 377503
MY COMMISSION EXPIRES MAR. 7, 2008

My commission expires: 3-7-2008

Seal:

Effects on Violence of Laws and Policies Facilitating the Transfer of Juveniles from the Juvenile Justice System to the Adult Justice System

A Systematic Review

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Abstract: The independent, nonfederal Task Force on Community Preventive Services (Task Force), which directs development of the *Guide to Community Preventive Services* (*Community Guide*), has conducted a systematic review of published scientific evidence concerning the effectiveness of laws and policies that facilitate the transfer of juveniles to the adult criminal justice system, on either preventing or reducing violence (1) among those youth who experience the adult criminal system or (2) in the juvenile population as a whole.

This review focuses on interpersonal violence. Violence may lead to the juvenile's initial arrest and entry into the justice system and, for those who are arrested, may be committed subsequent to exiting the justice system. Here transfer is defined as the placement of juveniles aged less than 18 years under the jurisdiction of the adult criminal justice system, rather than the juvenile justice system, following arrest. Using the methods developed by the *Community Guide* to conduct a systematic review of literature and provide recommendations to public health decision makers, the review team found that transferring juveniles to the adult justice system generally increases, rather than decreases, rates of violence among transferred youth. Evidence was insufficient for the Task Force on Community Preventive Services to determine the effect of such laws and policies in reducing violent behavior in the overall juvenile population. Overall, the Task Force recommends against laws or policies facilitating the transfer of juveniles from the juvenile to the adult judicial system for the purpose of reducing violence.

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Introduction

The purpose of this review was to determine whether laws or policies that facilitate the transfer of juveniles to the adult criminal justice system reduce interpersonal violence, either specifically, among those juveniles who have experienced the adult justice system, or generally, in the juvenile population as a whole.

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Although the legal term "juvenile" is defined differently among the states, for purposes of this review, a juvenile is a person aged less than 18 years. One rationale for facilitating the transfer of juveniles to the adult justice system is that this may deter juveniles from committing crimes, because they perceive the adult justice system as more severe and punitive than the juvenile system. For purposes of this review, "transfer" refers to placing juveniles under the jurisdiction of the adult criminal justice system, rather than the juvenile justice system, following arrest. Transfer is also referred to as "waiver," denoting the waiver of authority by the juvenile court that allows for transfer of a juvenile defendant to an adult criminal court; juveniles not transferred to the adult court system are often said to be "retained" in the juvenile system.

Background

Violence by juveniles is a major public health problem in the United States. Rates of violent crime, including

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simple and aggravated assault, robbery, and rape, are greater among people aged 12 to 20 years than in all age groups except those aged 21 to 29 years, as assessed in a 2003 national survey of crime victims, the National Crime Victimization Survey, which is based on victims' experiences and therefore excludes homicide.[1] Although they constitute only about 25% of the population, youth aged less than 18 years have been responsible for committing approximately 30% of all violent crime (which includes homicide, rape and other sexual assault, robbery, and simple and aggravated assault) and 40% of serious violent crime (which excludes simple assault) in the past 20 years.[2] Rates of youth homicide are higher in the United States than in most developed countries.[3] In a representative national survey in 2002, U.S. adults reported more than 1.87 million incidents of victimization by perpetrators estimated to be between the ages of 12 and 20 years—a rate of approximately 5.1 incidents of victimization per 100 juveniles in this age group.[4,5] Although arrest and victimization data show declines among juveniles for violent acts in general following a peak reached in 1993–1994, self-report of offenses continues to indicate high rates of violence.[6]

The first juvenile court in the United States was established in 1899 in Chicago. By 1925, all states except Maine and Wyoming had separate juvenile systems.[7] In the United States, juvenile and adult criminal law are principally handled at the state level; consequently, states have diverse mechanisms to allow juveniles to be transferred to the adult criminal justice system.[2,6,8] Although states have their own juvenile and adult criminal systems and laws, common trends are discernible across states.

A separate judicial process for juveniles has been justified on several grounds related to psychosocial development in the juvenile population.[9] In general, juveniles differ from adults in their biological development and mental processes and capacities. These differences are cited to justify the recent Supreme Court decision to ban capital punishment for crimes committed when the offender was aged less than 18 years at the time the crime was committed.[10] First, it has been argued that juveniles are less aware of consequences, less responsible, and thus less culpable for their actions.[9] For these reasons, juveniles cannot be held as accountable as adults and should receive different and more lenient punishment. It has also been argued that juveniles have less ability than adults to understand and thus participate in the standard, adult judicial process, and, therefore also, should be subject to a separate judicial process. A recent study of juveniles[11] (both in juvenile detention and in the community) indicates that at less than 16 years of age, juveniles on average lack the cognitive competence to understand and participate in the judicial process as required by law; furthermore, they make judgments comparable to those of adults found incompetent to stand trial. Finally, it has been argued that juveniles are more malleable and amenable to reform of their behavior, and thus, the judicial response to their deviant behavior should, "in the interests of the child," emphasize reform of the juvenile rather than, or in addition to, punishment—in contrast to the punitive focus of the adult criminal system.[12] Individual juveniles vary greatly in their degree of cognitive development and there are few clear dividing lines by age. Policy regarding the shift of jurisdiction from juvenile to adult court remains controversial.

From its inception, the philosophy of the juvenile court has been "parens patriae," meaning that the state acts as a parent for those who cannot take care of themselves.[2,7,13] Transfer of a juvenile from juvenile to adult court jurisdiction required an individualized determination of lack of amenability to treatment.[7,14] This philosophy was practiced through informal court procedures with weak safeguards for the legal rights of the juveniles, until a series of Supreme Court cases, beginning in the late 1960s, imposed additional safeguards already established in adult justice systems.[15] Recent changes in the law, however, extend the juvenile court's mission to include protection of the community as well as the interests of the child.[16]

Following the increases in violent juvenile crime in the late 1980s and early 1990s, most states modified their laws to facilitate the transfer of juveniles to the adult justice system.[2,7] Between 1992 and 1998, all but three states expanded their transfer provisions to facilitate prosecuting juveniles charged with certain crimes in the adult criminal court system[17–20]; this trend has continued, but slowed, in recent years.[21] Bishop[17] estimates that 20% to 25% of all juvenile offenders—210,000 to 260,000 juveniles—were prosecuted as adults in 1996.

There are six main mechanisms by which youth aged less than 18 may be tried in the adult criminal justice system. In "judicial waiver," the traditional mechanism, a juvenile court judge may waive a youth to the adult system, generally based on perceived lack of amenability to treatment, which in turn is often based on considerations such as age, seriousness of the current offense, and prior delinquency.[21] In "prosecutorial waiver," the prosecutor has the discretion to file a case in the juvenile or the adult criminal court system. In "statutory exclusion," youth of particular ages charged with particular crimes are excluded from juvenile justice system jurisdiction. When particular charges are excluded by law from juvenile court by statutory means, discretion also reverts to prosecutors, who decide which charges are filed.[22,23] The increases in transfer due to the preceding three mechanisms may be amplified by a policy of "once an adult, always an adult," whereby youth once transferred to adult court are also transferred for any future offending.[21] With "lowered age of

adult court jurisdiction," states set the age at which one is considered responsible for criminal actions, and no longer eligible for juvenile court, to an age younger than the traditional age of 18. Finally, in many states, juvenile who are married or otherwise "emancipated" (i.e., released from parental authority) are excluded from juvenile court. For youth who have not reached the age of adult court jurisdiction, the adult court often has the authority to transfer juveniles back to the juvenile court when cases are deemed inappropriate for the adult criminal court system. This is generally referred to as "reverse waiver."

Finally, states are experimenting with "blended sentencing," which allows a juvenile to be sentenced to both juvenile and adult sanctions by one court. Blended sentencing by the juvenile court allows the court to monitor youth beyond the traditional end of juvenile jurisdiction.[24] This frequently involves juvenile incarceration until the age of adult court jurisdiction, followed by adult incarceration. This greater sentencing flexibility may reduce the pressure to transfer court jurisdiction, but little research has yet been conducted on how blended sentencing is used in practice.[25]

Specific Versus General Deterrence

Reductions in violence are hypothesized to occur through transfer by two means: "specific deterrence" and "general deterrence." In specific deterrence, juveniles who have been subject to the adult justice system are thought to be deterred from committing subsequent offenses. In general deterrence, all youth in the population who would be subject to transfer provisions are thought to be deterred from offending by the perceived severity of sanctions they would face under the adult criminal justice system. Note that "deterrence" here refers to the behavioral outcome of reduced initial or subsequent offending and not to decision making processes which may accompany such outcomes. In addition, if juveniles in adult detention settings serve longer sentences than they would serve in juvenile settings, then strengthened transfer policies may also reduce the violence of transferred juveniles (i.e., violence outside of the prison setting) by increasing incapacitation, the inability of convicts to commit crime against the public during incarceration. Incapacitation as a deterrent, however, depends on the assumption that longer sentences would be given in adult courts compared with juvenile courts.

Research on the effectiveness of specific deterrence and general deterrence requires different study designs and effect measures. In specific deterrence research, outcome measures are derived from comparing the recidivism of those youth who have experienced the adult criminal justice system with the recidivism of youth retained in juvenile court. In general deterrence research, the outcome measures are rates of offense in the intervention population, such as the number of juveniles per 100,000 arrested for violent crimes. Comparison groups for general deterrence must necessarily be drawn from another place, from a time before enactment of the policy, or from a different age group among whom the transfer laws are weaker or absent. Researchers strive for comparison groups unaffected by the law but who are otherwise as similar as possible and similarly affected by many of the other social forces influencing offending.

In our assessment of general deterrence, studies comparing rates of violence before and after implementation of a strengthened transfer policy without concurrent comparison groups (e.g., Risler et al.[26]) are not included. Juvenile offending rates change over time for many reasons, as evidenced by the dramatic rise and then decline in crime in general, and in juvenile violence in particular during the late 1980s and early 1990s.[27,28] Thus, we considered the use of comparison groups unaffected by the law to be a critical design feature in evaluating the general deterrent effect on crime of this particular law. Without such concurrent comparison groups, any law enacted during a period of decline in crime would seem to have a deterrent effect, as indicated by simple before-and-after differences in rates of offending.

This review focused on violent outcomes, as measured by rates of arrest; one study assessed violent crime convictions. Some studies report violent and nonviolent offending arrests together and do not distinguish violent from other offending. For the purposes of this review, such studies are included, but this broader focus is considered a limitation (see Assessing Study Design and Execution section).

The Guide to Community Preventive Services

The systematic reviews in this report represent the work of the independent, nonfederal Task Force on Community Preventive Services, which is developing the *Community Guide to Preventive Services* (*Community Guide*) with the support of the U.S. Department of Health and Human Services in collaboration with public and private partners. The Centers for Disease Control and Prevention (CDC) provides staff support to the Task Force for development of the *Community Guide*. More information about the *Community Guide* and the Task Force can be found at www.thecommunityguide.org and in previous publications.[29,30]

Healthy People 2010 Goals and Objectives

Using interventions that are effective in reducing violence may help to reach several objectives specified in *Healthy People 2010*,[31] the disease prevention and health promotion agenda for the United States. These objectives identify some of the significant preventable threats to health and focus the efforts of public health systems,

Table 1. Selected *Healthy People 2010* objectives related to violence prevention

Objective	Population	Baseline (year)	2010 objective
Injury prevention			
Reduce firearm-related deaths (Objective 15-3)	All people	11.3 deaths/100,000 people (1998)[a]	4.1 deaths/100,000 people
Reduce nonfatal firearm-related injuries (15-5)	All people	24.0 injuries/100,000 people (1997)	8.6 injuries/100,000 people
Extend state-level child fatality review of deaths due to external causes for children aged <14 years (15-6)	Children aged <14 years	Developmental	
Violence and Abuse Prevention			
Reduce homicides (15-32)	All people	6.5 deaths/100,000 people (1998)[a]	3.0 deaths/100,000 people
Reduce the rate of physical assault by current or former intimate partners (15-34)	Persons aged >12 years	4.4 assaults/1000 people (1998)	3.3 assaults/1000 people
Reduce the annual rate of rape or attempted rape (15-35)	Persons aged >12 years	0.8 rapes or attempted rapes/1000 people (1998)	0.7 rapes or attempted rapes/1000 people
Reduce sexual assault other than rape (15-36)	Persons aged >12 years	0.6 sexual assaults other than rape/1000 people (1998)	0.4 sexual assaults other than rape/1000 people
Reduce physical assaults (15-37)	Persons aged >12 years	31.1 physical assaults/1000 people (1998)	13.6 physical assaults/1000 people
Reduce physical fighting among adolescents (15-38)	Adolescents in grades 9–12	36% engaged in physical fighting in past 12 months (1999)	32% engage in physical fighting
Reduce weapon carrying by adolescents on school property (15-39)	Adolescents in grades 9–12	6.9% carried weapon on school property in past 30 days	4.9% carry weapon on school property

[a]Age adjusted to the year 2000 standard population.

legislators, and law enforcement officials for addressing those threats. Many of the proposed *Healthy People* objectives in Chapter 15, "Injury and Violence Prevention," related to this intervention and relevant to juvenile transfer are shown in Table 1.

Methods

General *Community Guide* methods for systematic reviews have been discussed in detail elsewhere.[32] This section briefly describes the specific methods used in this review.

In *Community Guide* systematic reviews, evidence is summarized about the effectiveness of interventions in changing one or more outcomes (here, violence), as well as other positive or negative effects of the intervention. If an intervention is found to be effective, then available evidence is also summarized regarding the applicability of the findings (i.e., the extent to which available data indicate that the intervention might be effective in diverse populations and settings), economic impact, and barriers to the implementation of interventions. If an intervention is found to result in harm, available evidence may also be summarized regarding the applicability of the finding of harm (i.e., the extent to which available data indicate that the intervention might or might not be harmful to specific populations and settings), and any applicable barriers to reducing the harms or substituting other choices that are more effective or less harmful. Economic impact is not considered for interventions found to be harmful or if effectiveness is not established, unless the intervention is widespread and economic analysis may illuminate its ongoing consequences.

As with other *Community Guide* reviews, the process used to systematically review evidence and then translate that evidence into conclusions involved forming a systematic review development team; developing a conceptual approach to organizing, grouping, and selecting interventions; selecting interventions to evaluate; searching for and retrieving evidence; assessing the quality of and abstracting information from each study; assessing the quality of and drawing conclusions about the body of evidence of effectiveness; and translating the evidence of effectiveness into recommendations.

Systematic Review Development Team

Three groups of individuals served on the systematic review development team: the coordination team, the abstraction team, and the consultation team. The coordination team—consisting of a Task Force member, methodology experts in systematic reviews and economics from the Community Guide Branch of the CDC's National Center for Health Marketing, and experts on violence from the CDC's National Center for Injury Prevention and Control, the National Institutes of Health, and the National Institute of Justice—drafted the conceptual frameworks for the reviews, coordinated the data collection and review process, and drafted evidence tables, summaries of the evidence and the reports. The abstraction team collected and recorded data from studies for inclusion in the systematic reviews. The consultation team, comprised of national experts on violence-related topics, was involved in the initial selection of interventions to be reviewed, provided ongoing advice by request, and reviewed the final product.

Search for Evidence

Electronic searches for published research were conducted in databases from the National Criminal Justice Reference Service, Education Resources Information Center, PsycINFO, Wilson Social Sciences Abstracts, Social SciSearch, National Technical Information Service, Medline, and Lexis/Nexis. Search terms used included "juvenile transfer" and its synonyms, as well as "efficacy" and "recidivism." Additionally, references listed in retrieved articles were evaluated and, where relevant, obtained and abstracted. Consultations with experts were held to find additional published reports of studies. Finally, the review team conducted Internet searches to seek additional studies not found through these traditional search methods. Journal articles, governmental reports, books, and book chapters were eligible for inclusion.

Articles published before February 2003 became candidates for inclusion in the systematic review if they evaluated the specified policy or law, assessed a transfer-related violent outcome (i.e., arrest, conviction, or re-arrest), were conducted in a high-income country,[a] reported on a primary study rather than, for example, a guideline or review, and compared a group of people exposed to the intervention (i.e., law or policy) with a comparison group not exposed or less exposed to the intervention. Studies that provided relevant data for review were examined, even if the authors' research goals differed from those of the review. While searching for evidence, the team also sought information about effects of transfer on outcomes not related to violence, such as reductions in property crime and overrepresentation of minorities among transferred juveniles.

Multiple articles were treated as a single study if they reported on the same transfer policy applied to the same population in the same time period. Conversely, one article was treated as multiple studies if it reported separately on multiple transfer policies, multiple populations, or time periods that did not overlap. If separate research teams assessed the same policy in the same population and time frame, the study that received a better rating by *Community Guide* design and execution criteria was chosen to represent this effect.

Assessing Study Design and Execution

Each study that met *Community Guide* criteria for a candidate study was read and rated by the abstraction team. Disagreements among the abstractors were presented to the coordination team for reconciliation, and all candidate studies were presented for discussion by the coordination team. Standard *Community Guide* criteria were used to assess the study design and execution. Only data from qualifying studies (for this review, those with greatest or moderate design suitability, comparison population, and good or fair execution) were used to determine the effectiveness of the reviewed intervention.

Design suitability was assessed for each candidate study. Our system may result in classification of study design differing from that of study authors. According to *Community Guide* criteria, "greatest design suitability" refers to studies with a concurrent comparison group and prospective data collection, "moderate design suitability" refers both to retrospective studies and studies with multiple pre- or post-intervention measurements but no concurrent comparison group, "least suitable design" refers to cross-sectional studies or studies with only single pre- and post-intervention measurements and without concurrent comparison groups.

The review team assessed limitations in execution for the purposes of our review, and may differ from an assessment of limitations for the study's original purposes. Following *Community Guide* methods, the execution of candidate studies was assessed and coded for each of nine specific limitations. Limitations may be assigned for the study's failure to describe the study population and intervention (1 limitation), failure to describe sampling (1 limitation), failure to measure exposures or outcomes effectively (1 limitation each), failure to demonstrate effective follow-up (1 limitation), failure to use appropriate analytic methods (1 limitation), failure to control for either confounding or other bias (1 limitation each), or for some other problem in study execution (1 limitation). All limitations are counted equally. The *Community Guide* uses good execution to refer to studies with 0 to 1 limitations, fair execution to refer to studies with 2 to 4 limitations, and limited execution to refer to studies with ≥5 limitations. We did not assign a limitation for failure to provide demographic details for studies of general deterrence comparing states or cities since this information is readily available from other sources.

Outcome Measures and Effect Size Calculation and Summary

Unless otherwise noted, results of each study are given as point estimates for the relative change in the violent crime rates attributable to the interventions. The team calculated baselines and percent changes using the following formulas for relative change.

For studies with before-and-after measurements and concurrent comparison groups,

$$(\text{Ipost}/\text{Ipre})/(\text{Cpost}/\text{Cpre}) - 1 \qquad (1)$$

where:

Ipost = last reported outcome rate in the intervention group after the intervention;
Ipre = reported outcome rate in the intervention group before the intervention;
Cpost = last reported outcome rate in the comparison group after the intervention;
Cpre = reported outcome rate in the comparison group before the intervention.

In specific deterrence studies, intervention groups were defined as juveniles experiencing transfer to the adult justice system, and control groups as juveniles retained in the juvenile system. In general deterrence studies, intervention

[a]High-income countries as designated by the World Bank are Andorra, Antigua and Barbuda, Aruba, Australia, Austria, The Bahamas, Bahrain, Barbados, Belgium, Bermuda, Brunei, Canada, Cayman Islands, Channel Islands, Cyprus, Denmark, Faeroe Islands, Finland, France, French Polynesia, Germany, Greece, Greenland, Guam, Hong Kong (China), Iceland, Ireland, Isle of Man, Israel, Italy, Japan, Republic of Korea, Kuwait, Liechtenstein, Luxembourg, Macao (China), Malta, Monaco, Netherlands, Netherlands Antilles, New Caledonia, New Zealand, Norway, Portugal, Puerto Rico, Qatar, San Marino, Singapore, Slovenia, Spain, Sweden, Switzerland, Taiwan (China), United Arab Emirates, United Kingdom, United States, and Virgin Islands (U.S.).

groups were defined as populations (e.g., in states or cities) exposed to a changed transfer policy, and control groups as populations not exposed to such a change.

For studies with post-intervention measurements only and concurrent comparison groups,

$$(\text{Ipost} - \text{Cpost})/\text{Cpost} \quad (2)$$

If modeled results were reported from logistic regression, odds ratios were adjusted[33,34] for comparability to relative rate changes estimated from other studies:

$$RR = OR/([1 - P_0] + [P_0 \times OR]), \quad (3)$$

where:

RR = relative risk;
OR = odds ratio to be converted;
P_0 = incidence of the outcome of interest in the unexposed population (i.e., juveniles retained in the juvenile justice system).

In the case of specific deterrence studies, a positive value for the effect measures calculated using one of these formulas indicates that there is a greater rate of violence among transferred than among comparison (retained) juveniles. In the case of general deterrence studies, a positive value indicates a greater rate of violence in the population subject to the strengthened transfer law than in the comparison population.

In the reporting of study findings, the standard two-tailed p value ≤ 0.05 was used as a measure of statistical significance. When available, effect measures that were adjusted for potential confounders through multivariate analysis were preferred over crude effect measures. Follow-up periods of <1 year were considered a limitation. If effect measures reported by the authors could not be converted into percentage changes (e.g., results were presented only in graphical form, without statistics or numerical assessments), the reported findings are described in the text.

Using *Community Guide* methods described elsewhere,[32] the team then combined the individual studies reviewed into a single body of evidence and summarized its strength on the basis of the number of qualifying studies, the strength of their design and execution, and the size and consistency of effects. For evidence to be considered sufficient to merit recommendation of the intervention, the magnitude of the effect must be deemed of public health importance. Statistical significance is generally considered only when there is only one qualifying study. A single study of greatest design suitability and good execution can provide sufficient evidence, if the effect is statistically significant ($p<0.05$). Three studies of moderate design suitability and fair execution can provide sufficient evidence of effectiveness if findings are consistent in direction and size. Results that are deemed sufficient to draw a conclusion are summarized both graphically and statistically.

Reviews of Evidence

Results of studies on specific and general deterrence are presented separately because they examine different populations and use different methods.

Results, Part I

Specific Deterrence Effects

Our search identified six studies[14,35–40] that examined the effects of juvenile transfer on subsequent violent offenses by those juveniles who have been transferred. Descriptive information about design suitability, limitations of execution, and outcomes evaluated in these studies is provided in Appendix A. More detailed descriptions and evaluations of these studies are provided at the website, www.thecommunityguide.org. All six studies that evaluated specific deterrence were of greatest design suitability and good execution. Follow-up times for evaluating risk for re-offending ranged from 18 months[14] to 6 years.[40]

A major methodologic concern in studies of specific deterrence is selection bias—transfer to adult criminal court is generally intended for youth who are more serious offenders than youth who are retained in the juvenile court system, although this may not occur in practice.[41] To the extent that those transferred are more serious offenders, transferred youth would be expected to have greater risk of subsequent violence, independent of any effect of their experience with the adult criminal system. Most studies of the specific deterrent effect of transfer have been conducted in single jurisdictions, thus making it difficult to find control populations, since all juveniles are subject to the same law or policy. To control for possible selection bias, study authors generally restrict the cases considered for inclusion in the study to serious crimes among those eligible for transfer, and then compare the violent outcomes of juveniles in cases actually transferred with those in cases retained in the juvenile system. Statistical controls for factors that may play a role in transfer decisions (e.g., criminal history) may also be used to further control selection bias.[14,42] Two studies conducted in single jurisdictions go to greater lengths to control selection bias, by limiting comparisons to pairs of cases that are matched on critical case variables.[37,40]

To date, one published study has used a different approach to control for selection bias. Rather than compare similar cases within a jurisdiction, Fagan[36,43] compared recidivism between similar juvenile cases in two adjacent jurisdictions (i.e., regions within bordering states) with different transfer provisions. In contrast to studies within jurisdictions, in which a judge may transfer more serious juveniles while retaining the less serious ones, this design eliminates any decision maker from selecting cases for the adult versus the juvenile justice system, but makes the selection of jurisdictions comparable in background characteristics and potential confounders a critical task. The threat to this design is that arrest criteria as interpreted by law enforcement officials in different jurisdictions may differ. Fagan

compares criteria across jurisdictions to assess this problem.

An additional methodologic concern was the possibility of ascertainment bias (i.e., that juveniles who had initially committed more serious crimes and thus were subject to the adult judicial system, would also be more intensely monitored for subsequent criminal behavior and more likely to be re-arrested, regardless of intervening judicial process). However, this seems implausible in the large urban jurisdictions in which most of this research has been conducted, where most law enforcement officials would be unlikely to have knowledge of a youth's court experience when making an arrest.

Effectiveness

In a prospective cohort study, Fagan[43] examined the re-arrest of 15- to 16-year-old youth who were initially arrested in 1981–1982 for robbery or burglary (which is not regarded as violent), in the New York City Metropolitan Area (including the highly urbanized northern counties of New Jersey). He compared re-arrest of these youth in similar counties in New York and neighboring New Jersey.[b] In New York, the age of adult court jurisdiction is 16 years, and under the 1978 Juvenile Offender Law, 15-year-olds are legislatively excluded from trial in juvenile court for 15 felonies, including first- and second-degree robbery and burglary. In New Jersey, 18 years is the age of adult court jurisdiction and there is no legislative exclusion. The age of adult court jurisdiction is the age at which the state holds a person legally responsible for behavior, including criminal behavior. Thus, Fagan's intervention (New York) sample of arrested juveniles was transferred to adult court, while the comparison (New Jersey) sample was retained in juvenile court. Fagan followed the 1981–1982 arrest cohorts through June 1989. The minimum time "at risk" (while not incarcerated) for committing new crimes in the community was 2 years.[36]

To estimate recidivism, Fagan[36] used competing hazard models, which control for time at risk. He included age, time from arrest to disposition (i.e., judicial decision), and sentence length as covariates, and explored the interaction of transfer with sentence length. If their sentences did not include time in prison, Fagan found that transferred juveniles were 39% more likely than retained juveniles to be re-arrested on a violent offense. This effect (greater violent recidivism among transferred juveniles) was magnified for sentences that included incarceration.[36] For example, among transferred juveniles receiving prison sentences of a year, there was a 100% greater rate of violent recidivism, compared with those retained. The majority of those arrested and tried in both adult and juvenile courts received sentences not requiring incarceration, such as probation, restitution, or suspended sentences.[36]

A team of researchers evaluated Florida's juvenile transfer laws in separate studies of two different cohorts.[37,40] The first study compared the overall re-arrest rates of juveniles who were initially arrested in 1987 and then either transferred or retained.[40,41] Each youth transferred to adult court was matched to a youth retained in the juvenile court on six factors (most serious offense, number of counts, number of prior referrals to the juvenile system, most serious prior offense, age, and gender) and, when possible, on race as well.

An early follow-up report from this first study examined re-arrest through the end of 1988. When controlled for time available to commit further crime following release, the estimated re-arrest rate per year of exposure was 54% for transferred youth compared with 32% for retained youth.[41] In a later report,[40] the same youth were followed through November 15, 1994 to determine re-arrest rates. Overall, although transferred youth were re-arrested sooner, the two groups were re-arrested at similar rates (42% for transferred juveniles vs 43% for retained juveniles).

However, results differed for juveniles who were initially arrested for misdemeanors versus those initially arrested for felony offenses. Among those initially arrested for misdemeanors (22.6% of the sample), re-arrest rates were higher for transferred than for retained youth. In contrast, among those initially arrested for felonies (77.4% of the sample), and specifically among those initially arrested for property felonies (32.8% of the sample), re-arrest rates were somewhat lower for transferred than for retained youth. The numbers in these reported results, however, were not easily converted to the effect estimates we generally report (i.e., relative change). Winner et al.[40] confirmed these results by logistic regression, which controlled for age, gender, and criminal history. Survival analyses, which assess the relative rates of outcome (in this instance re-arrest for any crime) over time in intervention and control populations, found a significant effect among misdemeanants, who were re-arrested earlier when transferred than when retained, but this effect was not statistically significant among felons. Overall, the results of this study were inconsistent, indicating increased recidivism over the short term among transferred juveniles, but over the longer term, reduced recidivism for some transferred juveniles and increased recidivism for others.

The second study of juvenile transfer to adult justice systems in Florida[37] essentially replicated the design in the previous study, following implementation in 1990 and 1994 of juvenile laws that increased the breadth of prosecutorial waiver. This study followed youth arrested

[b]Fagan[43] matched counties on key crime and socioeconomic indicators including crime and criminal justice, demographic, socioeconomic, labor force, and housing characteristics (differing by <10%). The counties selected were Queens and Kings (Brooklyn) in New York, and Essex (Newark) and Hudson (Jersey City) in New Jersey.

in 1995–1996 and matched pairs of transferred and retained youth on the same factors as those matched in the earlier study, with the addition of race. Additional factors (e.g., weapon use) were also used to create a "seriousness" index. A subset of "best-matched pairs" was identified, in which each transferred juvenile was matched with a retained juvenile with at least as high a seriousness score (rather than an equivalent score). Because it is possible that retained subjects in comparison pairs might have higher seriousness scores, this criterion may bias the analysis against finding increased recidivism among transferred youth. The outcome compared was felony re-arrest, including nonviolent as well as violent felonies. In this study, the recidivism examined was restricted to felony offenses committed after age 18, on the grounds that this would ensure equivalent records of subsequent offending. Among the best-matched pairs, transferred youth showed 34% more recidivism than retained youth.

Another study[38,42] measured the effects of transfer in Hennepin County, Minnesota. All cases in which the prosecutor filed a motion to transfer a juvenile between 1986 and 1992 were examined. Among juveniles assessed, 60% were transferred. Recidivism rates for youth who were transferred to the adult system were then compared with rates for those who were retained in the juvenile justice system. In this study, recidivism was measured by conviction or by adjudication, its equivalent in the juvenile justice system. Youth were considered "at risk" for a new crime, arrest, and conviction, and followed for at least 2 years while in the community (i.e., not incarcerated).

One of the authors of this study (Podkopacz)[42] reported the results of logistic regression analyses of the effects of transfer on subsequent conviction for violent and nonviolent crimes combined. The analyses controlled for potential confounders including gender, criminal history, and whether the case resulted in incarceration. In their report[38] on subsequent conviction for violence alone (i.e., separated from more general crime), the researchers did not control for confounding. Given the potential for bias associated with the transfer of more serious offenders, the review team regarded controlling for confounding by the seriousness of initial crime as more critical than specific violent outcomes, for which controlled results were not available. The logistic regression analyses showed transfer associated with a 26.5% increased likelihood of further crime (OR=1.93 [b = 0.66], $P_0 = 0.565$).

Myers[14] studied males aged 15 to 18 years arrested in Pennsylvania in 1994 for robbery, aggravated assault, or both, involving use of a deadly weapon. Subsequent arrests for violent crime through 1997 were examined, comparing transferred juveniles to those retained in the juvenile court system. Before 1996, transfer was largely a matter of judicial discretion; however, under 1996 juvenile justice statutes, these cases would have been legislatively excluded from juvenile courts. By using a cohort of juveniles arrested before the statutory change, Myers[14] attempted to anticipate the effects of the new transfer provisions before their implementation. Multivariate analyses controlled for race, urbanicity, home and school settings, and prior offense history, including age at first arrest. Over a mean period of approximately 18 months, the estimated probability of arrest for a subsequent violent felony was 13% for retained juveniles and 23% for transferred juveniles. Thus, transfer was associated with a 77% greater likelihood of post-dispositional violent felony arrest.

Finally, like Myers, Barnoski[35] studied the effect of Washington State's 1994 Violence Reduction Act by examining the effects of discretionary transfers prior to implementation of the new law. The 1994 act legislatively excluded from original jurisdiction in juvenile court those 16- and 17-year-olds charged with any of nine "serious violent felonies" or those with specified offending histories. Barnoski[35] compared recidivism rates for transferred versus retained youth arrested on these same felonies in the 2 years before enactment of the 1994 act, when transfer was discretionary. Controlling for offenses charged in the case, prior record of offenses, gender, and ethnicity, no difference in recidivism was found between transferred and retained juveniles (11% of both retained and transferred juveniles were arrested for a subsequent violent felony within 18 months of release from prison; effect size was 0.00). Barnoski[35] also examined juveniles transferred after passage of the 1994 law. However, these data are not reviewed here, because follow-up time for the post-law cohort was short and data were available for only a small proportion of the population.

In summary, only one of the reviewed studies showed any evidence that transfer of juveniles to the adult justice system deterred either violent or other reoffending. Winner[40] found that transfer of juveniles initially arrested for property crimes was associated with a decrease in recidivism compared with juveniles initially arrested for similar crimes and retained in the juvenile system. In this study, among juveniles initially arrested for crimes other than property crimes, greater recidivism was found among those transferred than among those retained. One reviewed study[35] found no effect. The remaining four studies[14,36,37,39,42,43] all found a harmful effect, in which transferred juveniles committed more subsequent violent and total crime than retained juveniles. Overall, among studies for which a single effect can be calculated, effect sizes ranged from 0.00 to 0.77 with a median effect size of 0.337 (Figure 1). This positive effect size indicates that the weight of evidence shows greater rates of violence among transferred than among retained juveniles; transferred juveniles were approximately 33.7% more likely to be re-arrested for a violent or other crime than were juveniles retained in the juvenile justice system.

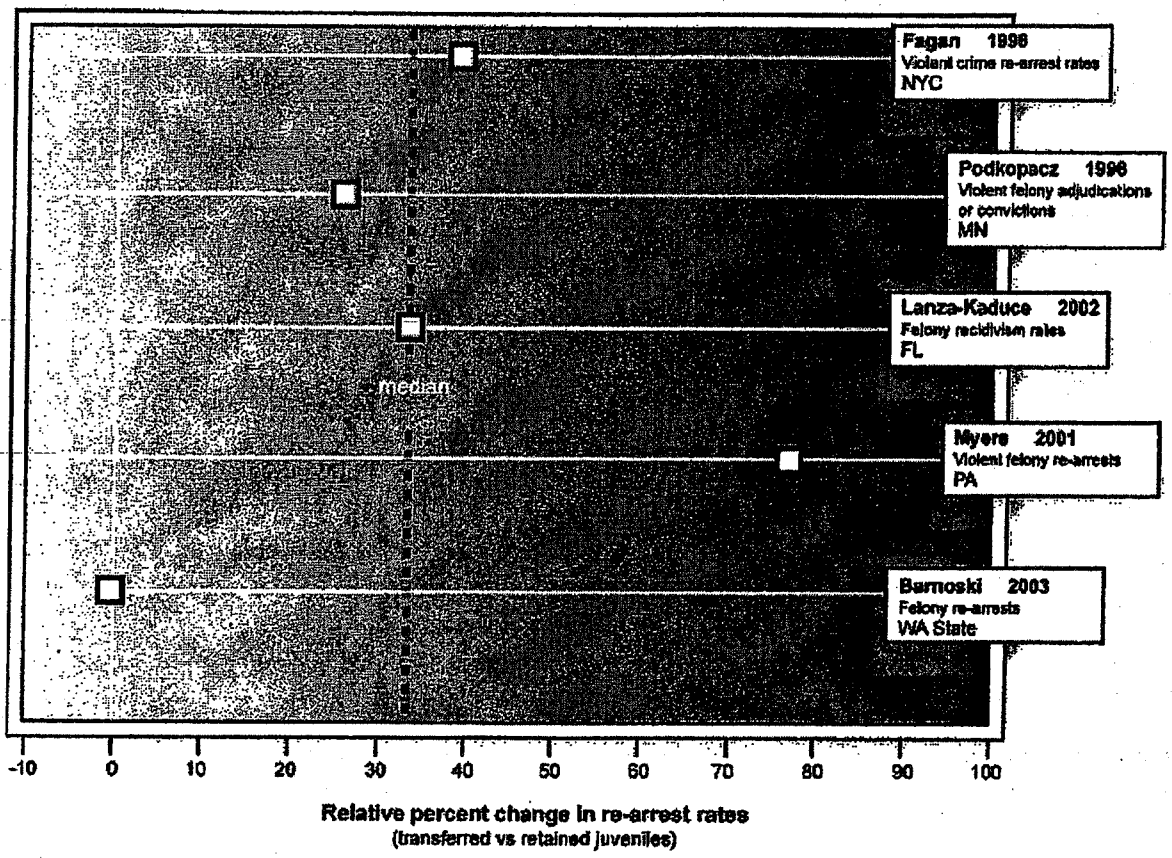

Figure 1. Effects of transfer on re-arrests of transferred juveniles. (Results of study by Winner et al. (1997) were not presented here because of complex effect modification by initial offense and other status characteristics.)

These studies used different strategies to control for selection bias. One study used a cross-jurisdiction design to control for selection bias.[43] Among the studies conducted within single jurisdictions, two used carefully matched pairs to control for selection bias,[37,40] and three relied on the strategy of multivariate statistical controls.[14,35,39] If selection bias had been a major confounding factor in these results, effect sizes adjusted for confounders should be smaller than crude effect sizes. However, in a study that assessed this matter by providing bivariate and multivariate analyses,[14] the effect adjusted for confounders was greater than the unadjusted effect, indicating that, if selection bias was present, it was less influential than confounders acting in a contrary direction. Finally, the level of consistency in results across diverse design strategies provides assurance that the findings are not primarily due to characteristics of study design.

Conclusion

On the basis of strong evidence that juveniles transferred to the adult justice system have greater rates of subsequent violence than juveniles retained in the juvenile justice system, the Task Force on Community Preventive Services concludes that strengthened transfer policies are harmful for those juveniles who experience transfer. Transferring juveniles to the adult justice system is counterproductive as a strategy for deterring subsequent violence.

Results, Part II

General Deterrence

Three studies[35,44–46] met our inclusion criteria for an assessment of the general deterrence effect of transfer laws or policies; all evaluated the effects of changes to a state's transfer laws. We also reviewed the tangential evidence from a study[47] that examined the effect of the transition to the age of adult court jurisdiction on rates of juvenile offending, as measured by offending rates in the general juvenile population within that state. Descriptive information about design suitability, limitations of execution, and outcomes evaluated in these studies is provided in Appendix B. More detailed descriptions of the studies included in this review, and how they were evaluated, are provided at the *Community Guide* website, www.thecommunityguide.com.

Three studies[35,44–46] that met our inclusion criteria evaluated the effects of state transfer laws on violent outcomes among the general juvenile population. All were of greatest design suitability and fair execution. We did not compute effect sizes for these studies because the necessary data were not provided.

Effectiveness

As noted above, Washington State's 1994 Violence Reduction Act legislatively excluded from initial jurisdiction in juvenile court all 16- and 17-year-olds charged with specified violent felonies or criminal histories. A 1997 amendment expanded the original list of offenses and combinations of offending histories that would exclude 16- and 17-year-olds from jurisdiction in juvenile court. Barnoski[35] examined the effect on state arrests for violent crime from 1989 to 2000 among 10- to 17-year-olds. Results, presented only graphically in the report, clearly showed that violent offenses peaked in 1994 and then declined. Barnoski[35] used national juvenile offending trends as a comparison. Without this, one might have concluded that the 1994 law deterred juvenile violence; the Washington trend, however, clearly parallels the national trend in arrests for violent crime, which also peaked in 1994 and subsequently declined.[2] Therefore, Barnoski[35] concludes that "we cannot attribute the decrease in juvenile arrests for violent crimes in Washington State solely to the automatic transfer statutes."

Jensen and Metsger[44] examined the deterrent effect of a 1981 Idaho law mandating automatic transfer to the adult criminal justice system of 14- to 18-year-olds charged with any of five violent crimes. Statewide juvenile violent crime arrest rates for the population aged less than 18 years were averaged for the previous 5 years (1976–1980) and for the 5 years following the legislative change (1982–1986). Changes in the number of arrests of 14- to 18-year-olds for violent offenses in Idaho were compared with those in Wyoming and Montana over the same periods. In Idaho, average arrest rates actually increased from the period before to the period after the legislation, while rates decreased in the comparison states. Thus, the new transfer law was associated with subsequent increases in violence in Idaho. Jensen and Metsger[44] conducted a second analysis of trends of juvenile violent crime in Idaho, controlling for potential confounders, but without comparing the trends in Idaho to trends in a population without comparable laws. For reasons noted above (i.e., the absence of a concurrent control population), we did not include findings from this second analysis and used the interstate comparison instead.

As described in our review of specific deterrence, New York's 1978 Juvenile Offender Law excluded from initial jurisdiction of the juvenile court 13- to 15-year-olds arrested on several specified felonies. Singer and McDowall[45] used interrupted time series methods to examine monthly arrest rates for 13- to 15-year-olds on four violent crimes—homicide, assault, robbery, and rape—between 1974 and 1984 (spanning the change in law). Arson was also examined in the study, but is not classified as a violent crime and is thus not included in our analysis.

In this study, New York City (NYC) was analyzed separately from the rest of the state. For NYC, two comparison populations were examined, neither of which was subject to the changes in transfer legislation. Study authors first compared arrest data for 13- to 15-year-old offenders with data for 16- to 19-year-old offenders in NYC. (Because 16 years is the age of adult court jurisdiction in New York, the older offenders were already too old for the juvenile justice system and, thus, unaffected by the Juvenile Offender Law.) The second comparison was of arrest data for 13- to 15-year-old NYC youth to data for Philadelphia youth in the same age range.

Using arrest data from the two comparison groups makes alternative explanations for changes in arrest rates in the intervention group less likely. Conceptually, if changes in arrest rates for the intervention group (13- to 15-year-olds in NYC) were paralleled by similar outcomes for either comparison group, this would suggest that something other than the intervention caused the change. Only changes in the intervention group not paralleled in either comparison group could plausibly be attributable to the change in law.

However, no consistent pattern of results was found across offenses. Only for rape was a statistically significant decrease shown for the intervention group. The NYC comparison group (16- to 19-year-olds), however, showed a larger decrease in rape, which was also statistically significant. The decline was considerably smaller in the Philadelphia comparison group, suggesting a local confounding effect, not attributable to the change in transfer, in NYC.

In the analysis for upstate New York, Singer and McDowall[45] used 16- to 19-year-olds in the region as the comparison group. For 13- to 15-year-olds (the intervention group), none of the violent crimes examined declined significantly, while assault increased significantly. Similar trends were found for the comparison group. In sum, Singer and McDowall[45] found no consistent pattern of evidence to suggest a general deterrence effect of the strengthened New York transfer law.

Finally, we reviewed a study[47] that assessed the general deterrent effect of reaching the age of adult court jurisdiction in various states. Levitt[47] assumed that if a state's adult criminal system were relatively more punitive than its juvenile system, juveniles would be deterred from committing crimes when they reached the age of adult court jurisdiction. Levitt[47] did not directly examine the effects of transfer laws or changes in transfer laws. He examined the effect of the transition to the age

47

of adult court jurisdiction on year-to-year changes in arrest rates, as a function of the relative punitiveness of the adult versus juvenile system in each state. To gauge relative punitiveness, Levitt[47] used the ratio of people incarcerated in each system—juvenile and adult—relative to age-specific offending rates; offending rates were measured as the proportion of reported crimes for which a suspect is arrested.

Levitt[47] analyzed seven age-specific offending rates (for ages 15 through 21) in a regression model that also controlled for state demographic factors. He found that the effect of the age of adult court jurisdiction was conditional on the relative punitiveness of the juvenile and adult/criminal systems. In states with especially punitive criminal versus juvenile justice systems, the age of adult court jurisdiction was associated with a relative decrease (or slower increase) in offending between years preceding transition to the age of majority and the transition to the age of adult court jurisdiction. However, in less-punitive states and at the average level of punitiveness across all states in the study (as calculated by the review team), transition to the age of adult court jurisdiction was actually associated with an increase in violence.[c] Levitt[47] speculated that this apparently counterdeterrent effect of the age of adult court jurisdiction "may be driven by the fact that a large fraction of juveniles are released from custody just prior to attainment of the age of adult court jurisdiction" and may therefore be able to commit additional crimes.

Levitt's[47] complex results have mixed implications for the possible deterrent effects of transfer laws and policies. Results for the most punitive states show a deterrent effect of the age of adult court jurisdiction, while the results for most states seem to show a counterdeterrent effect. While Levitt[47] speculated about a confounding effect that may account for the latter result, the empirical results regarding the actual deterrent effect remain ambiguous.

Conclusion

According to *Community Guide* rules of evidence, there is insufficient evidence to conclude whether laws or policies facilitating the transfer of juveniles to the adult criminal justice system are effective in preventing or reducing violence in the general juvenile population. While the number and quality of studies are sufficient, their findings are inconsistent. One study of general deterrence reports no apparent effect,[35] one reports mixed effects,[39] and one reports a counterdeterrent effect.[44] A study examining the effect of transition to the age of adult court jurisdiction suggests the possibility of general deterrence, but provides ambiguous evidence of whether, on average, reaching the age of adult court jurisdiction deters or increases violence among potential offenders.[d]

Additional Issues Regarding Strengthened Transfer Laws and Policies

The remainder of this review addresses conclusions pertaining to both specific and general deterrence.

Applicability. The studies reviewed here assessed specific deterrence in Washington State, Pennsylvania, and regions of New York, Minnesota, and Florida. Studies of general deterrence included Washington state, regions of New York, and Idaho; Levitt's[47] study included information from multiple states. These states are geographically and demographically diverse, suggesting broader applicability of the findings reported here.

Other positive or negative effects. Five additional outcomes that may be associated with the transfer of juveniles to the adult judicial system are worthy of mention, although they are not systematically reviewed here. First, youth under court jurisdiction may be released from custody before disposition of their case, even if arrested for serious violent crimes. Rates of release may be associated with subsequent transfer. For example, in 1990–1994, among youth charged with violent offenses in the nation's largest 75 counties, 44% of youth subsequently transferred were released before disposition, whereas 57% of retained youth were released before disposition.[48] However, the cases may not be of comparable seriousness. Increased release rates, in turn, could allow youth to commit additional offenses, including violent offenses, before their cases reach disposition.

Second, transfer may also be associated with the victimization of juvenile offenders themselves during incarceration. Evidence on this topic from the studies reviewed is mixed. One study of four cities between 1981 and 1984 reported rates of victimization of 37% in juvenile training schools (i.e., residential schools where delinquents receive vocational training), compared with 46% for those in adult prison.[49] Rates of inmate suicide among detained juveniles may also differ between those in juvenile and adult judicial institutions, although there are few good estimates. Memory[50] estimated 1978 suicide rates as 2041 per 100,000 for youth

[c]The relevant equations are shown in Levitt,[47] table 5. Model 3 gives the change in violent offending at adulthood as follows: (−0.121 × relative punitiveness) + 0.241 = (−0.121 × 1.42) + 0.241 = 0.069. The mean relative punitiveness in Levitt[47] is 1.42 (p. 1178).

[d]As this review was going to press, a new article was published on the general deterrent effects of increased legislative exclusion.[45] Although we did not formally include it in our review because it was outside our publication date cutoffs, it is one of the stronger studies to date regarding the general deterrence effect of increasing transfer. The study used time series methods, similar to those used by Singer and McDowall (1988),[45] to examine the effects of increased statutory exclusion in 22 states between 1979 and 2003. Of the 22 states, only one showed a general deterrence effect, leading the authors to conclude that transfer laws do not promote the general deterrence of violent crime.

in adult detention facilities, 57 per 100,000 for those in juvenile detention centers, and 12.4 per 100,000 for all those aged 12 to 24 years in the U.S. population. On the other hand, more recent analyses of suicides in juvenile correctional facilities suggest that suicide rates for incarcerated juveniles are similar to rates for juveniles in the general population.[51]

Third, incarcerated violent juveniles are "incapacitated" (i.e., prevented from committing subsequent violent acts in the community) during their period of incarceration. The studies reviewed provided some evidence on the relative length of incarceration of juveniles convicted in adult versus juvenile courts. Fagan[36] reported that juveniles retained in the juvenile system received slightly longer sentences, although the difference was not statistically significant. In contrast, Myers[14] found that transferred juveniles received substantially longer sentences, both in bivariate analysis and controlling for background differences. Barnoski[35] also reported longer sentences for transferred juveniles than for retained juveniles. Finally, Podkopacz[42] reported longer sentences for juveniles convicted of offenses that required a prison commitment in the adult system (e.g., a crime committed with a weapon), but shorter sentences for juveniles transferred for other crimes. Thus, the apparently conflicting data from this small sample of studies do not clearly indicate greater incapacitation for transferred than for retained juveniles.

More generally, research is mixed on whether adult courts are more punitive than juvenile courts to youth with comparable criminal profiles, and punitiveness may depend on the type of offense. Many studies have found the adult court to be more punitive than the juvenile court, but some have found the adult court to be more lenient.[52,53] Relative to older defendants in the adult court, juveniles may appear less threatening and their cases may appear less severe to those hearing their cases. In addition, although juvenile criminal records have become increasingly available,[2] their offending histories have in the past been less available to the adult court because of privacy provisions, possibly allowing the impression that a juvenile is a less-serious or less-hardened offender than his or her actions would indicate. In combination, these factors may lead to less-punitive sanctions in the adult than in the juvenile court. While national statistics indicate that, overall, adult courts are more punitive to juveniles than juvenile courts, much of this disparity is due to differences in severity of crimes or criminal histories of defendants or other specific factors between the cases in the two court systems.[54] This problem of selection, which challenges research on the specific deterrence effects of transfer, also challenges research seeking to establish the relative punitiveness of the two courts. Feld[55] has suggested that the adult court may respond differently to juveniles charged with property crimes than those charged with violent crimes, being more lenient to the former and more punitive to the latter. For violent offenders, a recent review concludes that "most transferred youth convicted of violent offenses receive sentences far more severe than could be imposed in the vast majority of the nation's juvenile courts."[17]

Fourth, while this review focuses on effects on violent crime, researchers have also examined recidivism of juveniles charged with crimes not regarded as violent (e.g., burglary). Four of the reviewed studies report on outcomes among nonviolent offenders, with inconsistent findings. In analyses controlling for background characteristics of offenders, Fagan[36] found no significant effects of transfer on overall re-arrests among nonviolent offenders. Transferred youth showed higher rates of subsequent arrest for nonviolent misdemeanors and lower rates for drug-related crimes. Similarly, Barnoski[35] found no overall effect of transfer on nonviolent felony recidivism. In table 6 of Podkopacz and Feld,[38] they report that transferred youth had a lower rate of felony drug convictions and a lower rate of misdemeanor convictions, but a higher rate of felony convictions for property crimes; however, these analyses did not control for confounders. The multivariate analysis by Myers[14] similarly indicates greater overall recidivism among transferred juveniles—including both violent and nonviolent re-offending. In sum, the effects of transfer on crimes not regarded as violent are not yet clear, although transferred youth seem to show lower rates of later drug offenses.

Fifth, the question of differential treatment of minorities in the justice system overall has long been an issue.[2] Although the relationship of race to transfer is not generally a focus of the studies reviewed here, several of the studies of specific deterrence provide information on race. Among the reviewed studies, the design of the Florida studies by Bishop,[41] Winner et al.,[40] and Lanza-Kaduce et al.[37,40,41] precludes consideration of this matter, because they matched transferred and retained cohorts on race. Myers[14] and Podkopacz and Feld,[38] who studied transfers that were largely discretionary, found that the cases of whites were slightly, albeit not significantly, more likely to be transferred. In contrast, Fagan[36] studied the effects of transfer when it was largely nondiscretionary (i.e., determined by some combination of age and severity of crime), and found no significant association between race and transfer. Barnoski[35] examined changes over time as transfer policy became less discretionary as it expanded legislative exclusion of certain crimes from juvenile courts. A more proportional representation of minorities was found among transferred cases following the statutory change. That is, the proportion of blacks among those transferred decreased from 31% to 22%, while the proportion of whites increased from 51% to 63%. The proportion of women transferred after the expanded exclusion laws took effect increased from 2% to

7%, suggesting a previous selection bias against women. For a recent review of this topic, see Bortner et al.[16]

Barriers to reducing the use of transfer policies. While this review found that strengthened transfer policies generally result in greater re-arrest for crime, including violent crime, among those who are transferred than among those who are retained in the juvenile system of justice, strengthened transfer policies may nonetheless be favored by some policymakers or the public for other reasons (e.g., retribution against serious crime or incapacitation of serious offenders). Policymakers will have to weigh competing interests in making policy decisions. The recent Supreme Court decision, *Roper v. Simmons*,[10] which bans capital punishment for offenders who committed their crimes while minors, suggests a growing sentiment for treating juveniles in a separate system on the basis of their developmental stage.

Results, Part III

Research Issues

Although the Task Force found evidence of harm in the transfer of juveniles to adult courts as an intervention for the purpose of preventing violence, transfer policies are currently in effect, and the following important research issues remain insofar as these policies remain in place. Available studies may provide data allowing for additional analyses.

- We found insufficient evidence regarding general deterrence. Excepting one study,[47] which examined the associations of age of adult court jurisdiction and rates of arrest rather than the effects of transfer per se, the studies reviewed here assessed limited geographic areas and, in general, used simple methodologies. Data may be available to apply time series methods to a broader array of regions and to adjust for confounding variables with ecologic designs (see footnote c).
- It is not clear whether the effect of increased violence among juveniles who experience the adult versus the juvenile justice system is attributable to the overall judicial process, to the differences in sanctions experienced, or to some other component of the process. Among the studies reviewed, analyses by Fagan[36] and Podkopacz[42] indicate that the effects of transfer are not exclusively attributable to incarceration, but also involve the overall justice system, which may result in acquittal or parole. This issue merits further exploration.
- The effectiveness of transfer policies on violence across levels of severity (e.g., murder versus assault) should also be examined. While several studies reviewed indicate different effects for differing initial offenses, other studies do not stratify effects by initial offense.
- Systematic comparison of state transfer laws should be undertaken to determine the extent to which the specific provisions of state laws included in the review are representative of all state transfer provisions. Differences in the application and enforcement of provisions should also be assessed.
- Exploration of the costs of transferring youth to the adult criminal system versus retaining them in the juvenile system are rare.[56] In some sense, evaluating costs of interventions (e.g., transfer) that cause net harm seems unnecessary; because any spending on harmful interventions appears wasteful, the more spending, the more waste. On the other hand, however, documenting the variability and relative costs of the two judicial and correctional systems, the distribution of responsibility for these costs across different levels of government and society, and the net balance of program costs, the costs of subsequent crime, and the costs of opportunities lost to the juveniles themselves might allow a constructive discussion of the economic consequences of change.

Discussion

Certain limitations in our findings should be noted. First, the intervention assessed here, namely transfer policy, varies substantially from state to state. The reviewed studies of specific deterrence and general deterrence cover a small number of states (excluding Levitt's[47] study of a related topic with a national sample). These reviewed studies were the only ones that met our standards and may not represent transfer laws among all states.

Second, the outcome measures in all these studies result from official records of violent offending, either arrest or conviction, rather than from direct measures of violence. However, there are many determinants of who gets arrested for crimes and may then be convicted. The perpetrators of most crimes are not arrested,[57] and there are errors in arrests as well. Studies measuring violence by self-report were not available; however, the review team would have preferred them. Nevertheless, arrest rates are among the best available and most commonly used indicators of crime, and thus the best available outcome for assessment in this review.

Third, given the impossibility of experimental trials in policies such as transfer laws, the challenges of controlling for potential confounding are great. The studies of specific deterrence reviewed here have used several approaches to control confounding, including matched pairs within jurisdictions, cross-jurisdictional comparisons with control of sociodemographic and criminologic variables, and analytic control for background characteristics. The convergence of results across these studies suggests that increased violent recidivism following transfer is a robust finding in spite of these challenges to controlling for potential confounders.

Fourth, the effects of transfer policies on violence and other crime may differ across levels of juvenile crime severity (e.g., misdemeanors or felonies) and should be examined. To ensure comparability, the studies reviewed

here control for the severity of the crime for which the juvenile is at risk of being transferred and, where possible, for the juvenile's criminal history as well. They have not generally assessed whether the effects of transfer differed for juveniles with more or less serious offenses and offense histories; perhaps transfer might be argued to be more effective or less harmful if restricted to the most serious offenders. In fact, the Florida studies[37,40,41] document a large number of misdemeanants transferred to adult court, and find greater harm for these offenders. In any case, the possibility of transferring the most serious juvenile offenders was available in all court systems before the strengthening and formalizing of the transfer policies reviewed here. What has resulted from the changes assessed in this review is the broad lowering of thresholds for the seriousness of crimes for which juveniles are transferred.

This review, along with the accompanying recommendation from the Task Force on Community Preventive Services, is expected to provide guidance and serve as a useful tool for public health and juvenile justice policymakers, for program planners and implementers, and for researchers. Review of the evidence on effect of transfer laws on subsequent violence among those transferred to adult criminal justice systems indicates that transfer of juveniles to the adult criminal system generally results in increased rather than decreased subsequent violence, compared with violence among juveniles retained in the juvenile system. In addition, the evidence on whether transfer laws deter juveniles in the general population from violent crime is inconclusive. Overall, available evidence indicates that use of transfer laws and strengthened transfer policies is counterproductive for the purpose of reducing juvenile violence and enhancing public safety.

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Points of view are those of the authors and do not necessarily reflect those of the Centers for Disease Control and Prevention, the National Institute of Justice, the Department of Justice, or the National Institutes of Health.

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Appendix A. Studies measuring specific deterrence effects of juvenile transfer policies.

Author (year) Design suitability: design Limitations of execution (#) Specific limitations Analytic methods	Historical Context	Location Study population Sample size (N) Sample demographic characteristics	Intervention population Comparison population	Results		
				Reported effect measure Follow-up time; % sample or N with sufficient time at risk for recidivism analysis[a]	Reported effect	Value used in review)[b]
Barnoski (2003)[1] Greatest: prospective cohort study with concurrent comparison Good (0) • No limitations Multivariate analysis, controlling for demographics, charge, and offending history	Washington State expanded automatic transfer provisions in 1994 & 1997. This study examined an earlier cohort arrested on charges that would have made them eligible for automatic transfer had they been arrested after the 1994 law.	Washington state Youth 16–17 years old arrested 1/1/1992–7/1/1994 N = 913 Retained youth, n = 738 Age: 16 yrs 54%; 17 yrs 46% Sex: F 7%; M 93% Race: white 56%; black 20% Transferred youth, n = 175 Age: 16 yrs 26%; 17 yrs 74% Sex: F 2%; M 98% Race: white 51%; black 31%	Youth arrested on any of nine serious felonies, or with specified offending histories, and transferred to criminal justice system Youth meeting same arrest and offending history criteria, but retained in juvenile justice system	Violent felony re-arrests during 18 mos follow-up after release from confinement, adjusted for confounders by logistic regression Retained youth: 81% (600 of 738 followed up) Transferred youth: 51% (90 of 175 followed up)	Transferred youth = 11% Retained youth = 11%	% increase in recidivism associated with transfer, compared with retention Effect size = 0.0%
Bishop et al (1996);[2] Winner et al (1997)[3] Greatest: prospective, with matched comparison Good (1) • Proxy measure of outcome (i.e., re-arrest for any crime) Analysis of discordant pairs; logistic regression, controlling for background and history; time to and frequency of re-arrest		Florida Youth arrested 1/1/1985–12/30/1987. N = 2887 matched pairs Demographics: Male: 92% Age: 17 yrs 60%; 16 yrs 25%; 15 yrs 25%; <15 yrs 3%[c] Race: Transferred youth (53% white; 47% nonwhite) Non-transferred youth (58% white; 42% nonwhite)	Youth transferred from the Florida juvenile justice system to the adult justice system Youth retained in the juvenile system, matched with transferred youth on six criteria: most serious current charge, number of counts, most serious prior offenses, number of prior referrals, age, gender (race matched when possible)	Re-arrest for any crime through Nov 15, 1994; over 6 years 93% (2700 pairs [2887 total pairs – 187 lost])	Probability of any rearrest among transferred juveniles, compared with retained juveniles: 0.95 (p=0.332)	Because significant effect modification by initial arrest (misdemeanor vs. felony and felony type) was found in logistic regression analysis, and because full model coefficients were not published, effect sizes were not calculated.

Author (year) Design suitability: design Limitations of execution (#) Specific limitations Analytic methods	Historical Context	Location Study population Sample size (N) Sample demographic characteristics	Intervention population Comparison population	Results		
				Reported effect measure Follow-up time; % sample or N with sufficient time at risk for recidivism analysis[a]	Reported effect	Value used in review[b]
Fagan (1995, 1996)4,5 Greatest: prospective cohort study with comparison Good (1) • Sample demographics not described Proportions re-arrested and re-incarcerated; time to first re-arrest Re-arrest rate; proportional hazards of specific types of subsequent crime, including violent crime	New York Juvenile Offender Law of 1978 legislatively excludes from juvenile processing 14–15 yr olds on 15 charges, and 13 yr olds on non-capital murder In NY 16 yrs is age of adult court jurisdiction In NJ, age of adult court jurisdiction is 18; no legislative exclusion	New York City metro area 15 and 16 yr olds arrested 1/1/1981–12/31/1982 on either felony robbery or burglary N = 800 youth (200 in each of 4 counties) Sampled on age (15 or 16); other demographics not stated	Youth arrested in 2 counties in NY on either felony robbery or burglary Youth arrested in 2 socio-demographically similar counties in NJ on equivalent charges	Re-arrest and time to re-arrest Follow-up through 6/30/1989; at least 2 years "at risk" following release	Proportional hazard model for violent crime re-arrest: Exp (B) = 0.72 ($p<.05$), (juvenile vs. adult court associated with 28% decreased rate of re-arrest for violent crime) Note: The model includes a significant interaction of transfer with sentence length; the transfer effect increases with longer sentences	Effect size used is based on transfer main effect term alone, and underestimates the effect for those with sentences including incarceration. Increased violent recidivism for transfer = 39% (1/0.72) ? 1 Note: Most of the sample in each court was not incarcerated.
Lanza-Kaduce (2002)6 Greatest: prospective matched pair comparison Fair (2) • Sample demographics not provided • Proxy measure of outcome (i.e., re-arrest for any felony Study compared felony recidivism rates and assessed discordant pairs in "best matched" pair data subset (i.e., retained pair member at least as serious as transferred member)	1994 changes in Florida law extended prosecutorial waiver for 14- and 15-year olds, and also for certain repeat and violent offenders of any age	Florida (6 out of 20 judicial circuits, both urban and rural) Youth arrested in 1995–1996 N = 475 matched pairs N = 315 "best matched pairs" (Best matched pairs exclude pairs in which transferred youth had a worse criminal background than retained youth on a 12-item index. Possibility of worse criminal background among retained youth not noted.)	Youth transferred to adult court system Youth retained in the juvenile system who were matched on 7 criteria: most serious current charge, number of counts, most serious prior offenses, number of prior referrals, age, gender, race	Felony recidivism after age 18 Recidivism data collected through early 2001 Depending on age at arrest, the recidivism periods after age 18 ranged from <1 to over 4+ years, equivalent within matched pairs	Best-matched pairs: Felony recidivism higher among transferred than retained juveniles (49.2% vs 36.8%) Ratio of discordant pairs among the best-matched = 1.76 Only transferred youth re-arrested (90 pairs) vs only retained youth re-arrested (51 pairs)	% increase in felony recidivism for transferred vs. retained youth Effect Size: 33.7% (49.2/36.8) – 1

Author (year) Design suitability: design Limitations of execution (#) Specific limitations Analytic methods	Historical Context	Location Study population Sample size (N) Sample demographic characteristics	Intervention population Comparison population	Results		
				Reported effect measure Follow-up time; % sample or N with sufficient time at risk for recidivism analysis[a]	Reported effect	Value used in review)[b]
Myers (2001)7 Greatest: prospective cohort study Good (0) Logistic regression of overall re-arrest, and violent felony re-arrest, controlling for demographics, criminal history, current offense and case processing; Survival models of time to recidivism following release	1996 Pennsylvania law expanded transfer by excluding from juvenile court murder and several violent crimes committed with a deadly weapon by juveniles between 15 and 18 yrs of age at the time of offense. This study examined a sample from an earlier cohort, who were arrested on charges that would have made them eligible for automatic transfer had they occurred after the legal change	Pennsylvania Males aged 15–18 yrs, arrested 1/1/1994–2/31/1994 N = 557 males Transferred: 138 Retained: 419 Mean age: 16.7 yrs transferred juveniles; 16.0 yrs retained juveniles Race: 72% transferred nonwhite; 82% retained nonwhite	Youth transferred to adult court Youth retained in juvenile court	Violent felony re-arrests Follow-up until 6/30/1998 (mean time "at risk" in the community for committing a subsequent crime: 17.9 months) Follow-up for those not still incarcerated as of Dec. 31, 1997, 89% (494 of original 557)	Logistic regression of violent recidivism following final disposition B = .692 (SE .463), (p>0.10) OR = 2.0	% increase in violent felony recidivism for transferred compared with retained juveniles, calculated from reported modeled proportions of violent recidivism Transferred youth: 0.2305 Retained youth: 0.1304 Effect size = 77% (0.2305 /0.1304) – 1
Podkopacz & Feld (2001) Podkopacz (1996) Greatest: prospective cohort study Good (1) No analysis assessing violent outcome while controlling background confounding Logistic regression		Minnesota (Hennepin County) Juveniles arrested in 1986–1992 for whom a motion was filed for transfer to adult court; some were transferred, others retained. N = 330 youth Transferred = 215; Retained = 115 Age at offense: mean 16.5 yrs Race: 55% African American, 28% white; 17% other	Youth transferred to adult court system Youth motioned for transfer, but retained in juvenile court system	New adjudicated or convicted offense Follow-up: at least 2 yrs of "at risk" time N = 290 (excluding 40 youth with insufficient time at risk)	Reconviction for any offense, controlled for criminal history, gender, age at transfer decision, type of sentence: Transfer OR : 1.93, p<.05. (i.e., reconvicted youth more likely to have been transferred than retained)	% increase in reconviction among transferred juveniles compared with retained juveniles: Effect size: 26.5% (OR was applied to retained reconviction rate, to generate RR)

Key: mo month; N sample size; NA not available; yr year; NJ New Jersey; NY New York ; OR odds ratio; vs versus

[a] Assessment of attrition is not applicable in these studies, as they report re-arrest in the presence of re-arrest records and assume no re-arrest in the absence of records.

[b] If results were reported from logistic regression models, odds ratios were transformed into relative rate changes (*21,41*) so that these effect measures could be more appropriately compared with other studies in the body of evidence.

[c] Percentages add to >100% (error in original data)

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Appendix B. Studies measuring general deterrence effects of juvenile transfer policies.

Author (year) Design suitability: design Limitations of execution (#) Specific limitations Analytic methods	Historical Context	Location Study period Unit of analysis Sample size (N) Sample demographics	Intervention group Comparison group	Results Reported effect measure Comparison period	Reported effect	Value used in review[a]
Barnoski (2003) Greatest: before-and-after population-based study Good (1) • No control for confounding Graphical comparison of Washington State and national violent crime arrest rate trends	Washington State expanded automatic transfer provisions in 1994 & 1997 16 and 17 yr olds with specified criminal offenses and histories were automatically transferred	Washington state Late 1980s to late 1990s Juveniles 10 – 17 yrs of age Population-based (not sampled) Demographics NA	Juveniles (10–17) in Washington state in yrs following law changes Graphically compared with: Juveniles (10–17) in Washington state in yrs preceding law changes. Juveniles (10–17) in U.S. in yrs preceding and following Washington law changes	Violent arrest rates among juveniles (10–17 yrs) per 1000 juveniles Comparison period: late 1980s–late 1990s	"Thus, we cannot attribute the decrease in juvenile arrests for violent crimes in the state solely to the change in WA's jurisdiction statute."	No effect Quantitative effect cannot be computed from the graphical analysis
Jensen, Metsger (1994) Greatest: before-and-after intervention with concurrent comparison (Additional analysis—before-and-after design without concurrent comparison—not considered in this review.) Fair (2) • Selection of comparison populations not well justified • No control of confounding Comparison of changes in rates of violent crime before and after law in intervention and comparison states	1981 Idaho law transferred more juveniles to adult court. There were no comparable changes in comparison states, Wyoming and Montana.	Idaho 1976 – 1986 States (Idaho, compared with Wyoming and Montana) Population-based (not sampled) Demographics NA	Juveniles <18 yrs of age in Idaho in yrs following law changes, 1982–86 Compared with: Juveniles <18 yrs of age in Idaho in yrs preceding law changes, 1976–80 Juveniles <18 yrs of age in Wyoming and Montana in yrs preceding and following law changes in Idaho	Changes in mean juvenile arrest rates, 1982–86 compared with 1976–80	Before-and-after differences of means juvenile violent crime arrest rates ID 12.8 p<0.005 WY –4.2 p<0.025 MT –14.1 p<0.005	Increase in violent crime arrest rates in state with strengthened transfer law, in comparison with neighboring states without this law Effect size not computed because population data not provided

Author (year) Design suitability: design Limitations of execution (#) Specific limitations Analytic methods	Historical Context	Location Study period Unit of analysis Sample size (N) Sample demographics	Intervention group Comparison group	Results Reported effect measure Comparison period	Reported effect	Value used in review[a]
Singer & McDowell (1988) Singer (1996) Greatest: prospective cohort study Good (0) • No limitations Interrupted time series analysis and rate comparisons	New York Juvenile Offender Law of 1978 legislatively excludes from juvenile processing 14–15 yr olds on 15 charges, and 13 yr olds on non-capital murder	New York City and Upper New York State Jan. 1974 – Dec.1984 Regions/cities NYC and NYS are compared. Philadelphia is used as an additional comparison for NYC Population-based (not sampled) Demographics NA	Two different sets of intervention and comparison groups: A. Juveniles in New York City ages 13–15 yrs Compared with: Juveniles in New York City ages 16–19 yrs Juveniles in Philadelphia, ages 13–15 yrs B. Juveniles in upper New York State, ages 13–15 yrs compared with: Juveniles in upper New York State, ages 16–19 yrs	Time series of monthly arrests for homicides, assaults, robberies, and rapes, with 1978 date of New York law as intervention point. Comparison period: January 1974 – December 1984	Shift in level of crime following introduction of law in 1978 Ω t Homicides NYC 13–15 –0.9633 –1.62 NYC 16–19 2.0370 1.55 Phil 13–15 –0.6586 –2.71 Assaults NYC 13–15 0.0230 0.81 NYC 16–19 –21.3500 –1.49 Phil 13–15 –4.7540 –3.32[b] Robberies NYC 13–15 16.0100 0.63 NYC 16–19 17.3400 0.35 Phil 13–15 7.4100 1.95 Rapes NYC 13–15 –4.1570 –3.12[b] NYC 16–19 –6.4120 –3.14[b] Phil 13–15 –.5748 –0.92 Homicides NYS 13–15 –0.0104 –0.37 NYS 16–19 0.0012 0.00 Assaults NYS 13–15 4.4320 4.42 NYS 16–19 2.2520 1.48 Robberies NYS 13–15 2.6180 1.38 NYS 16–19 9.9870 3.08 Rapes NYS 13–15 0.4211 1.34 NYS 16–19 0.8510 1.39	Effect size not computed because heterogeneous results within the study

Key: aggr aggravated; N sample size; NA not available; NS not significant; NYC New York City; NYS Upper New York State; Phil Philadelphia; t t-test; vs versus; yr year; Ω time series estimate of shift in the level of crime associated with introduction of the law

[a] Because of heterogeneous methodologies and the absence of requisite and commensurate data among studies, we did not calculate an overall effect size for this body of evidence.

[b] $p < 0.05$

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IJA-ABA Juvenile Justice Standards Relating to Transfer Between Courts

Original Publication Date 1980

PREFACE

The standards and commentary in this volume are part of a series designed to cover the spectrum of problems pertaining to the laws affecting children. They examine the juvenile justice system and its relationship to the rights and responsibilities of juveniles. The series was prepared under the supervision of a Joint Commission on Juvenile Justice Standards appointed by the Institute of Judicial Administration and the American Bar Association. Seventeen volumes in the series were approved by the House of Delegates of the American Bar Association on February 12, 1979.

The standards are intended to serve as guidelines for action by legislators, judges, administrators, public and private agencies, local civic groups, and others responsible for or concerned with the treatment of youths at local, state, and federal levels. The twenty-three volumes issued by the joint commission cover the entire field of juvenile justice administration, including the jurisdiction and organization of trial and appellate courts hearing matters concerning juveniles; the transfer of jurisdiction to adult criminal courts; and the functions performed by law enforcement officers and court intake, probation, and corrections personnel. Standards for attorneys representing the state, for juveniles and their families, and for the procedures to be followed at the preadjudication, adjudication, disposition, and postdisposition stages are included. One volume in this series sets forth standards for the statutory classification of delinquent acts and the rules governing the sanctions to be imposed. Other volumes deal with problems affecting nondelinquent youth, including recommendations concerning the permissible range of intervention by the state in cases of abuse or neglect, status offenses (such as truancy and running away), and contractual, medical, educational, and employment rights of minors.

The history of the Juvenile Justice Standards Project illustrates the breadth and scope of its task. In 1971, the Institute of Judicial Administration, a private, nonprofit research and educational organization located at New York University School of Law, began planning the Juvenile Justice Standards Project. At that time, the Project on Standards for Criminal Justice of the ABA, initiated by IJA seven years earlier, was completing the last of twelve volumes of recommendations for the adult criminal justice system. However, those standards were not designed to address the issues confronted by the separate courts handling juvenile matters. The Juvenile Justice Standards Project was created to consider those issues.

A planning committee chaired by then Judge and now Chief Judge Irving R. Kaufman of the United States Court of Appeals for the Second Circuit met in October 1971. That winter, reporters who would be responsible for drafting the volumes met with six planning subcommittees to identify and analyze the important issues in the juvenile justice field. Based on material developed by them, the planning committee charted the areas to be covered.

In February 1973, the ABA became a co-sponsor of the project. IJA continued to serve as the secretariat of the project. The IJA-ABA Joint Commission on Juvenile Justice Standards was then created to serve as the project's governing body. The joint commission, chaired by Chief Judge Kaufman, consists of twenty-nine members, approximately half of whom are lawyers and judges, the balance representing nonlegal disciplines such as psychology and sociology. The chairpersons of the four drafting committees also

serve on the joint commission. The perspective of minority groups was introduced by a Minority Group Advisory Committee established in 1973, members of which subsequently joined the commission and the drafting committees. David Gilman has been the director of the project since July 1976

The task of writing standards and accompanying commentary was undertaken by more than thirty scholars, each of whom was assigned a topic within the jurisdiction of one of the four advisory drafting committees: Committee I, Intervention in the Lives of Children; Committee II, Court Roles and Procedures; Committee III, Treatment and Correction; and Committee IV, Administration. The committees were composed of more than 100 members chosen for their background and experience not only in legal issues affecting youth, but also in related fields such as psychiatry, psychology, sociology, social work, education, corrections, and police work. The standards and commentary produced by the reporters and drafting committees were presented to the IJA-ABA Joint Commission on Juvenile Justice Standards for consideration. The deliberations of the joint commission led to revisions in the standards and commentary presented to them, culminating in the published tentative drafts.

The published tentative drafts were distributed widely to members of the legal community, juvenile justice specialists, and organizations directly concerned with the juvenile justice system for study and comment. The ABA assigned the task of reviewing individual volumes to ABA sections whose members are expert in the specific areas covered by those volumes. Especially helpful during this review period were the comments, observations, and guidance provided by Professor Livingston Hall, Chairperson, Committee on Juvenile Justice of the Section of Criminal Justice, and Marjorie M. Childs, Chairperson of the Juvenile Justice Standards Review Committee of the Section of Family Law of the ABA. The recommendations submitted to the project by the professional groups, attorneys, judges, and ABA sections were presented to an executive committee of the joint commission,to whom the responsibility of responding had been delegated by the full commission. The executive committee consisted of the following members of the joint commission:

Chief Judge Irving R. Kaufman, Chairman
Hon. William S. Fort, Vice Chairman
Prof. Charles Z. Smith, Vice Chairman
Dr. Eli Bower
Allen Breed
William T. Gossett, Esq.
Robert W. Meserve, Esq.
Milton G. Rector
Daniel L. Skoler, Esq.
Hon. William S. White
Hon. Patricia M. Wald, Special Consultant

The executive committee met in 1977 and 1978 to discuss the proposed changes in the published standards and commentary. Minutes issued after the meetings reflecting the decisions by the executive committee were circulated to the members of the joint commission and the ABA House of Delegates, as well as to those who had transmitted comments to the project.

On February 12, 1979, the ABA House of Delegates approved seventeen of the twenty-three published volumes. It was understood that the approved volumes would be revised to conform to the changes described in the minutes of the 1977 and 1978 executive committee meetings. The Schools and Education volume was not presented to the House and the five remaining volumes-Abuse and Neglect, Court Organization and Administration, Juvenile Delinquency and Sanctions, Juvenile Probation Function, and

Noncriminal Misbehavior-were held over for final consideration at the 1980 mid-winter meeting of the House.

Among the agreed-upon changes in the standards was the decision to bracket all numbers limiting time periods and sizes of facilities in order to distinguish precatory from mandatory standards and thereby allow for variations imposed by differences among jurisdictions. In some cases, numerical limitations concerning a juvenile's age also are bracketed.

The tentative drafts of the seventeen volumes approved by the ABA House of Delegates in February 1979, revised as agreed, are now ready for consideration and implementation by the components of the juvenile justice system in the various states and localities.

Much time has elapsed from the start of the project to the present date and significant changes have taken place both in the law and the social climate affecting juvenile justice in this country. Some of the changes are directly traceable to these standards and the intense national interest surrounding their promulgation. Other major changes are the indirect result of the standards; still others derive from independent local influences, such as increases in reported crime rates.

The volumes could not be revised to reflect legal and social developments subsequent to the drafting and release of the tentative drafts in 1975 and 1976 without distorting the context in which they were written and adopted. Therefore, changes in the standards or commentary dictated by the decisions of the executive committee subsequent to the publication of the tentative drafts are indicated in a special notation at the front of each volume.

In addition, the series will be brought up to date in the revised version of the summary volume, Standards for Juvenile Justice: A Summary and Analysis, which will describe current history, major trends, and the observable impact of the proposed standards on the juvenile justice system from their earliest dissemination. Far from being outdated, the published standards have become guideposts to the future of juvenile law.

The planning phase of the project was supported by a grant from the National Institute of Law Enforcement and Criminal Justice of the Law Enforcement Assistance Administration. The National Institute also supported the drafting phase of the project, with additional support from grants from the American Bar Endowment, and the Andrew Mellon, Vincent Astor, and Herman Goldman foundations. Both the National Institute and the American Bar Endowment funded the final revision phase of the project.

An account of the history and accomplishments of the project would not be complete without acknowledging the work of some of the people who, although no longer with the project, contributed immeasurably to its achievements. Orison Marden, a former president of the ABA, was co-chairman of the commission from 1974 until his death in August 1975. Paul Nejelski was director of the project during its planning phase from 1971 to 1973. Lawrence Schultz, who was research director from the inception of the project, was director from 1973 until 1974. From 1974 to 1975, Delmar Karlen served as vice-chairman of the commission and as chairman of its executive committee, and Wayne Mucci was director of the project. Barbara Flicker was director of the project from 1975 to 1976. Justice Tom C. Clark was chairman for ABA liaison from 1975 to 1977.

Legal editors included Jo Rena Adams, Paula Ryan, and Ken Taymor. Other valued staff members were Fred Cohen, Pat Pickrell, Peter Garlock, and Oscar Garcia-Rivera. Mary Anne O'Dea and Susan

J. Sandler also served as editors. Amy Berlin and Kathy Kolar were research associates. Jennifer K. Schweickart and Ramelle Cochrane Pulitzer were editorial assistants.

It should be noted that the positions adopted by the joint commission and stated in these volumes do not represent the official policies or views of the organizations with which the members of the joint commission and the drafting committees are associated.

This volume is part of a series of standards and commentary prepared under the supervision of Drafting Committee II, which also includes the following volumes:

COURT ORGANIZATION AND ADMINISTRATION

COUNSEL FOR PRIVATE PARTIES

PROSECUTION

THE JUVENILE PROBATION FUNCTION: INTAKE AND PREDISPOSITION INVESTIGATIVE SERVICES

PRETRIAL COURT PROCEEDINGS

ADJUDICATION

APPEALS AND COLLATERAL REVIEW

ADDENDUM OF REVISIONS IN THE 1977 TENTATIVE DRAFT

As discussed in the Preface, the published tentative drafts were distributed to the appropriate ABA sections and other interested individuals and organizations. Comments and suggestions concerning the volumes were solicited by the executive committee of the IJA-ABA Joint Commission. The executive committee then reviewed the standards and commentary within the context of the recommendations received and adopted certain modifications. The specific changes affecting this volume are set forth below. Corrections in form, spelling, or punctuation are not included in this enumeration.

1. Standards 1.1 B. and 1.1 C. were amended by reducing the minimum age for criminal court jurisdiction from over fifteen to over fourteen years of age at the time the offense is alleged to have occurred.

   The commentaries to Standards 1.1. B. and 1.1 C. also were revised to include fifteen-year-old juveniles among those under eighteen who could be subject to waiver of juvenile court jurisdiction.

2. Standard 1.2 A. was amended by bracketing thirty-six months to comply with the policy adopted by the executive committee of making recommended time limitations permissive rather than mandatory.

   The commentary to Standard 1.2 A. also was revised to place brackets around three years, the recommended maximum duration for juvenile court dispositions.

3. The commentary to Standard 1.2 B. was revised to add two sentences at the end of the last paragraph to expand the cross-reference to the provisions in the Dispositions volume that modify a disposition by applying Dispositions Standard 5.4 to revocation of probation.

4. Standards 2.1 A. through 2.1 E. were amended to bracket all numbers representing time limits, adding class two juvenile offenses to the category of charges for which waiver of juvenile court jurisdiction would be possible, and reducing to fifteen the age at which the alleged juvenile offense must have been committed for waiver to be possible.

   The commentaries to Standards 2.1 A. through 2.1 E. were revised to reflect the above changes.

5. Standard 2.2 A. 1. was amended to add class two offenses to the provision requiring a finding of probable cause as a prerequisite to waiver.

   The commentary also was revised to add class two offenses.

6. Standard 2.2 C. was amended by adding class two offenses to the provisions on necessary findings for waiver, by requiring a finding of a prior record of adjudication for class two offenses only, and by adding a cross-reference to Standard 2.1 E. providing that the court's finding that the juvenile is not a proper person for juvenile court handling must be in writing.

   The commentary to Standard 2.2 C. was revised accordingly.

7. Standard 2.2 D. was amended to include class two offenses in the provision on the substitution of a finding of probable cause in subsequent juvenile court proceedings but not in any subsequent criminal proceeding.

8. Standards 2.3 A. and B. were amended to bracket five court days for notice of the waiver hearing.

9. Standard 2.3 C. was amended to add to the provision that the court pay expert witness fees and expenses a clause making payment subject to the court finding the expert testimony necessary.

   The commentary was revised to include the same caveat.

10. Standard 2.3 E. was amended to add class two offenses to the provision placing the burden of proof of probable cause and of the juvenile's unfitness for juvenile court handling on the prosecutor.

    Commentary to Standard 2.3 E. was revised to add to the discussion of the juvenile's right to challenge prosecution evidence a cross-reference to the right to compulsory process in Dispositional Procedures Standard 6.2, Juvenile Records and Information Systems Standard 5.7 B., and Pretrial Court Proceedings Standard 1.5 F.

11. Standard 2.3 I. was amended to delete "criminal," thereby extending the inadmissibility of admissions by the juvenile during the waiver hearing to both juvenile and criminal proceedings, and to add an exception for perjury proceedings.

12. Standard 2.4 was amended to bracket the seven days for filing appeals.

    Commentary to Standard 2.4 was revised to add a cross-reference to Appeals and Collateral Review Standard 2.2, which authorizes appeal of the waiver decision by either party.

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INTRODUCTION

Drawing lines is difficult and necessarily arbitrary. The line between "adult" and "child" is important in every context, but nowhere more than in the application of the criminal law. The "adult" faces the processes and sanctions of the criminal court. The "child" experiences the juvenile court, its treatment programs, and limited penalties.

This volume is about waiver, the process by which the juvenile court releases certain juveniles from its jurisdiction and transfers them to the criminal courts.

Juvenile courts exist because Americans admit to a fundamental difference between children and adults. We are, perhaps, more sympathetic to troublesome children than to criminal adults. Because they are immature and not held to the same degree of responsibility for their acts, or because they are more malleable and susceptible to rehabilitation, children are brought within the jurisdiction of a juvenile court whose rhetoric, and sometimes whose practice, is kinder, more hopeful, and less vindictive than that of the criminal court.

The juvenile court is often described as a child-saving institution, principally rehabilitative. By contrast, the criminal court acknowledges its multiple purposes of retribution, deterrence, containment, and, when it can be reconciled with the others, rehabilitation. Public opinion appears to tolerate, even endorse, the propositions that juvenile courts should be different from criminal courts and that children should be treated more benevolently than adults. The juvenile court's clients are usually referred to in this volume asexually and unemotionally as "juveniles" or "persons." In these few paragraphs, however, we use the terms "children" and "child" advisedly. A "child" is not an adult, and the line between them must be drawn somewhere.

Many American jurisdictions have determined in recent years that an eighteen-year-old is an adult for purposes of voting, conscription, marriage, and alcohol consumption. An adult for some purposes, the argument goes, should be an adult for all. Eighteen years of age will suffice to draw the line for crime as for alcohol or the ballot.

There is nothing inherently right or just about a line drawn at eighteen. Other ages would do as well, and have. Professor Egon Bittner has convincingly argued that the concept of adolescence is a recent Western invention. "Policing Juveniles-The Social Bases of Common Practice," in Pursuing Justice for the Child (Rosenheim ed. 1976). See also J.R. Gillis, Youth and History: Tradition and Change in European Age Relations, 1770-Present (1975). Without adolescence, the child-adult line might be at fourteen, or thirteen, or younger.

No matter what the age, difficult cases will remain. There always will be individuals who are victims of arbitrary lines. Innocent and immature adults of eighteen years will be processed by the criminal courts. "Young person" or "young adult" programs may be available which will mean exposure to lesser sanctions than face other adults, but they will be in the criminal courts just the same. A compassionate prosecutor or judge may exercise discretion in favor of a particular defendant, but that will be fortuitous. Beneficence will be good fortune, not a theoretical right. Whatever the qualities of children which argue for special treatment, an eighteen-year-old, by irrebuttable legal presumption, is not a child. Neither the laws of any state nor this volume propose any method by which the presumption of adulthood can be overcome. [FNa1]

The converse problem ought to be equally easy. A tough-minded view of majority might have as a logical corollary a soft-hearted view of minority. If an adult is outside the juvenile court's jurisdiction

because the alleged act occurred a day past his or her eighteenth birthday, a child should be within the juvenile court if the act occurs a day before the crucial birthday.

It doesn't work that way. The presumption of childhood can be rebutted in almost every state. Under certain circumstances, children of certain ages who have allegedly committed certain acts can be transferred to the criminal court. This volume offers specific guides to making transfer decisions. It discusses who decides, under whose initiatives these decisions are made, what procedures and information are involved, age range, and the nature of the decisionmaking mechanisms.

The stakes are high. The adult accused of murder, rape, or armed robbery can be punished with life imprisonment in most jurisdictions, in some with death. In most cases the child faces punishments of lesser duration and severity.

If something about children compels the existence of juvenile courts, the lack of symmetry between the irrebuttable presumption of majority and the rebuttable presumption of minority should be disturbing. But, disturbing or not, the possibility of waiver is unavoidable. Some acts are so offensive to the community that the arbitrary line drawn at eighteen cannot acceptably be used to protect the alleged wrongdoer. The serious offender should not be permitted to escape the criminal justice system simply because he or she is a day or a year short of eighteen. As age eighteen approaches, credible argument can be made that the juvenile court's always inadequate resources should not be devoted to those youthful wrongdoers whose offenses are so serious or who appear to be so incorrigible as to be unworthy of or beyond help.

Finally, all court proceedings are prospective. They deal with past acts but also with future remedies, sanctions, and programs. If the conduct alleged is sufficiently serious, some mechanism should exist to permit retention of authority over some juveniles beyond the eighteenth birthday. A waiver decision will determine which court will have jurisdiction. If the precipitating acts are serious enough, the criminal court's capacity to maintain control over the juvenile for long periods of time may be more appropriate and socially reassuring than the maximum three-year period of juvenile court control proposed in these standards.

The standards that follow express a preference for retention by the juvenile court of jurisdiction over most persons under eighteen. An implicit presumption should be made explicit; every person under eighteen years of age at the time he or she commits an act that would constitute a criminal offenses should remain subject to the juvenile court's jurisdiction unless every one of many conditions is present. Every procedural and substantive standard that follows grows out of the presumption.

The presumption in favor of juvenile court jurisdiction need not adopt any particular theoretical rationale for the juvenile court and the concept of separate treatment for juveniles. One rationale, the first principle of the juvenile court, is that children are qualitatively different from adults. Possibly they are most innocent and in some moral sense less responsible for their acts and more deserving of compassion than are adults. Possibly they are victims of criminogenic environments from which they should be given every opportunity to escape. Possibly children are more malleable than adults and more likely to benefit from gentler handling. For these reasons and others, it can be argued that, whenever possible, children should be accorded a humane, compassionate response to their disturbing acts.

A second rationale for the juvenile court derives from the view recently summarized as radical nonintervention. This view, in broadest outline (it takes many forms) is that many young people engage in seriously antisocial acts, but most simply outgrow them. Arguing in part from labeling theories, this view urges that the children who are least likely to mature out of antisocial acts are those who are identified as delinquent and treated as such by the state (and necessarily the community at large). Most juvenile acts by

this view ought to be disregarded. Moreover, the juvenile and criminal justice systems disproportionately enforce laws against the poor and dispossessed who are accordingly labeled "delinquent" and eventually, by self-fulfilling prophecy, become adult criminal statistics. While some violent, threatening, or repetitive acts cannot conscientiously be ignored, radical nonintervention argues for the minimum possible intervention in children's lives. The juvenile court often has lesser consequences (if only because the duration and severity of its sanctions are more limited, and because its records are, ostensibly, confidential) than the criminal court and should therefore be preferred.

A third rationale is that the juvenile court is peculiarly capable of rehabilitating disruptive or disturbed children. Recent research urges skepticism about the efficacy of existing rehabilitative methods. Stanton Wheeler in 1966 summarized juvenile rehabilitative programs and concluded:

> But do we know enough about delinquency to specify the ways in which even a moderate reduction could be brought about? In terms of verified knowledge, the answer must be an unqualified no.... Indeed, as of now, there are no demonstrable and proven methods for reducing the incidence of serious delinquent acts through preventive or rehabilitative procedures. Either the descriptive knowledge has not been translated into feasible action programs, or the programs have not been successfully implemented; or if implemented, they have lacked evaluation; or if evaluated, the results usually have been negative; and in the few cases of reported positive results, replications have been lacking. Wheeler et al., "Juvenile Delinquency-Its Prevention and Control," in President's Commission on Law Enforcement and Administration of Justice, Task Force Report: Juvenile Delinquency and Youth Crime 410 (1967).

In 1973, LaMar Empey canvassed the major experiments in rehabilitation of delinquent children and concluded:

> [S]pecial treatment institutions for juveniles have been built, but ironically, they seem to have perpetuated many of the same difficulties [as adult institutions]. Except for the protection of society in the most extreme cases, there is little evidence to support the notion that juvenile institutions are successful. "Diversion, Due Process and Deinstitutionalization," in Prisoners in America 35 (Ohlin ed. 1973).

Paul Lerman's 1974 reanalysis of the evaluation data of two of the most acclaimed juvenile rehabilitative programs concluded: "There is an array of evidence that current correctional 'packages,' regardless of their contents, are relatively ineffective in changing youth behavior," Community Treatment and Social Control-A Critical Analysis of Juvenile Policy 96 (1974). "It is ... evident that an effective juvenile control/treatment strategy has yet to be scientifically demonstrated." Id. at 206.

Probably the most that can be said presently is that lavishly funded experimental programs with a high level of staff commitment, low staff-client ratios, and empathetic long-term aftercare facilities have some likelihood of improving the life chances of the children who experience them. We can hope that rehabilitative programs will be successful. We do not know that we can improve life chances, but we need not yet be convinced that we cannot. The possibility that juveniles are more susceptible of rehabilitation is not to be dismissed or belittled. Many of those involved in the creation of the juvenile court and in its present administration have believed in its promise. To the extent that the juvenile court is successful with some children and changes some lives for the better, the rehabilitative argument for the juvenile court has great moral force.

Each of the first three rationales is vulnerable to serious objections. To the first, it can be argued, as Justice Fortas did in In re Gault, 387 U.S. 1 (1967), that we have failed to deliver to the child as we

promised and that nonadult characteristics do not justify the juvenile court's reduced protections and the juvenile's vulnerability to unstructured judicial and social worker discretion. That view has been widely adopted. Witness the many recent calls for limitation of the juvenile court's criminal jurisdiction to acts that would be criminal if committed by an adult and for adoption by the juvenile court of most of the procedural protections of the criminal court for juvenile offenders. Other volumes in these standards support that position.

The second rationale is convincing only to those (who are increasing in number but still a minority) who accept most of the tenets of radical nonintervention and who further accept the proposition that a criminal court intervention will cause more harm than a juvenile court intervention.

The rehabilitative rationale by itself is persuasive only to the optimistic at heart and to that dwindling number of informed people who believe that the technology of rehabilitation has achieved a reliability that justifies taking special power over others to change them.

A fourth rationale for the juvenile court remains and it may be the most compelling of all. Assume that children are not, or morally should not be viewed as, materially different from adults. Assume that innate difference is not a compelling justification for the separate juvenile court. Assume that the criminal court's social consequences are no more severe than those of the juvenile court. Assume further a negative or agnostic view of the technology of rehabilitation.

The fourth rationale is that the criminal justice system is so inhumane, so poorly financed and staffed, and so generally destructive that the juvenile court cannot do worse. Perhaps it can do better. This type of cynical analysis, often called a theory of less harm, has appeared in many contexts in recent years. Plans for new prisons have been justified on the basis that they will cause less harm to their inmates than do existing megaprisons. The influential Beyond the Best Interests of the Child (Goldstein, Freud, and Solnit [1973]) calls for employment of a "least detrimental alternative" concept in child placement decisions in all contexts.

President Johnson's crime commission nine years ago presented its most powerful argument for retention of a separate juvenile court in terms of an argument of less harm:

> The Commission does not conclude from its study of the juvenile court that the time has come to jettison the experiment and remand the disposition of children charged with crime to the criminal courts of the country. As trying as are the problems of the juvenile court, the problems of the criminal courts, particularly those of the lower courts that would fall heir to much of the juvenile court jurisdiction, are even graver. President's Commission on Law Enforcement and Administration of Justice, The Challenge of Crime in a Free Society 81 (1967).

The following standards and the commentary in support do not attempt to offer theoretical or ideological explanations. Nor do we necessarily adopt any one or more of the rationales offered here to the exclusion of the others. Sound social policies require a presumption that all persons under the juvenile court's maximum age jurisdiction should remain subject to the juvenile court's jurisdiction. Only extraordinary juveniles in extraordinary factual situations should be transferred to the criminal court and then only in accordance with procedures designed to accord maximum procedural protections to juvenile and in compliance with precise and exacting behavioral standards.

FNa1. The unusual process of reverse certification-see Ark. Stat. § 45-241 (1964) and Vt. Stat. Ann. tit. 33, § 635(b) (Supp. 9, 1974)-by which juveniles first appear in criminal court and the criminal court judge determines whether juvenile court jurisdiction is appropriate, may be an exception.

Part I: Jurisdiction

STANDARD 1.1 AGE LIMITS

A. The juvenile court should have jurisdiction in any proceeding against any person whose alleged conduct would constitute an offense on which a juvenile court adjudication could be based if at the time the offense is alleged to have occurred such person was not more than seventeen years of age.

B. No criminal court should have jurisdiction in any proceeding against any person whose alleged conduct would constitute an offense on which a juvenile court adjudication could be based if at the time the offense is alleged to have occurred such person was not more than fourteen years of age.

C. No criminal court should have jurisdiction in any proceeding against any person whose alleged conduct would constitute an offense on which a juvenile court adjudication could be based if at the time the offense is alleged to have occurred such person was fifteen, sixteen, or seventeen years of age, unless the juvenile court has waived its jurisdiction over that person.

STANDARD 1.2 OTHER LIMITS

A. No juvenile court disposition, however modified, resulting from a single transaction or episode, should exceed [thirty-six] months.

B. The juvenile court should retain jurisdiction to administer or modify its disposition of any person. The juvenile court should not have jurisdiction to adjudicate subsequent conduct of any person subject to such continuing jurisdiction if at the time the subsequent criminal offense is alleged to have occurred such person was more than seventeen years of age.

STANDARD 1.3 LIMITATIONS PERIOD

No juvenile court adjudication or waiver decision should be based on an offense alleged to have occurred more than three years prior to the filing of a petition alleging such offense, unless such offense would not be subject to a statute of limitations if committed by an adult. If the statute of limitations applicable to adult criminal proceedings for such offense is less than three years, such shorter period should apply to juvenile court criminal proceedings.

Part II. Waiver

STANDARD 2.1 TIME REQUIREMENTS

A. Within [two] court days of the filing of any petition alleging conduct which constitutes a class one or class two juvenile offense against a person who was fifteen, sixteen, or seventeen years of age when the alleged offense occurred, the clerk of the juvenile court should give the prosecuting attorney written notice of the possibility of waiver.

B. Within [three] court days of the filing of any petition alleging conduct which constitutes a class one or class two juvenile offense against a person who was fifteen, sixteen, or seventeen years of

age when the alleged offense occurred, the prosecuting attorney should give such person written notice, multilingual if appropriate, of the possibility of waiver.

C. Within [seven] court days of the filing of any petition alleging conduct which constitutes a class one or class two juvenile offense against a person who was fifteen, sixteen, or seventeen years of age when the alleged offense occurred, the prosecuting attorney may request by written motion that the juvenile court waive its jurisdiction over the juvenile. The prosecuting attorney should deliver a signed, acknowledged copy of the waiver motion to the juvenile and counsel for the juvenile within [twenty-four] hours after the filing of such motion in the juvenile court.

D. The juvenile court should initiate a hearing on waiver within [ten] court days of the filing of the waiver motion or, if the juvenile seeks to suspend this requirement, within a reasonable time thereafter.

E. The juvenile court should issue a written decision setting forth its findings and the reasons therefor, including a statement of the evidence relied on in reaching the decision, within [ten] court days after conclusion of the waiver hearing.

F. No waiver notice should be given, no waiver motion should be accepted for filing, no waiver hearing should be initiated, and no waiver decision should be issued relating to any juvenile court petition after commencement of any adjudicatory hearing relating to any transaction or episode alleged in that petition.

STANDARD 2.2 NECESSARY FINDINGS

A. The juvenile court should waive its jurisdiction only upon finding:
   1. that probable cause exists to believe that the juvenile has committed the class one or class two juvenile offense alleged in the petition; and
   2. that by clear and convincing evidence the juvenile is not a proper person to be handled by the juvenile court.

B. A finding of probable cause to believe that a juvenile has committed a class one or class two juvenile offense should be based solely on evidence admissible in an adjudicatory hearing of the juvenile court.

C. A finding that a juvenile is not a proper person to be handled by the juvenile court must include determinations, by clear and convincing evidence; of:
   1. the seriousness of the alleged class one or class two juvenile offense;
   2. a prior record of adjudicated delinquency involving the infliction or threat of significant bodily injury, if the juvenile is alleged to have committed a class two juvenile offense;
   3. the likely inefficacy of the dispositions available to the juvenile court as demonstrated by previous dispositions of the juvenile; and
   4. the appropriateness of the services and dispositional alternatives available in the criminal justice system for dealing with the juvenile's problems, and whether they are, in fact, available.

Expert opinion should be considered in assessing the likely efficacy of the dispositions available to the juvenile court. A finding that a juvenile is not a proper person to be handled by the juvenile court should be based solely on evidence admissible in a disposition hearing of the juvenile court, and should be in writing, as provided in Standard 2.1 E.

D. A finding of probable cause to believe that a juvenile has committed a class one or class two juvenile offense may be substituted for a probable cause determination relating to that offense (or a lesser included offense) required in any subsequent juvenile court proceeding. Such a finding should not be substituted for any finding of probable cause required in any subsequent criminal proceeding.

STANDARD 2.3 THE HEARING

A. The juvenile should be represented by counsel at the waiver hearing. The clerk of the juvenile court should give written notice to the juvenile, multilingual if appropriate, of this requirement at least [five] court days before commencement of the waiver hearing.

B. The juvenile court should appoint counsel to represent any juvenile unable to afford representation by counsel at the waiver hearing. The clerk of the juvenile court should give written notice to the juvenile, multilingual if appropriate, of this right at least [five] court days before commencement of the waiver hearing.

C. The juvenile court should pay the reasonable fees and expenses of an expert witness for the juvenile if the juvenile desires, but is unable to afford, the services of such an expert witness at the waiver hearing, unless the presiding officer determines that the expert witness is not necessary.

D. The juvenile should have access to all evidence available to the juvenile court which could be used either to support or contest the waiver motion.

E. The prosecuting attorney should bear the burden of proving that probable cause exists to believe that the juvenile has committed a class one or class two juvenile offense and that the juvenile is not a proper person to be handled by the juvenile court.

F. The juvenile may contest the waiver motion by challenging, or producing evidence tending to challenge, the evidence of the prosecuting attorney.

G. The juvenile may examine any person who prepared any report concerning the juvenile which is presented at the waiver hearing.

H. All evidence presented at the waiver hearing should be under oath and subject to cross-examination.

I. The juvenile may remain silent at the waiver hearing. No admission by the juvenile during the waiver hearing should be admissible to establish guilt or to impeach testimony in any subsequent proceeding, except a perjury proceeding. J. The juvenile may disqualify the presiding officer at the waiver hearing from presiding at any subsequent criminal trial or juvenile court adjudicatory hearing relating to any transaction or episode alleged in the petition initiating juvenile court proceedings.

STANDARD 2.4 APPEAL

A. The juvenile or the prosecuting attorney may file an appeal of the waiver decision with the court authorized to hear appeals from final judgments of the juvenile court within [seven] court days of the decision of the juvenile court.

B. The appellate court should render its decision expeditiously, according the findings of the juvenile court the same weight given the findings of the highest court of general trial jurisdiction.

C. No criminal court should have jurisdiction in any proceeding relating to any transaction or episode alleged in the juvenile court petition as to which a waiver motion was made, against any person over whom the juvenile court has waived jurisdiction, until the time for filing an appeal from that determination has passed or, if such an appeal has been filed, until the final decision of the appellate court has been issued.

STANDARDS WITH COMMENTARY

Part I: Jurisdiction

STANDARD 1.1 AGE LIMITS

1.1 A. The juvenile court should have jurisdiction in any proceeding against any person whose alleged conduct would constitute an offense on which a juvenile court adjudication could be based if at the time the offense is alleged to have occurred such person was not more than seventeen years of age.

Commentary

This standard addresses two major issues: the maximum age of juvenile court jurisdiction and the point at which the juvenile's age is relevant.

Standard 1.1 A. proposes that all accused persons seventeen and younger should be subject to juvenile court jurisdiction. The eighteenth birthday should define an adult for the purposes of court jurisdiction. The jurisdictional statutes of thirty-seven states agree. Nine states end juvenile court jurisdiction at the seventeenth birthday; four at the sixteenth. The eighteenth birthday signals the achievement of majority for many legal purposes. The twenty-sixth amendment to the United States Constitution establishes a constitutional right to vote in federal elections at that age. This near consensus among the states and the federal government argues compellingly that juvenile court jurisdiction should end at age eighteen.

Standard 1.1 A. bases jurisdiction on age at the time an act allegedly occurred that would constitute an offense on which a juvenile court adjudication could be based. One alternative is to look to age at the time that the juvenile court petition or the criminal court complaint, information, or indictment is filed. A majority of states base jurisdiction on a person's age at the time of the alleged conduct giving rise to juvenile court jurisdiction. See Iowa Code Ann. § 232.62 (1941); La. Rev. Stat. § 13.1569(3) (Supp. 1974); and W. Va. Code Ann. § 49-5-3 (Supp. 49, 1974). In some states the controlling factor is age when juvenile court proceedings are initiated. See Ky. Rev. Stat. Ann. § 208.020 (1969) and Mich. Comp. Laws Ann. § 712A.2 (Supp. 37, 1974).

The existence of a juvenile court reflects a social policy decision that the acts of juveniles ordinarily should not place them within the jurisdiction of the criminal court. To base juvenile court jurisdiction on any age other than that at the time of the alleged wrongful conduct would conflict with the fundamental concept that the acts of juveniles should receive different judicial treatment from those of adults.

A second argument for the time-of-conduct jurisdictional rule is the possibility that otherwise prosecutorial caprice could determine jurisdiction. Conduct that could be the basis for a juvenile court delinquency adjudication can usually also support a criminal prosecution. In a state where jurisdiction is based on age at the time of filing, a prosecutor can deny juvenile court jurisdiction simply by delaying the initiation of proceedings. Texas prosecutors have become notorious for this practice. See Note, "Trial of Juveniles as Adults," 21 Baylor L. Rev. 333 (1969) and Note, "Juvenile Due Process Texas-Style: Fruit of the Poisonous Tree Resweetened," 24 Baylor L. Rev. 71 (1972).

Standard 1.1 A.'s time-of-conduct age jurisdiction rule avoids a troublesome jurisdictional problem encountered in states (and the District of Columbia) that employ a two-part age jurisdiction standard; the individual must have been under a specified age at the time of the alleged conduct and must be under a second age at the time of adjudication. The gap between the time-of-conduct and time-of-adjudication limits is usually at least three years. Representative statutes include: Ga. Code Ann. § 24A-401(c)(2) (Supp. 9A, 1973); N.H. Rev. Stat. Ann. § 169:1 (Supp. 2, 1973); and Utah Code Ann. § 55- 10-77 (1973).

The two-part age test produces anomalies. The customary situation involves an individual who meets the time-of-conduct age requirements but not the time-of-adjudication age. The juvenile can properly argue that the juvenile court lacks jurisdiction either to adjudicate the alleged conduct or to waive its jurisdiction. If the criminal court can have jurisdiction over the juvenile only after waiver, the juvenile can assert that no court has jurisdiction over the conduct alleged. Such an argument was accepted with little discussion in Wilson v. Reagan, 354 F.2d 45 (9th Cir. 1965).

Appellate courts strain to avoid the Reagan result. In Kent v. United States, 383 U.S. 541 (1965), the Supreme Court refused dismissal, recommending that the criminal court attempt to reconstruct the waiver hearing. The commentary following Standards 2.4 A. and B. suggests some defects of such a hearing.

Reagan and Kent concerned challenges to prior waiver hearings; acceptance of those challenges and rejection of outright release made reconstruction of the waiver hearings necessary. That outcome could be avoided by rejecting the challenge to the prior hearing, as occurred in Mordecai v. United States, 421 F.2d 1133 (D.C. Cir. 1969), and Brown v. Cox, 481 F.2d 622 (4th Cir. 1973). Standard 1.1 A. avoids this problem by basing age jurisdiction solely on time-of-conduct.

Assuming a successful appeal and a remand to the juvenile court, an extended appeal from a waiver hearing can result in juvenile court jurisdiction over persons beyond the court's customary age range. Standard 2.4 attempts to lessen that possibility by requiring prompt filing of appeals from waiver decisions and prompt resolution of those appeals.

Jurisdiction based on time-of-conduct has the possible disadvantage that delay in apprehension could produce a "juvenile" who is beyond the customary age range of the juvenile court. Without further limitations on jurisdiction a thirty-year-old could be the subject of a juvenile court adjudication. Standard 1.3 addresses that problem by establishing a three-year limitations period for the acts of juveniles.

1.1 B. No criminal court should have jurisdiction in any proceeding against any person whose alleged conduct would constitute an offense on which a juvenile court adjudication could be based if at the time the offense is alleged to have occurred such person was not more than fourteen years of age.

Commentary

The juvenile court should have exclusive jurisdiction over persons who were fourteen or younger at the time of the alleged criminal conduct. Standard 1.1 C. authorizes waiver of juvenile court jurisdiction over persons who were fifteen, sixteen, or seventeen at the time of the alleged conduct. This standard recognizes that any line between adult and juvenile is necessarily arbitrary. Practical and political pressures will sometimes require that persons otherwise subject to juvenile court jurisdiction be referred to the criminal court. Standards 1.1 A. and 1.1 C. create a rebuttable presumption that fifteen-, sixteen-, and seventeen-year-olds should be treated as juveniles. This standard reflects a determination that fourteen-year-olds are, or at least should irrebuttably be presumed to be, juveniles for purposes of court jurisdiction.

Minimum ages at which juveniles can appear in criminal courts vary widely. The minima result both from laws determining criminal responsibility and laws defining juvenile and criminal court jurisdiction. Prosecution of a mere infant is theoretically possible in Arizona. Ariz. Rev. Stat. Ann. § 13-135 (1956) presumes lack of criminal responsibility in children thirteen or under, but the prosecution can rebut the presumption with a showing that "at the time of committing the act charged against them they knew its wrongfulness." Under Ariz. R. Juv. P. 12, the juvenile court may waive its jurisdiction over any child subject to criminal prosecution. In Idaho and the District of Columbia, an alleged offender is subject to criminal prosecution only if he or she is eighteen or older at the time of trial. Idaho Code § 16-1806(1)(b) (Supp. 3, 1973) and D.C. Code Ann. § 16-2307(a)(3) (1973).

In thirteen states the lower limit of criminal jurisdiction is the sixteenth birthday: California, Hawaii, Idaho, Kansas, Montana, Nevada, New Jersey, New Mexico, North Dakota, Oregon, Rhode Island, Vermont, and Wisconsin. In nine and in twenty-five jurisdictions the minimum ages are fifteen and fourteen, respectively. The minimum is thirteen years of age in Illinois and twelve in Arkansas and Washington. Thus Standard 1.1 B. establishes a rule that presently exists only in a minority of the jurisdictions that allow waiver.

The realism of the minority rule adopted here is suggested by existing research on the incidence of waiver. Regardless of the permissible scope for waiver, its occurrence rarely extends beyond the last two years of juvenile court jurisdiction. Few fifteen-year-olds are waived to the criminal court. A recent study indicates that the juvenile courts in Nashville during a two-year period waived jurisdiction only over persons who were seventeen and thus in their last year of juvenile court eligibility. See Note, "Problem of Age and Jurisdiction in the Juvenile Court," 19 Vand. L. Rev. 833, 854 (1966). Similarly, a Houston survey of juveniles whose waiver was sought during a period in 1970 found that most were in the last two years. See Hays and Solway, "The Role of Psychological Evaluation in Certification of Juveniles for Trial as Adults," 9 Houston L. Rev. 709, 710 (1972).

A minimum age jurisdiction of fifteen years for the criminal court may enhance the juvenile court's public image. Exclusive jurisdiction over persons under fifteen evidences commitment to the proposition that juveniles are qualitatively different from adults and should be treated differently.

Standard 1.1 B. assumes that the criminal court does not hear appeals from the juvenile court. In jurisdictions in which that is not the case, Standard 1.1 B. should be modified to read "No criminal court should have original jurisdiction in any proceeding...."

1.1 C. No criminal court should have jurisdiction in any proceeding against any person whose alleged conduct would constitute an offense on which a juvenile court adjudication could be based if at the time the offense is alleged to have occurred such person was fifteen, sixteen, or seventeen years of age, unless the juvenile court has waived its jurisdiction over that person.

Commentary

Waiver by the juvenile court of its jurisdiction over certain persons is one mechanism by which persons otherwise subject to the juvenile court can be referred to the criminal court. There are other mechanisms. By "reverse certification," criminal courts can refer criminal defendants to the juvenile court for handling. The matter also can be settled by excluding form the juvenile court's jurisdiction persons accused of particular offenses regardless of age. The prosecutor then decides what court will have jurisdiction by deciding what criminal charge to allege.

This volume adopts a waiver approach in which the juvenile court judge, upon motion by the prosecutor, decides whether waiver of juvenile court jurisdiction is appropriate in the particular case.

Standard 1.1 C. prohibits criminal court jurisdiction over any person who was fifteen, sixteen, or seventeen at the time an act allegedly occurred that would constitute an offense on which a juvenile court adjudication could be based unless the juvenile court has waived its jurisdiction over such person.

The standard recognizes that the eighteenth birthday is an arbitrary point at which to draw the line between juveniles and adults. Standard 1.1 C. allows a wide two-year age range in which waiver is possible. At the same time, a fundamental premise of this volume is that the vast majority of juveniles should be handled by the juvenile court. Later standards in this volume establish a rigorous test that must be met before any person otherwise within the juvenile court's jurisdiction can properly be waived to the criminal court.

The standards recognize that arguments will be made as to why certain individuals are not proper persons to be handled by the juvenile court. Among those arguments will be: the seriousness of the alleged offense; public demands for harsher treatment of juvenile offenders; the age or prior criminal record of the individual; or the demonstrated inefficacy of juvenile court programs. By allowing a liberal age range but a strict test for waiver's appropriateness, this volume offers the view that the clearly dangerous juvenile should be waived, even if only fifteen, but no one else.

Only New York bars waiver, N.Y. Family Ct. Act § 713 (McKinney 1962) grants "exclusive original jurisdiction" to the state's juvenile courts. New York law provides no mechanism to relieve the juvenile court of the task of handling persons within the court's age jurisdiction. This seemingly brave experiment commits the state to attempt to treat as juveniles all those statutorily defined as juveniles.

A lack of flexibility appears to be the major flaw in New York's Family Court Act. The New York legislature lowered the maximum age for court jurisdiction to fifteen-see N.Y. Family Ct. Act § 712(a) (McKinney Supp. 29A, 1973)-and the sixteen- or seventeen-year-old is therefore never eligible for juvenile court treatment.

Standard 1.1 C. manifests an intention to define juvenile court jurisdiction broadly. The juvenile court can subsequently waive those juveniles for whom juvenile court jurisdiction is found

inappropriate. Without some ability to select, the juvenile court must misallocate its efforts and limited resources on juveniles who appear unlikely to benefit from juvenile court programs. Failure to deal constructively with the most troublesome juveniles might produce legislative pressure, as in New York, to lower the maximum age for juvenile court jurisdiction. Contraction of jurisdiction would force many persons into the criminal courts who might benefit from the special handling of the juvenile court. A flexible case-by-case waiver scheme is far preferable to the New York approach.

Standard 1.1 C. provides that the juvenile court, rather than a criminal court, should be the setting for the waiver decision. The criminal court may assert jurisdiction only after the juvenile court waives. This approach follows the example of the Model Penal Code § 4.10(1) (Proposed Official Draft 1962).

The alternative to juvenile court decision-making power is reverse certification, in which the juvenile first appears before a criminal court. The criminal court judge decides whether to retain jurisdiction or to certify the case to the juvenile court. California had such a system until the California legislature amended Cal. Welf. & Inst'ns Code § 604 in 1971. Only Arkansas and Vermont currently employ reverse certification exclusively. See Ark. Stat. § 45-241 (1964), and Vt. Stat. Ann. tit. 33, § 635(b) (Supp. 9, 1974).

A principal argument against reverse certification is that the juvenile court ought to, and has special competence to, interpret the laws regulating its own jurisdiction. Granting the criminal primary responsibility for the decision invites abuse. The juvenile court judge is more aware of the juvenile court's capacities and limitations, and he or she should make the waiver decision.

Reverse certification is also incompatible with the juvenile court's conceptual underpinnings. The court's very existence is premised on the view that the special characteristics of juveniles require that they receive different judicial treatment than adults. Any waiver mechanism consistent with that view must institutionalize a presumption in favor of juvenile court jurisdiction. Reverse certification institutionalizes the opposite presumption: that juveniles are subject to the criminal court's jurisdiction unless special steps are taken.

Standard 1.1 C. assumes that the criminal court does not hear appeals from the juvenile court. In jurisdictions in which that assumption is unfounded, Standard 1.1 C. should be modified to read "No criminal court should have original jurisdiction in any proceeding...."

STANDARD 1.2 OTHER LIMITS

1.2 A. No juvenile court disposition, however modified, resulting from a single transaction or episode, should exceed [thirty-six] months.

Commentary

Standard 1.2 A. places a maximum [three-year] limit on any juvenile court disposition resulting from a single episode or transaction.

One of the fundamental modern criticisms of the juvenile court has been that it subjects juveniles to longer and harsher interventions in their lives than are experienced by adults accused of the same unlawful acts. Gerald Gault, the principal of In Re Gault, 387 U.S. 1 (1967), was found to have violated an Arizona statute prohibiting "vulgar, abusive or obscene language ... in the presence or

hearing of any woman or child...." Ariz. Rev. Stat. Ann. § 13-377 (1956). An adult convicted of that offense could be imprisoned for no more than sixty days. Gerald Gault was committed to the State Industrial School until he reached majority at age twenty-one, unless sooner discharged.

Juvenile courts in Kansas and Rhode Island may retain dispositional jurisdiction over juveniles until the twenty-first birthday, even if the juvenile was only twelve or thirteen when the disposition was ordered. See Kan. Stat. Ann. § 38-806(b) (Supp. 3, 1973) and R.I. Gen. Laws Ann. § 14-1-6 (1956). In forty-six states and the District of Columbia, juvenile courts retain authority over persons previously adjudicated after the maximum age for initial jurisdiction has passed. The court customarily retains jurisdiction to administer its dispositions until the juvenile's twenty-first birthday. See Mont. Rev. Codes Ann. § 10-1206(1) (Supp. vol. 1, pt. 2. 1974) and Okla. Stat. Ann. ch. 10, § 1102 (Supp. 10, 1974).

Hawaii, Massachusetts, South Dakota, Vermont, and West Virginia do not permit retained jurisdiction to administer dispositions beyond the maximum adjudicatory age jurisdiction of the juvenile court. Those states initially deny the court power to adjudicate or to supervise a disposition of any person over seventeen. See Hawaii Rev. Stat. § § 571-11(1), 571-13 (Supp. 7, 1973); Mass. Gen. Laws Ann. ch. 119, § 68 (Supp. 18, 1974); S.D. Compiled Laws Ann. §§ 26-8-1(3), 26-8-48, 26-1-1 (Supp. 9, 1974); Vt. Stat. Ann. tit. 33, §§ 633(a), 632(a)(1), 634, tit. 1, § 173 (Supp. 1, 1974); and W. Va. Code Ann. § § 49-5-2, 49-2-2 (Supp. 14, 1974). Those statutory provisions reflect a view that a person who is not a juvenile for adjudicatory purposes should not be a juvenile for dispositional purposes.

There are circumstances in which the court should have authority over persons beyond the maximum age for initial adjudication. Apprehension may occur shortly before the eighteenth birthday. If dispositional authority beyond the eighteenth birthday is lacking, powerful incentive either to waive juvenile court jurisdiction or not to invoke the juvenile court process at all will result.

Denial of dispositional jurisdiction beyond the court's maximum adjudicatory age limit would result in several anomalies. For instance, a juvenile could allegedly commit a criminal act on his or her seventeenth birthday. If a rigorous test for the propriety of waiver exists in the jurisdiction, as this volume recommends, the juvenile might not be waivable and in one month would be beyond the authority of any court. Similarly, the concept of a statute of limitations such as that suggested in Standard 1.3 is compatible only with extended dispositional jurisdiction. A three-year limitations period in a state having an eighteenth birthday maximum age jurisdiction would actually be the lesser of three years or the period of time remaining before the eighteenth birthday.

Abolition of retained jurisdiction would create pressure to transfer for criminal prosecution any older juvenile accused of serious criminal conduct. Waiver would be attractive because the juvenile court could enforce its disposition only for a short period, while the criminal court would have greater dispositional authority. A fundamental premise of this volume is that the vast majority of persons within the juvenile court's age jurisdiction who are alleged to have committed criminal acts should be handled by the juvenile court. To deny juvenile court handling because there is not sufficient time to provide it is inconsistent with that premise.

When waiver is not possible because the alleged conduct occurred before the juvenile's fifteenth birthday or, as in New York, waiver is simply not authorized, the argument for extending jurisdiction is different. Without retained dispositional jurisdiction there would be a strong inducement to release a juvenile apprehended at seventeen for a crime committed at fourteen. The limited duration of juvenile court jurisdiction could make adjudication and short-term disposition of the juvenile a misallocation of the court's limited resources.

Most states permit retained dispositional jurisdiction. The most common approach allows the juvenile court to impose its disposition until the juvenile reaches a certain age, usually from one to four years beyond the maximum age for adjudication. This is the system that Gerald Gault experienced and subjects younger juveniles to dispositional jurisdiction for very long periods.

A few states, including Connecticut, New York, and Pennsylvania, allow retention of dispositional jurisdiction for a specified period of years following adjudication. Jurisdiction to impose a disposition lasts two years in Connecticut and the juvenile court may renew the jurisdiction for another two-year period. See Conn. Gen. Stat. Ann. § 17-69 (Supp. 10, 1974). New York authorizes dispositional jurisdiction for three years after adjudication. See N.Y. Family Ct. Act § 758 (McKinney Supp. 29A, 1973). Pennsylvania law also authorizes a three-year dispositional period and, as in Connecticut, grants the juvenile court power to renew the period. See Pa. Stat. Ann. tit. 11, § 50-323 (Supp. 11, 1974). However, the court may retain dispositional jurisdiction past the maximum age for adjudication only if the juvenile was apprehended after reaching a specified age: thirteen in New York; twelve in Connecticut and Pennsylvania. This fixed term of years approach is preferable to its more popular alternative. Fixed duration dispositional authority also lessens the disparity between the maximum periods of court control faced by juveniles and adults alleged to have committed certain offenses.

1.2 B. The juvenile court should retain jurisdiction to administer or modify its disposition of any person. The juvenile court should not have jurisdiction to adjudicate subsequent conduct of any person subject to such continuing jurisdiction if at the time the subsequent criminal offense is alleged to have occurred such person was more than seventeen years of age.

Commentary

Standard 1.2 B. bars adjudications based on conduct occurring during the extended period of dispositional jurisdiction of persons not otherwise within the court's age jurisdiction. Standard 1.1 A. implicitly achieves the same result. However, an unequivocal declaration was considered appropriate. Such a provision contradicts statutes like Mich. Comp. Laws Ann. § 712A.22 (Supp. 37, 1974) that permit adjudication of previously adjudicated and disposed seventeen- and eighteen-year-olds even though the maximum age for initial juvenile court jurisdiction is sixteen. Michigan limits such permissible subsequent adjudications to allegations of noncriminal conduct. Thus, section 712A.22 subjects an eighteen-year-old whom the juvenile court has adjudicated and disposed to a further adjudication if the juvenile repeatedly disobeys the commands of his or her parents.

The prohibition on new adjudications should not bar modifications of disposition during the period of extended jurisdiction. Such a bar would unduly restrict the juvenile court's dispositional options. A juvenile's conduct while subject to a juvenile court disposition is material to decisions to modify that disposition. There will be occasions when distinguishing between a proper modification of a disposition and an improper imposition of what is in substance an additional disposition without an additional adjudication will be difficult. The bases for modifying dispositional decisions are discussed in the Dispositions volume. Dispositions Standard 5.4 provides that when a juvenile fails to comply with a dispositional order and a warning is insufficient to induce compliance, the court may modify conditions or impose the next most severe disposition, but may not extend its duration. Thus probation (community supervision) could be revoked and a custodial disposition in a nonsecure residence substituted for the remainder of the dispositional term if a warning or changed conditions of probation would be ineffective.

STANDARD 1.3 LIMITATIONS PERIOD

No juvenile court adjudication or waiver decision should be based on an offense alleged to have occurred more than three years prior to the filing of a petition alleging such offense, unless such offense would not be subject to a statute of limitations if committed by an adult. If the statute of limitations applicable to adult criminal proceedings for such offense is less than three years, such shorter period should apply to juvenile court criminal proceedings.

Commentary

Standard 1.3 establishes a three-year statute of limitations for juvenile court adjudications in most cases. Standard 1.3 rejects the two most common existing limitations approaches in juvenile courts: incorporation of statutes limiting criminal prosecutions, and application of equitable principles of limitation. This standard incorporates adult statutes of limitations only to the extent that they establish limitation periods shorter than three years or provide no limitations period for specified serious criminal offenses.

Standards 1.1 A., 1.2 A., and 1.3 combine to authorize the juvenile court to maintain jurisdiction over a juvenile until age twenty-four. Standard 1.1 A. gives the court jurisdiction over persons under eighteen at the time-of-conduct. Standard 1.3 creates a three-year limitations period for most offenses. The juvenile a day short of age eighteen at the time-of-conduct could be two days short of twenty-one when the petition is filed. Disregarding the time required for adjudication, the three-year maximum disposition authorized by Standard 1.2 A. would permit the court to retain jurisdiction over that individual until almost his or her twenty-fourth birthday.

New Jersey's juvenile courts have been among the leaders in applying criminal statutes of limitations to juvenile court proceedings. In State in the Interest of B.H., 270 A.2d 72 (N.J. 1970), a juvenile and domestic relations court held that the one-year limit on prosecutions under the Disorderly Persons Act restricted the filing of juvenile petitions as well:

> The lapse of the statutory period for prosecution is not a procedural defense; it is substantive and jurisdictional.... It would indeed be anomalous to award juveniles an ever-expanding shield of procedural protection, but deny them the right to plead a substantive defense. Id. at 74.
>
> Dictum in State in the Interest of K. V.N., 271 A.2d 921 (N.J. 1970), endorses this view, as does Standard 1.3.

Periods of limitation frequently vary by offense. New Jersey employs a one-year limit for disorderly conduct but five years for armed robbery or rape.

A three-year limitations period has the advantages of certainty and predictability. The certainty of the three-year limit is preferable to the frequently arbitrary differences between limitations periods for different offenses.

The view of delinquency summarized in E. Schur's Radical Nonintervention-Rethinking the Delinquency Problem (1973) holds that most juveniles will outgrow propensities for antisocial acts if left alone. The 1973 Report of the National Advisory Commission on Criminal Justice Standards and Goals largely supported that view. See National Advisory Commission on Criminal Justice Standards and Goals, A National Strategy to Reduce Crime 109 (1973). For those offenses subject to the three-year limit, Standard 1.3 embodies the view that acts that occurred more than three years before the

filing of a petition are not valid indicators of a juvenile's social adjustment, notwithstanding that the adult limitations period exceeds three years.

The juvenile should, however, receive the benefit of any adult limitations period shorter than three years. Being a juvenile should not justify intervention that adults who have engaged in similar criminal conduct do not experience. The argument in support of incorporation by reference of shorter adult limitations periods is similar to that in support of the maximum three-year dispositional jurisdiction of Standard 1.2 A.

Some juvenile courts have applied equitable concepts to limitations problems. The Oklahoma Court of Criminal Appeals in Sorrels v. Steele, 506 P.2d 942 (Okla. 1973), voided a delinquency finding, in part for staleness reasons:

> It should be apparent that one isolated incident removed in point of time by some thirty-one months is far too remote to have any possible bearing on the current conduct of a fourteen-year-old girl, much less to be considered as part of a basis for adjudicating her a delinquent. Id. at 944.

Standard 1.3 permits the flexibility of the equitable limitations approach, and implements the "least intrusive alternative" policy of these standards.

Standard 1.3 omits from the statute of limitations the customary list of circumstances that suspend the limitation period. Flight from the jurisdiction or concealment of criminal conduct will not toll the statute. Such exceptions have no place in a juvenile court statute of limitations. The arguments in support of a three-year limitations period for most juvenile offenses apply equally even if the alleged criminal conduct has been concealed or the juvenile has been outside the jurisdiction.

Standard 1.3 incorporates by reference the provisions of criminal law statutes of limitations that except certain offenses, usually murder, rape, and other serious criminal acts. The seriousness of those particular criminal acts, which gives rise to the criminal court provisions, applies equally in the juvenile court. The juvenile accused of an excepted offense regarding which the general limitations period has run out will not necessarily be subject to waiver. If the alleged conduct occurred before the juvenile's fifteenth birthday, waiver will not be possible in any event. If the alleged conduct occurred while the juvenile was fifteen, sixteen, or seventeen, the general standards for waiver will apply.

Part II: Waiver

STANDARD 2.1 TIME REQUIREMENTS

2.1 A. Within [two] court days of the filing of any petition alleging conduct which constitutes a class one or class two juvenile offense against a person who was fifteen, sixteen, or seventeen years of age when the alleged offense occurred, the clerk of the juvenile court should give the prosecuting attorney written notice of the possibility of waiver.

Commentary

Standard 2.1 A. requires the clerk of the juvenile court to give prompt written notice to the prosecuting attorney of the filing of petitions against fifteen-, sixteen-, and seventeen-year-olds with class one or class two juvenile offenses. The recommended time requirement has been bracketed to indicate that it is not mandatory, since calendar backlogs, resources, and other circumstances may

vary significantly among jurisdictions. This is consistent with the policy adopted throughout the revised versions of the standards to bracket all such numerical limitations (see Preface).

Standards 2.1 B. through 2.1 E. similarly require prompt consideration and resolution of waiver motions. Delay can have an adverse impact on the juvenile regardless of the outcome of the juvenile court proceeding. If the petition is dismissed, for whatever reason, intervention in the juvenile's life should be as short and unobtrusive as possible. If the petition results in a delinquency adjudication, the juvenile should be spared unnecessary delay in the imposition of a disposition. The disposition should begin promptly. The adverse effects of juvenile court processing should be minimized.

The problems of delay are multiplied during the waiver process. The subject of an unresolved waiver proceeding is in limbo. Neither the juvenile court nor the criminal court can act upon the criminal charges until the waiver motion is decided.

Notice to the prosecuting attorney of the possibility of waiver is necessary only when the petition alleges conduct which would constitute a class one or class two juvenile offense. Standard 2.2 A. prohibits waiver unless the juvenile court finds probable cause to believe that the juvenile committed a class one or class two juvenile offense. The term "class one juvenile offense" is defined in the Juvenile Delinquency and Sanctions volume as those criminal offenses for which the maximum sentence for adults would be death or imprisonment for life or a term in excess of twenty years. A "class two juvenile offense" is one for which an adult could be imprisoned for a term in excess of five but not more than twenty years.

2.1 B. Within [three] court days of the filing of any petition alleging conduct which constitutes a class one or class two juvenile offense against a person who was fifteen, sixteen, or seventeen years of age when the alleged offense occurred, the prosecuting attorney should give such person written notice, multilingual if appropriate, of the possibility of waiver.

Commentary

Standard 2.1 B. requires the prosecuting attorney to give prompt consideration to the possibility of waiver proceedings against fifteen-, sixteen-, and seventeen-year-olds accused of class one or class two juvenile offenses. For reasons discussed in the commentary following Standard 2.1 C., the prosecuting attorney should have exclusive authority to initiate waiver proceedings.

The notice must be given within [three] court days of the filing of the petition alleging conduct that would constitute a class one or class two juvenile offense. Failure to give timely notice would be a fatal defect to any waiver proceeding.

The prosecuting attorney will be compelled to determine within [three] court days whether waiver is appropriate in each case. If timely notice is not given, the juvenile court can proceed to consider the petition on the merits. If the notice is given, the juvenile will be informed early that he or she may be waived to the criminal court.

Some prosecutorial offices might respond to Standard 2.1 B. by giving notice in every case in which waiver is possible. Although such a procedure would partially frustrate the objectives of the notice requirement, the juvenile would be put on notice of the possibility of waiver in the case. Other prosecutorial offices might comply with the spirit of 2.1 B. and signal their intention not to seek waiver by not giving notice. In those offices which establish a standard notice procedure, Standard 2.1

C., which requires filing of the waiver motion within [seven] court days of the filing of the juvenile court petition, minimizes the uncertainty which the juvenile faces.

Multilingual notices should be given when the language primarily spoken by the juvenile is not English.

2.1 C. Within [seven] court days of the filing of any petition alleging conduct which constitutes a class one or class two juvenile offense against a person who was fifteen, sixteen, or seventeen years of age when the alleged offense occurred, the prosecuting attorney may request by written motion that the juvenile court waive its jurisdiction over the juvenile. The prosecuting attorney should deliver a signed, acknowledged copy of the waiver motion to the juvenile and counsel for the juvenile within [twenty-four] hours after the filing of such motion in the juvenile court.

Commentary

Standard 2.1 C. gives the prosecuting attorney sole authority to determine which juveniles will not be the subjects of waiver motions. A decision not to seek waiver can be indicated definitively by not filing a waiver motion within [seven] court days of the filing of the juvenile court petition. The prosecuting attorney may initiate, but not decide, waiver proceedings.

Prosecutorial authority to initiate, but not decide, waiver diverges from present practice in most states. See Minn. Stat. Ann. § 260.125(1) (1971) for one of the few exceptions.

Prosecuting attorneys customarily possess authority to waive juvenile jurisdiction in either of two ways. Some juvenile courts have concurrent jurisdiction with the criminal courts. See, e.g., Wyo. Stat. Ann. § 14- 115.4(c) (Supp. 5, 1973), and Fugate v. Ponin, 91 N.W.2d 240 (Neb. 1958). Prosecuting attorneys in those jurisdictions determine court jurisdiction by deciding whether to file a petition in juvenile court or a complaint in criminal court.

Prosecuting attorneys in some jurisdictions can determine court jurisdiction by alleging certain criminal acts. Some juvenile courts lack jurisdiction over certain crimes. Ten states and the District of Columbia have such provisions. See, e.g., Colo. Rev. Stat. Ann. § 22-1-3(17) (1963), Del. Code Ann. tit. 10, § 957 (1953), Ind. Code § 31-5-7-4(1) (1973), and D.C. Code Ann. § 16-2301(3) (1973). Such laws permit the prosecuting attorney to select a forum by selecting a charge. District of Columbia criminal courts may retain jurisdiction to try the juvenile for a lesser included offense even if the alleged lesser included offense by itself would not have warranted criminal court jurisdiction. Prosecuting attorneys can abuse such a system by charging a juvenile with conduct over which the juvenile court lacks jurisdiction. After juvenile court jurisdiction has been avoided, the charge can be reduced to a crime more susceptible of proof. Such license to charge capriciously grants the prosecutor unfettered discretion to determine court jurisdiction over juveniles.

Mr. Justice Douglas, dissenting from denial of a petition for certiorari in United States v. Bland, 412 U.S. 909 (1973), presented a forceful argument against prosecutorial authority to determine juvenile court jurisdiction. Bland, a sixteen-year-old District of Columbia resident, was charged with armed robbery. The District of Columbia juvenile courts lack jurisdiction over armed robbery. The district court upheld Bland's constitutional objections to unreviewable prosecutorial discretion to charge Bland with an offense triable only in the criminal courts. 330 F. Supp. 34 (D.C.D.C. 1970). The court of appeals reversed. 472 F.2d 1329 (D.C. Cir. 1972). Bland's petition for certiorari to the United States Supreme Court was denied.

Justice Douglas argued against prosecutorial discretion to determine court jurisdiction over juveniles:

> A juvenile or "child" is placed in a more protected position than an adult.... In that category he is theoretically subject to rehabilitative treatment. Can he, on the whim or caprice of a prosecutor, be put in the class of run-of-the-mill criminal defendants, without any hearing, without any chance to be heard, without an opportunity to rebut the evidence against him, without a chance of showing that he is being given an invidiously different treatment from others in his group? 412 U.S. 909 at 911.

This potential for arbitrary and unequal treatment of juveniles is aggravated by the absence of review of prosecutorial decisions. This is the "barricade behind which the prosecutor operates." Id.

Justice Douglas' policy argument in Bland is persuasive whatever its present constitutional force. The very existence of juvenile courts should evidence a policy decision that juveniles should be subject to juvenile court jurisdiction unless a considered decision is made that criminal court jurisdiction is appropriate in the given case. This volume has adopted a strong presumption in favor of juvenile court jurisdiction. The presumption can properly be overcome only in a trial-type, due process proceeding in which the decision-making process is visible, based on identifiable and credible information and subject to review. The power of the prosecutor to make unreviewable waiver decisions at a low level of visibility invites capricious decisions.

Standard 2.1 C. strikes a balance between unlimited prosecutorial authority to waive juvenile court jurisdiction and no authority at all. Standard 2.1 C. grants the prosecuting attorney discretion to bar waiver; the juvenile court may consider waiver only upon the prosecutor's motion. The prosecuting attorney, often an elected official, may weigh political considerations in deciding whether to seek waiver and thereby express public outrage at a particularly serious offense. As the official who can properly take public sentiments into account, the prosecutor can partially insulate the juvenile court judge, who cannot properly consider such matters, from public pressure. The juvenile court judge must base the waiver decision on the findings required by Standard 2.2 A., thus providing judicial review of the prosecutor's actions.

It could be argued that Standard 2.1 C. grants too much authority to the prosecuting attorney; the juvenile court should be able to consider waiver on its own motion and should not be bound by the prosecutor's decision not to seek waiver. Several state legislatures have accepted this reasoning. Virginia amended its waiver statute in 1973 to replace prosecutorial discretion to waive with a hearing procedure that may be initiated by either the prosecuting attorney or the juvenile court judge. Va. Code Ann. § 16.1-176 (Supp. 4, 1974).

Virginia's procedure compromises the integrity of the court. The court should assume a passive stance, deciding in an impartial fashion only those questions necessary for resolution of the case before it. Raising issues sua sponte is undesirable for it shifts the court from a passive to an active role. The impartiality of the court's resolution of an issue raised on its own motion is inherently suspect. The court must be concerned with both the fact and the appearance of fairness and impartiality. The court's behavior will appear less than evenhanded to the juvenile whose treatment as a juvenile is first questioned by the juvenile court judge. Juvenile court judges should rule on waiver but their judicial status should prevent their initiating the subject.

A third approach to deciding jurisdiction over juveniles is to prohibit waiver and thereby deny discretion to both the juvenile court judge and the prosecuting attorney, as in New York. Some objections to that approach are discussed in the commentary following Standard 1.2 C.

2.1 D. The juvenile court should initiate a hearing on waiver within [ten] court days of the filing of the waiver motion or, if the juvenile seeks to suspend this requirement, within a reasonable time thereafter.

Commentary

Standard 2.1 D. requires the juvenile court to begin a waiver hearing within [ten] court days after the waiver motion is filed. Waiver of jurisdiction must be premised on the findings required by Standard 2.2 A. based on evidence presented at an adversary hearing.

The United States Supreme Court approved a similar hearing requirement for the District of Columbia in Kent v. United States, 383 U.S. 541 (1966). Kent confessed to involvement in the robbery and rape of a District of Columbia resident. The juvenile court waived jurisdiction over him without a hearing and without published reasons. After extensive but unsuccessful efforts to appeal the waiver decision, Kent was convicted of robbery, but not rape. The judgment was affirmed by the District of Columbia Court of Appeals. 343 F.2d 247 (D.C. Cir. 1964).

The Supreme Court disapproved waiver without a hearing:

> [C]onsidering particularly that decision as to waiver of jurisdiction and transfer of the matter to the District Court was potentially as important to petitioner as the difference between five years' confinement and a death sentence, we conclude that, as a condition to a valid waiver order, petitioner was entitled to a hearing, ... and to a statement of reasons for the juvenile court's decision. We believe that this result is required by the statute read in the context of constitutional principles relating to due process and the assistance of counsel. 383 U.S. 541 at 557.
>
> The sentence last quoted has plagued attempts to assess Kent's significance. Is a waiver hearing necessary because of "constitutional principles" or because of the particular District of Columbia statute? Does procedural due process require that a hearing precede resolution?

The importance of the constitutional question should not be over-emphasized. Even if Kent concerned only statutory construction, the arguments for a hearing on the waiver issue would remain strong, given the potential prejudice to the juvenile in denying juvenile court jurisdiction without a hearing and opportunity to object. Disposition by a court of a critically important motion without hearing arguments or receiving evidence lacks fundamental fairness.

An adversary hearing is the best method for judicial resolution of the waiver issue. An overwhelming majority of state legislatures agree. For the minority view see, e.g., Ala. Code tit. 13, § 364 (1959) and Miss. Code Ann. § 43-21-31 (1972). Faced with similar statutory provisions (most of which have now been redrafted), a number of state courts have found waiver hearings to be required constitutionally.

The Supreme Court of Indiana held "in accordance with Kent" that the appellant had a right to a full juvenile court hearing prior to waiver. Summers v. State, 230 N.E.2d 320, 325 (Ind. 1967). Oregon's highest court found "that the intent of the United States Supreme Court ... is that the due process clause of the Constitution of the United States requires states to accord a hearing before a juvenile can be remanded to the adult criminal process." Bouge v. Reed, 459 P.2d 869, 870 (Ore. 1969). See also In re Harris, 434 P.2d 615 (Cal. 1967); Smith v. Commonwealth, 412 S.W.2d 256 (Ky. 1967); and Jefferson v. State, 442 S.W.2d 6 (Mo. 1969).

Some courts have disagreed. The Supreme Court of Appeals of Virginia did so in Cradle v. Peyton, 156 S.E.2d 874 (Va. 1967). However, most state courts have emphasized the constitutional foundations of Kent. "Although our decision turned upon the language of the statute, we emphasized the necessity that 'the basic requirements of due process and fairness' be satisfied in such proceedings." In re Gault, 387 U.S. 1, 12 (1967).

One commentator has remarked that "[a]fter a careful reading of Kent and Gault, a question as to the constitutional status of the holdings in the former case would seem pure rhetoric." Schornhorst, "The Waiver of Juvenile Court Jurisdiction: Kent Revisited," 43 Ind. L.J. 583, 585 (1968). This opinion is based on the significance of the waiver decision and the consequent need for procedural safeguards, steps in analysis which "bristle with constitutional indicia." Id. at 586.

Standard 2.1 D. conforms to prevailing constitutional opinion regarding waiver hearings. If that view is subsequently rejected as a matter of constitutional law, the policy reasons in support of a hearing requirement remain strong.

2.1 E. The juvenile court should issue a written decision setting forth its findings and the reasons therefor, including a statement of the evidence relied on in reaching the decision, within [ten] court days after conclusion of the waiver hearing.

Commentary

Standard 2.1 E. requires the juvenile court to issue a written decision on the waiver motion setting forth its findings and the reasons therefor within [ten] court days after conclusion of the waiver hearing.

Kent requires not only a hearing but also that the juvenile court state the reasons for its decision. Kent v. United States, 383 U.S. 541, 557 (1966). Indiana's highest court explicitly accorded both of these holdings full constitutional authority in Summers v. State, 230 N.E.2d 320 (Ind. 1967).

Kent's statement of reasons requirement has been adopted in a number of jurisdictions. The state courts, exercising their powers to promulgate rules of court, have been the prime movers. See, e.g., Ohio R. Juv. P. 30(E), Wash. Juv. Ct. R. 6.4, and Fla. Juv. R. 8.100(c).

The importance of written decisions cannot be overstated. Written decisions discourage slipshod decision making in the particular case and in the juvenile process generally. More care may be exercised if the juvenile court judge realizes that decisions can be scrutinized. Statements of findings and reasoning in particular cases may benefit other judges in similar proceedings. Written decisions will narrow the range of questions on which reasonable judges may disagree and focus attention on those questions. Reasoned elaboration of the law will be promoted.

The argument for written decisions would remain strong even if the intellectual rigor of waiver decisions was guaranteed and every reasonably disputable question was removed from the waiver statute. The appearance of accountability created by explained decisions is beneficial to the juvenile court. A decision unsupported by reasons or based on reasons unsupported by evidence appears arbitrary, regardless of its actual character.

2.1 F. No waiver notice should be given, no waiver motion should be accepted for filing, no waiver hearing should be initiated, and no waiver decision should be issued relating to any juvenile court petition after commencement of any adjudicatory hearing relating to any transaction or episode alleged in that petition.

Commentary

Standard 2.1 F. prohibits consideration of waiver after adjudicatory proceedings have begun. Any other approach would be incompatible with Breed v. Jones, 421 U.S. 519 (1975), which held that jeopardy attaches for purposes of double jeopardy when the juvenile court, as the trier of fact, begins to hear evidence.

A juvenile court petition was filed against Gary Steven Jones, then seventeen, alleging that he had committed acts which if committed by an adult would constitute robbery. The juvenile court, after taking evidence from two prosecution witnesses and the juvenile, found that the allegations were true. Three weeks later the juvenile court determined that Jones was unsuitable for treatment as a juvenile and waived jurisdiction. Jones was subsequently convicted in criminal court of armed robbery in the first degree.

After a number of unsuccessful appeals from the waiver decision on double jeopardy grounds, Jones persuaded the Circuit Court of Appeals for the Ninth Circuit that the double jeopardy clause of the fifth amendment to the United States Constitution "is fully applicable to juvenile court proceedings." 497 F.2d 1160, 1165 (9th Cir. 1974). The Supreme Court granted certiorari to resolve the conflict on that question among federal courts of appeals and state supreme courts.

With the exception of McKeiver v. Pennsylvania, 403 U.S. 528 (1971), which held that jury trials are not required in juvenile court adjudicatory proceedings, the trend of recent Supreme Court decisions on juvenile court issues has been to apply criminal court procedural protections to juvenile court proceedings. Breed v. Jones is in line with that policy. On the applicability to juvenile court proceedings of the double jeopardy clause, the Supreme Court concluded:

> We believe it is simply too late in the day to conclude, as did the District Court in this case, that a juvenile is not put in jeopardy at a proceeding whose object is to determine whether he had committed acts that violate a criminal law and whose potential consequences include both the stigma inherent in such a determination and the deprivation of liberty for many years. Breed v. Jones, 421 U.S. at 529.
>
> Breed v. Jones laid to rest any remaining doubts as to the applicability of the double jeopardy clause to juvenile court proceedings. It would appear that the Gault decision, when read in conjunction with the Court's subsequent decision in Benton v. Maryland, 395 U.S. 784 (1969), which applied the double jeopardy clause of the fifth amendment to state criminal proceedings, made Breed v. Jones inevitable.

Moquin v. State, 140 A.2d 914 (Md. 1958), epitomizes state court opinions concerning double jeopardy claims raised by juveniles before Gault, Benton, and Breed v. Jones:

> ... [T]he rule of double jeopardy is applicable only when the first prosecution involves a trial before a criminal court or at least a court empowered to impose punishment by way of fine, imprisonment or otherwise as a deterrent to the commission of crime. The question to be decided is whether the hearing before the

> Juvenile Court of Montgomery County subjected the defendant to the risk of these penalties. We answer this question in the negative. 140 A.2d at 916.

The Maryland Court of Appeals focused on a rehabilitative rationale for the juvenile court, rather than on the impact of an adjudication on the juvenile:

> The juvenile act does not contemplate the punishment of children where they are found to be delinquent. The act contemplates an attempt to correct and rehabi litate.... [W]hile the act recognizes that there will be cases where hospital care or commitment to a juvenile training school or other institution may be necessary, this is all directed to the rehabilitation of the child concerned rather than punishment for any delinquent conduct. Id. at 916-17.

The pre-Breed state legislatures were only slightly more willing to extend protection against double jeopardy to juveniles than were the state courts. New Mexico's provision, N.M. Stat. Ann. § 13-14-25(I) (Supp. 3, 1973), which explicitly bars all other proceedings after an adjudication has begun, is unique. Other states have not been quick to follow New Mexico's lead.

The Supreme Court of California anticipated Breed v. Jones by explicitly recognizing the combined effect of Benton and Gault in M. v. Superior Court, 482 P.2d 664 (Cal. 1971). Without dissent that court held that the constitutional guarantee against double jeopardy prohibited multiple threats of judgment in juvenile court proceedings. Id. at 668.

The United States Court of Appeals for the Fifth Circuit, in a decision quoted by the Supreme Court in Breed v. Jones, also anticipated Breed. In Fain v. Duff, 488 F.2d 218 (5th Cir. 1973), Fain, arrested for rape in Florida, was indicted in criminal court after a juvenile court had adjudicated him delinquent on the basis of the alleged rape. Before criminal trial, Fain sought and obtained a writ of habeas corpus in federal court, claiming that the indictment placed him twice in jeopardy. The state appealed.

Judge Morgan, speaking for the majority, rejected the notion that there is no jeopardy in a court seeking to rehabilitate:

> Fain's commitment ... resulted from his having been found delinquent. And his being found delinquent resulted from his having violated a criminal law.... Thus a violation of the criminal law many directly result in incarceration. This is a classic example of jeopardy. Id. at 225.

Standard 2.1 F. accepts the reasoning of Breed v. Jones. The threat of a juvenile court adjudication constitutes jeopardy. The juvenile court judge should not consider waiver of jurisdiction after an adjudicatory hearing has begun.

STANDARD 2.2 NECESSARY FINDINGS

2.2 A. The juvenile court should waive its jurisdiction only upon finding:

1. **that probable cause exists to believe that the juvenile has committed the class one or class two juvenile offense alleged in the petition; and**
2. **that by clear and convincing evidence the juvenile is not a proper person to be handled by the juvenile court.**

Commentary

Standard 2.2 A. establishes a two-part test for waiver of juveniles to the criminal court. The juvenile court must find that probable cause exists to believe that the juvenile committed a class one or class two juvenile offense and, by clear and convincing evidence, that the juvenile is not a proper person for juvenile court handling. The required findings are discussed in the commentary following Standards 2.2 B. and 2.2 C.

2.2 B. A finding of probable cause to believe that a juvenile has committed a class one or class two juvenile offense should be based solely on evidence admissible in an adjudicatory hearing of the juvenile court.

Commentary

Standard 2.2 A. requires a probable cause finding as a necessary precondition of waiver. Probable cause is a condition for waiver in eighteen of the thirty-six jurisdictions which have waiver statutes. See, e.g., Me. Rev. Stat. Ann. tit. 15, § 2611(3) (1964), N.C. Gen. Stat. § 7A-280 (1969), and Tex. Family Code § 54.02(f) (1973). The presumption in favor of juvenile court jurisdiction should be overcome only in extreme cases. A juvenile against whom probable cause cannot be found should not be considered an extreme case. A probable cause finding should be a necessary, but not the sole, condition for waiver.

The juvenile court could assume the prosecutor's factual allegations, leaving open only the question of whether a juvenile is a proper person for juvenile court handling. Such a procedure would lead to wasted effort. Inquiry into whether a juvenile is a proper person for juvenile court handling must be careful and thorough to be meaningful. That inquiry is useless if lack of probable cause will bar any subsequent proceeding, whether criminal or juvenile. Judicial economy is an important objective. Probable cause is likely to be a factor in waiver proceedings in all juvenile court, regardless of the applicable statutory provisions.

Requiring a probable cause finding at the waiver hearing encourages reliable factual allegations by the prosecutor. A prosecutorial tactic for overreaching the juvenile in plea bargaining is to threaten treatment as an adult. That threat can be particularly effective when the prosecutor can inflate the potential criminal charge without jeopardizing the case for waiver. Forcing the juvenile to bargain under such circumstances is unfair.

The juvenile court must find probable cause to believe that the juvenile's alleged conduct constitutes a class one or class two juvenile offense. The term "class one juvenile offense" is defined in the Juvenile Delinquency and Sanctions volume as those criminal offenses for which the maximum sentence for adults would be death or imprisonment for life or a term in excess of twenty years. A "class two juvenile offense" would be punishable for adults by imprisonment for more than five but no more than twenty years. Fourteen of the states which permit waiver bar surrender of jurisdiction

over conduct amounting only to misdemeanor. See, e.g., Fla. Stat. Ann. § 39.02(6)(a) (Supp. 1A, 1973), N.H. Rev. Stat. Ann. § 169:21-a (Supp. 2, 1973), Ohio Rev. Code § 2151.26(A) (Supp. 21, 1973), and Utah Code Ann. § 55-10-86 (1973).

Juveniles should be waived to the criminal court only when serious felonies are alleged. Offenses which the legislature had elected to punish with the severe penalties attached to class one or class two juvenile offenses should include such serious felonies. Allegations of lesser criminal acts should be insufficient to overcome the presumption in favor of juvenile court jurisdiction. The class one or class two juvenile offense requirement limits the prosecutor's ability to inflate a misdemeanor or minor felony into a major felony to support a waiver motion. In such a situation, the court could find probable cause to believe that the juvenile committed the conduct alleged but that such conduct did not constitute a class one or class two juvenile offense. The juvenile court could thereby limit prosecutorial manipulation of its jurisdiction.

The probable cause determination must be based on evidence admissible in juvenile court adjudicatory hearings. Evidence which could not be the basis for an adjudication should not be the basis for waiver. Concern for judicial economy compels that requirement. Probable cause determinations based on evidence not otherwise admissible in juvenile court adjudicatory proceedings (or in the criminal court where evidence standards will be at least as strict) will inevitably result in wasted effort. Standard 2.2 D. permits use of probable cause determinations in waiver proceedings in other juvenile court proceedings. The possibility of multiple use of the waiver probable cause finding necessarily requires that the finding be based on evidence that the juvenile court can otherwise properly consider.

2.2 C. A finding that a juvenile is not a proper person to be handled by the juvenile court must include determinations, by clear and convincing evidence; of:

1. **the seriousness of the alleged class one or class two juvenile offense;**
2. **a prior record of adjudicated delinquency involving the infliction or threat of significant bodily injury, if the juvenile is alleged to have committed a class two juvenile offense;**
3. **the likely inefficacy of the dispositions available to the juvenile court as demonstrated by previous dispositions of the juvenile; and**
4. **the appropriateness of the services and dispositional alternatives available in the criminal justice system for dealing with the juvenile's problems, and whether they are, in fact, available.**

Expert opinion should be considered in assessing the likely efficacy of the dispositions available to the juvenile court. A finding that a juvenile is not a proper person to be handled by the juvenile court should be based solely on evidence admissible in a disposition hearing of the juvenile court, and should be in writing, as provided in Standard 2.1 E.

Commentary

The juvenile court should waive jurisdiction only over extraordinary juveniles in extraordinary factual circumstances. Standard 2.2 C. defines those circumstances. Waiver is appropriate only when the juvenile is accused of a serious class one or class two juvenile offense, has demonstrated a propensity for violent acts against other persons and, on the basis of personal background, appears unlikely to benefit from any disposition available to the juvenile court. The court's finding that the juvenile is not a proper person to be handled by the juvenile court should be set forth in a written

decision stating the reasons for that conclusion, including the evidence on which it relied, as required in Standard 2.1 E.

Although certain rehabilitative functions are appropriate to the juvenile justice system, existing research suggests a skeptical view of the system's ability to rehabilitate troubled and troublesome juveniles. From the perspective that coercive state intervention in children's lives should be infrequent and limited, the juvenile court has one unarguable advantage; a person subject to the juvenile court is not, unless waived, subject to the harsher penalties of criminal court.

The presumption of Standard 2.2 C., that juveniles should be handled by the juvenile court, accords both with a noninterventionist philosophy and with the conviction that the juvenile court plays a constructive role in the lives of all or some of the juveniles who come within its jurisdiction. The requirements of Standard 2.2 C. must be met before that presumption can be overcome.

Standards 2.2 A. and 2.2 C. speak of juveniles who are not "proper persons to be handled by the juvenile court." A more frequently used concept, premised on a rehabilitative juvenile court rationale, is the juvenile who is not "amenable to treatment." The findings required by Standard 2.2 C. are appropriate regardless of whether or not a rehabilitative view is taken of the juvenile courts.

Twenty-fourd of the thirty-six jurisdictions that have waiver statutes require a waiver finding that the juvenile is not amenable to treatment. However, nonamenability is not the most widely adopted statutory justification for waiver of juvenile court jurisdiction. Twenty-seven states' statutes establish the "public interest" as a basis for waiver.

Standard 2.2 C. rejects the public interest as a justification for waiver. The presumption in favor of juvenile court jurisdiction requires that the juvenile "deserve" waiver. Waiver must be justified on the basis of the juvenile and his or her actions and personal history. A "public interest" basis for waiver looks to something external to the juvenile. To the extent that the public interest means political considerations, these standards reject such considerations as a proper element in the decision to waive jurisdiction over a specific juvenile. Such factors may be proper considerations for the prosecuting attorney to weigh in deciding whether to seek waiver. They are inappropriate to the waiver decision itself.

Some statutes authorize consideration of general deterrence in waiver proceedings. Montana permits waiver when "the seriousness of the offense and the protection of the community requires treatment of the youth beyond that afforded by juvenile facilities." Mont. Rev. Codes Ann. § 10-2229(d) (Supp. 1 Part 2, 1974). Several states combine considerations of general deterrence with the child's interest. Utah approves waiver when "it would be contrary to the best interests of the child or of the public to retain jurisdiction." Utah Code Ann. § 55-10-86 (1973).

A waiver system premised solely on general deterrence would probably be unconstitutional. The state does not possess authority to use individuals as symbols without regard to individual responsibility. A waiver scheme premised solely on general deterrence would refer some individuals to the criminal court arbitrarily without concern for the facts of specific cases and would probably constitute a denial of due process and equal protection. No state is likely to establish such a scheme, but the arguments against consideration of general deterrence in juvenile court, even as only one element of the waiver decision, are equally applicable. The court's mission is the successful maturation, and in some cases reintegration into the community, of troubled juveniles. Considerations of general deterrence are inappropriate to waiver proceedings.

Some waiver tests are premised on specific deterrence and community security. Some public interest provisions focus on deterrence of the particular individual before the juvenile court. In Connecticut, waiver is possible if "the safety of the community requires that the child continue under restraint for a period extending beyond his majority." Conn. Gen. Stat. Ann. § 17-60a (Supp. 10, 1974). Ohio allows waiver when "[t]he safety of the community may require that he be placed under legal restraint ... for the period extending beyond his majority." Ohio Rev. Code Ann. § 2151.26(A)(3)(b) (Supp. 1973) (emphasis added).

Considerations of specific deterrence and community security are implicit in Standard 2.2 C. The "not a proper person" test is designed to identify juveniles who are genuine threats to community safety as evidenced by the seriousness of the present criminal charge, their past violent acts, and their unsuccessful past experience with the juvenile justice system. Standard 2.2 C. will not authorize waiver over all persons as to whom a persuasive specific deterrence argument could be made. That is a cost that Standard 2.2 C. (and the existence of the juvenile court) evidences willingness to accept.

A judgment that treatment as a juvenile is improper is necessarily subjective. Any subjective decision creates an opportunity for abuse. Juvenile court judges might waive jurisdiction while speaking in terms of nonamenability or not a proper person but thinking of the public interest, general deterrence, or some other inappropriate justification. Limited research on waiver suggests this potential for abuse. Surveys in Wisconsin and Ohio show that a desire to consolidate the trials of juvenile and adult co-offenders often leads to waiver. See Note, "Waiver of Jurisdiction in Wisconsin Juvenile Courts," 1968 Wis. L. Rev. 551, 553 (1968); Note, "Waiver of Jurisdiction in Juvenile Courts," 30 Ohio St. L. J. 132, 137 (1969). The United States Children's Bureau's Survey of Juvenile Courts and Probation Services (1966) corroborates this finding. Administrative convenience is not an acceptable justification for waiver. That juvenile court judges occasionally accept it demonstrates the opportunities for abuse in waiver decisions.

Subsections 1., 2., and 3. of Standard 2.2 C. contain the specific determinations on which a finding that a juvenile is not a proper person for juvenile court handling must be based. Specific required determinations lessen the likelihood that a juvenile will be waived for public interest, general deterrence, or other inappropriate reasons. Subsection 1. requires that the juvenile be charged with a "serious" class one or class two juvenile offense. In most cases, the probable cause finding required by Standard 2.2 B. will also suffice for 2.2 C. 1. Class one and class two juvenile offenses are defined by the maximum sanctions that may be imposed. Most offenses likely to fall within the categories, such as murder, rape, and armed robbery, will be "serious." Occasionally anomalies will exist. The juvenile court judge should have power to assess the seriousness of the criminal act alleged. If possession of a small quantity of cannabis, or simple theft, is punishable within a jurisdiction by a possible life sentence, the judge should have authority to decide for purposes of waiver that the criminal act alleged is not "serious."

Subsection C.2. requires that the juvenile have been previously adjudicated on charges of threatening or inflicting serious bodily injury if the juvenile is alleged to have committed a class two juvenile offense. The presumption in favor of juvenile court jurisdiction is strong. Only juveniles who pose genuine threats to community safety should be waived and exposed to the greater sanctions of the criminal court. A prior record of violent acts is evidence of that threat. Prior records of property offenses, minor violent offenses, or alleged but unproven serious violent offenses do not evidence that threat. However, it should be noted that an adjudication involving a serious violent offense by itself does not warrant waiver. As originally drafted, the standards permitted waiver only if the juvenile was alleged to have committed a class one juvenile offense. When revised to include class two offenses, the requirement of a finding of a prior record was eliminated for class one offenses.

The requirements of subsection 2. probably conform to most present practices. Inconclusive but revealing studies of the Metropolitan Nashville Juvenile Court and Houston's juvenile courts suggest as much. In the Nashville sample, every juvenile remanded to criminal court over a seventeen-month period had appeared in juvenile court at least once before; forty-three of forty-nine had previously been committed. See Note, "Problem of Age and Jurisdiction in the Juvenile Court," 19 Vand. L. Rev. 833, 854 (1966). In Houston the juvenile courts considered the waiver of eighteen juveniles over a six-month period. Distributed among those eighteen were twenty-one charges: ten of murder and assault to murder, three of rape, and eight of robbery by firearms. Hays and Solway, "The Role of Psychological Evaluation in Certification of Juveniles for Trial as Adults," 9 Houston L. Rev. 709, 710 (1972).

Subsection C. 3. requires the juvenile court judge to consider every available dispositional alternative and the likelihood that the juvenile will not benefit from each. This analysis should include detailed consideration of the juvenile's previous exposure to juvenile justice programs.

In Hazel v. United States, 404 F.2d 1275 (D.C. Cir. 1968), a United States Court of Appeals considered the validity of an order, supported by a bare finding of nonamenability, that waived juvenile court jurisdiction. The case was decided on the juvenile court judge's failure to obtain an adequate release by the juvenile of his right to a waiver hearing. The court of appeals nevertheless devoted considerable attention to the sufficiency of the waiver findings. Chief Judge Bazelon wrote:

> The Juvenile Court did not indicate what strategy might offer hope to rehabilitate the appellant, nor what facilities would be necessary to pursue such a strategy nor what efforts had been made to explore the availability of such facilities. The unelaborated conclusion that "facilities currently available to the Juvenile Court" offered no promise of rehabilitation thus telescoped together the several distinct stages of this critical inquiry. Id. at 1280.

Faced with a suspicious waiver order, the juvenile court was warned not to "abandon its statutory duty to help the young offender." Id. at 1282. The court of appeals required that an examination of all dispositional alternatives precede any finding of nonamenability. "[I]t is only after all rehabilitative possibilities have been canvassed that a decision to waive jurisdiction to the District Court is ever proper." Id.

The Haziel requirements ensure a thorough, particularized study of the juvenile's situation and discourage cursory consideration of dispositional alternatives. Subsection C. 3. seeks to achieve the same ends. Recurrent examination of dispositional alternatives may focus attention on the juvenile court's facilities and contribute to their improvement. "Perhaps it is only by searching for what we need but do not have that future improvements in knowledge and resources can be hoped for." Id. at 1280.

Standard 2.2 C. encourages consideration of expert opinion in assessing the likely efficacy of the dispositions available to the juvenile court.

The court may find that a juvenile is not a proper person for juvenile court handling only on the basis of clear and convincing evidence. This provision is a compromise between the widely used standard of proof of the justification for waiver by a preponderance of the evidence and the beyond-a-reasonable-doubt standard required in juvenile adjudications.

Use of the standard constitutionally required in juvenile court adjudicatory hearings would unduly restrict the juvenile court's power to waive jurisdiction. Determinations that a juvenile is not a "proper person" are exercises in judgment of the sort never entirely free from reasonable doubt. A lesser standard, which nonetheless requires a thorough demonstration of the need for waiver-which a mere preponderance test does not-is appropriate. For this reason, the standard of proof by clear and convincing evidence has been chosen.

The findings required by Standard 2.2 C. must be based on evidence admissible in a juvenile court dispositional hearing. Evidence that cannot properly be considered by the juvenile court at a dispositional hearing following an adjudication is no more credible or worthy of consideration in the context of waiver.

A finding that a juvenile is not a proper person for juvenile court handling must include all four determinations required by Standard 2.2 C. Only extraordinary juveniles in extraordinary circumstances should be waived. If any of the required determinations cannot be made on the basis of clear and convincing evidence, the juvenile should not be waived. Standard 2.2 C. permits but does not require waiver. The juvenile need not be waived even if the juvenile court judge decides that all four determinations have been demonstrated by clear and convincing evidence.

2.2 D. A finding of probable cause to believe that a juvenile has committed a class one or class two juvenile offense may be substituted for a probable cause determination relating to that offense (or a lesser included offense) required in any subsequent juvenile court proceeding. Such a finding should not be substituted for any finding of probable cause required in any subsequent criminal proceeding.

Commentary

Standard 2.2 D. bars substitution of the waiver hearing's finding of probable cause for any similar finding required in any subsequent criminal proceeding. The bar does not apply to subsequent juvenile court proceedings.

Many jurisdictions have limited provisions for discovery in criminal proceedings. In the words of Judge Weinstein, a preliminary hearing constitutes "the most valuable discovery technique available" to the criminal defendant. United States ex rel. Wheeler v. Flood, 269 F. Supp. 194, 198 (E.D.N.Y. 1967). Depriving the person waived from juvenile court jurisdiction of this opportunity to learn the nature of the evidence gathered is unfair and possibly unconstitutional. The juvenile will often have stipulated the existence of probable cause at the waiver hearing and focused on the issue of being a proper person for juvenile court handling.

The juvenile court situation is different. Principles of economy favor consolidation of judicial function. The court, the juvenile, the prosecuting attorney, and the issues are the same in probable cause determinations in the context of waiver and in other juvenile court contexts. Neither the juvenile court nor the juvenile should be required to go through the same motions a second time. Breed v. Jones, 421 U.S. 519 (1975), does not require otherwise.

STANDARD 2.3 THE HEARING

2.3 A. The juvenile should be represented by counsel at the waiver hearing. The clerk of the juvenile court should give written notice to the juvenile, multilingual if appropriate, of this requirement at least [five] court days before commencement of the waiver hearing.

Commentary

Standard 2.3 A. requires that the juvenile be represented by counsel. Written notice of the requirement, multilingual if appropriate, must be given to the juvenile at least [five] court days before the waiver hearing begins.

Kent v. United States, 383 U.S. 541 (1966), acknowledges the constitutional significance of the right to counsel in waiver proceedings: "The right to representation by counsel is not a formality. It is not a grudging gesture to a ritualistic requirement. It is of the essence of justice." Id. at 561. This right has been widely acknowledged. See, e.g., Alaska R. Juv. P. 3(c) and 15(a); Steinhauser v. State, 206 S.2d 25 (Fla. 1967); and N.D. Cent. Code § 27-20-26 (1974).

This standard rejects, for the juvenile court, the Supreme Court's decision in Faretta v. California, 422 U.S. 806 (1975). Faretta affirms the constitutional right of an adult criminal defendant to represent him- or herself without benefit of counsel.

Some, perhaps all, juveniles may be legally incapable of a knowing and intelligent waiver of the right to counsel. The thirteen-year-old is unlikely to have sufficient maturity and perspective. The seventeen-year-old may. Any method of determining which juveniles are capable of an intelligent and knowing waiver of the right to counsel will inevitably err on occasion. Rather than accept the inevitable error, Standard 2.3 A. imposes counsel on the hypothetical juvenile who rejects the right to counsel.

A fundamental premise of this volume is that juveniles are different from adults in material respects. Being a juvenile should seldom justify reduced procedural protections. That state does justify the imposition of a protection which should in most cases benefit the juvenile.

2.3 B. The juvenile court should appoint counsel to represent any juvenile unable to afford representation by counsel at the waiver hearing. The clerk of the juvenile court should give written notice to the juvenile, multilingual if appropriate, of this right at least [five] court days before commencement of the waiver hearing.

Commentary

Standard 2.3 B. requires appointment of counsel to represent juveniles unable to afford representation at the waiver hearing.

Since In re Gault, 387 U.S. 1 (1967), juveniles unarguably have a constitutional right to counsel, including appointed counsel when necessary, in any juvenile court adjudicatory hearing.

A similar constitutional right to counsel must exist for waiver hearings. An adverse decision results in denial of juvenile court handling and its limited sanctions, and in prosecution, conviction, and punishment as an adult. The need for procedural protection in waiver proceedings was recognized before Kent v. United States, 383 U.S. 541 (1966), and the Gault opinions were issued. In Black

v. United States, the United States Court of Appeals for the District of Columbia observed that the need for the assistance of counsel, while substantial in delinquency hearings, "is even greater in the adjudication of waiver since it contemplates the imposition of criminal sanctions." 355 F.2d 104, 106 (D.C. Cir. 1965). Also see Kemplen v. Maryland, 428 F.2d 169, 173-75 (4th Cir. 1970).

The propriety of notification of the right to counsel is indisputable. Gault requires such notice in juvenile adjudications, 387 U.S. at 41, and Kemplen explicitly extended the requirements to waiver hearings. 428 F.2d at 175.

2.3 C. The juvenile court should pay the reasonable fees and expenses of an expert witness for the juvenile if the juvenile desires, but is unable to afford, the services of such an expert witness at the waiver hearing, unless the presiding officer determines that the expert witness is not necessary.

Commentary

Standard 2.3 C. requires the juvenile court to pay the reasonable costs and expenses of an expert witness for the juvenile in cases of indigency, unless the court exercises its discretion to rule that no need appears for such testimony.

Standard 2.2 C. 3. requires the waiver judge to consider the likely efficacy of available juvenile court dispositions in deciding whether a juvenile is a proper person for juvenile court handling. Standard 2.2 C. also requires the juvenile court judge to consider expert opinion in considering the 2.2 C. 3. finding. The juvenile should receive benefit of the testimony of experts chosen by the defense, even when the juvenile cannot afford the expert's fees and expenses.

Wealth should not determine the quality of a juvenile's opposition to waiver. Justice Black eloquently affirmed the necessity of "providing equal justice for poor and rich ... alike" in the majority opinion in Griffin v. Illinois, 351 U.S. 12 (1956). Griffin involved indigent criminal defendant who were denied free transcripts for use in appellate proceedings:

> Surely no one could contend that either a State or the Federal Government could constitutionally provide that defendants unable to pay court costs in advance should be denied the right to plead not guilty or to defend themselves in court. Such a law would make the constitutional promise of a fair trial a worthless thing. Notice, the right to be heard, and the right to counsel would under such circumstances be meaningless promises to the poor. In criminal trials a State can no more discriminate on account of poverty than on account of religion, race or color. Id. at 16-17.

In Jacobs v. United States, 320 F.2d 571 (4th Cir. 1965), citing Griffin, the fourth circuit extended this guarantee to include court appointment of a psychiatrist to testify on defendant's competency to stand trial. In 1969 the seventh circuit extended Griffin to juvenile adjudications. Reed v. Duter, 416 F.2d 744 (7th Cir. 1969). Given Jacobs and Reed, the requirement that the state pay the costs of an expert witness in waiver proceedings is consistent with current constitutional precepts.

2.3 D. The juvenile should have access to all evidence available to the juvenile court which could be used either to support or contest the waiver motion.

Commentary

Standard 2.3 D. grants the juvenile access to all evidence available to the juvenile court that could be used to support or contest the waiver motion.

Justice Fortas in Kent v. United States, 383 U.S. 541 (1966), asserted a District of Columbia juvenile's right to access through his attorney to all information in the hands of the juvenile court:

> With respect to access by the child's counsel to the social records of the child, we deem it obvious that since these are to be considered by the juvenile court in making its decision to waive, they must be made available to the child's counsel. 383 U.S. at 562.

An eminent scholar soon responded, criticizing this holding as a "shortcoming." Paulsen, "Kent v. United States: The Constitutional Context of Juvenile Cases," 1966 Sup. Ct. Rev. 167, 179-81. Paulsen argued that the Supreme Court underestimated the importance of juvenile court confidentiality, fearing that full disclosure of social records would "touch off an uproar among social workers." He noted:

> There is a footnote referring to the fact that Kent's lawyer had, in fact, seen the confidential material at a stage in the proceedings after the waiver decision. In that footnote, Mr. Justice Fortas quipped: "Perhaps the point of it is that it again illustrates the maxim that while nondisclosure may contribute to the comfort of the staff, disclosure does not cause the heavens to fall." To which many experienced probation officers would respond: "Not right away perhaps." Id. at 179-80.

Paulsen feared that the disclosure requirement would dry up one of the juvenile court's principal sources of information:

> To get information, especially of an intimate sort, the social investigator must be able to give firm assurances of confidentiality; if people generally learn that supplying information will bring them to court or plunge them into a neighborhood feud, they will no longer share their knowledge and impressions; information destructive of the youngster's chances at rehabilitation may leak back to him. Id. at 180.

The decade since Kent has seen no revolt by juvenile court personnel in the District of Columbia or nationwide. Social workers have adjusted well to Kent's imposition on the confidentiality of their reports. Paulsen underestimated the ability of juvenile court personnel to adjust to full disclosure in the waiver setting. That demonstrated ability is a persuasive argument for Kent's disclosure requirements.

2.3 E. The prosecuting attorney should bear the burden of proving that probable cause exists to believe that the juvenile has committed a class one or class two juvenile offense and that the juvenile is not a proper person to be handled by the juvenile court.

2.3 F. The juvenile may contest the waiver motion by challenging, or producing evidence tending to challenge, the evidence of the prosecuting attorney.

2.3 G. The juvenile may examine any person who prepared any report concerning the juvenile which is presented at the waiver hearing.

2.3 H. All evidence presented at the waiver hearing should be under oath and subject to cross-examination.

Commentary

Standard 2.3 E. through H. establishes requirements for the conduct of the waiver hearing. The waiver hearing will determine whether a juvenile is denied juvenile court handling or is exposed to the practices and punishments of the criminal court. A decision of that magnitude should be considered on the basis of a fully adversary hearing in which the state must establish the propriety of the result that it urges. The prosecutor should bear the burden of proof and the risk of nonpersuasion. The juvenile should be able to contest prosecution evidence; cross-examine prosecution witnesses, including persons who prepare reports which the prosecution introduces in support of waiver; and present original evidence in opposition to waiver. On the right to compulsory process, see Dispositional Procedures Standard 6.2, Juvenile Records and Information Systems Standard 5.7 B., and Pretrial Court Proceedings Standard 1.5 F.

2.3 I. The juvenile may remain silent at the waiver hearing. No admission by the juvenile during the waiver hearing should be admissible to establish guilt or to impeach testimony in any subsequent proceeding, except a perjury proceeding.

Commentary

Standard 2.3 I. establishes a right to silence in waiver hearings. The juvenile's right to silence at the waiver hearing should be axiomatic. The Supreme Court recognized this right in juvenile adjudications in In re Gault, 387 U.S. 1 (1967), and in criminal prosecutions in Malloy v. Hogan, 378 U.S. 1 (1964). The protection against self-incrimination available in the juvenile and criminal courts should apply to the hearing which serves as the bridge between them.

Standard 2.3 I. also gives the juvenile power to bar the introduction in any subsequent criminal trial or other proceeding, except for perjury, of admissions made during the waiver hearing.

Twenty states offer similar evidentiary protection to juveniles opposing waiver. These statutes fall into three general categories. Some, like Va. Code Ann. § 16.1-176(b) (Supp. 4, 1974) and Wyo. Stat. Ann. § 14- 115.38 (Supp. 5, 1973), appear as part of the statute authorizing waiver and apply solely to that process. Others, like Ala. Code tit. 13, § 377 (1959) and Ore. Rev. Stat. § 419.567(3) (1974), apply to all juvenile court proceedings, including waiver hearings. Still others seem to pertain to waiver, but ambiguous drafting (resulting, perhaps, from a preoccupation with admissions at other juvenile court hearings) clouds the issue. See, e.g., Mass. Ann. Laws ch. 119, § 60 (Supp. 18, 1974) and Mich. Comp. Laws Ann. § 712A.23 (1969). A statute specifically applicable to admission at the waiver hearing is preferable.

Such statutes encourage candor at the waiver hearing. A better-informed waiver decision should result. The juvenile need not fear that an admission of misconduct-contrition evidencing that the juvenile is a proper person for juvenile court handling-will lead to a criminal conviction if the juvenile court elects to waive jurisdiction.

Justice Harlan offered similar reasoning in an analogous situation in Simmons v. United States, 390 U.S. 377 (1968). One co-defendant admitted ownership of a suitcase in order to establish standing to suppress evidence found in the suitcase; at trial this admission was used against him. The defendant claimed that such use had a chilling effect on his right to challenge the introduction of evidence unconstitutionally seized.

The Supreme Court agreed:

> [T]here will be a deterrent effect in those ... cases in which it cannot be estimated with confidence whether the motion will succeed. Since search-and-seizure claims depend heavily upon their individual facts, and since the law of search and seizure is in a state of flux, the incidence of such marginal cases cannot be said to be negligible. Id. at 393.

The Simmons opinion observes that, in marginal suppression cases "a defendant with a substantial claim for the exclusion of evidence may conclude that the admission of the evidence, together with the Government's proof linking it to him, is preferable to risking the admission of his own testimony connecting himself with the seized evidence." Id. at 393. Most waiver cases are marginal. The juvenile with an argument against waiver based in part on inferences from an admission of misconduct might accept a criminal trial after token opposition to waiver rather than risk use of such an admission at a criminal trial. Standard 2.3 E. avoids this dilemma for the juvenile. Use of admissions during the waiver process in subsequent criminal proceedings is prohibited.

The 2.3 I. restriction does not apply to subsequent juvenile proceedings. Similarly, Standard 2.2 D. permits subsequent use in the juvenile court of the waiver hearing's probable cause determination.

The primary reason for permitting later juvenile court use of admissions at the waiver hearing is judicial economy. Otherwise, a juvenile could admit (or the court could find probable cause to believe) occurrence of a class one juvenile offense but assert innocence at a juvenile court probable cause or adjudicatory hearing. The court, the juvenile, the prosecutor, and defense counsel would have to consider probable cause de novo or try a question that all believe has previously been resolved.

Standard 2.3 I.'s evidentiary bar is broad. Admissions made during the waiver hearing may not be used either to establish guilt or to impeach testimony.

Standard 2.3 I. rejects the distinction in Harris v. New York, 401 U.S. 222 (1971), between inadmissible use of the defendant's statements to establish guilt (because obtained without proper Miranda warnings) and admissible use to attack the credibility of the defendant's testimony in his or her own behalf.

2.3 J. The juvenile may disqualify the presiding officer at the waiver hearing from presiding at any subsequent criminal trial or juvenile court adjudicatory hearing relating to any transaction or episode alleged in the petition initiating juvenile court proceedings.

Commentary

Standard 2.3 J. permits the juvenile to disqualify the judge who presided at the waiver hearing from presiding at a subsequent juvenile court adjudication or criminal trial.

The waiver judge hears evidence that would be inadmissible in an adjudicatory hearing or a trial. The likelihood that the juvenile will perceive impropriety is great. Standard 2.3 J. permits any juvenile who senses such a disadvantage to demand a different judge at the adjudicatory proceeding.

Similar provisions appear at § 31 (i) of the "Legislative Guide for Drafting Family and Juvenile Court Acts" prepared by the United States Children's Bureau and at § 34(E) of the Uniform Juvenile Court Act. The notes of the National Conference of Commissioners on Uniform Laws appended to subsection (E) offer this rationale:

> On a hearing to transfer, the judge of necessity must hear and consider matters relating adversely to the child which would be inadmissible in a hearing on the merits of the petition. Hence, the need for avoiding their prejudicial effect by requiring over objection that another judge hear the charges made in the petition or in the criminal court if the case is transferred.
>
> The commissioners emphasize the danger of actual prejudice to the juvenile. This danger is less persuasive an argument for disqualification than is the certainty of apparent prejudice. No matter how fair the waiver judge may be in subsequent proceedings, an impression of unfairness will exist.

STANDARD 2.4 APPEAL

2.4 A. The juvenile or the prosecuting attorney may file an appeal of the waiver decision with the court authorized to hear appeals from final judgments of the juvenile court within [seven] court days of the decision of the juvenile court.

Commentary

The right to appeal provided by Standard 2.4 A. must be exercised within [seven] court days after the waiver decision. The alternative-review only after entry of a final order in either criminal or juvenile court-appears to be the majority rule. Few statutes address the issue. State courts have disagreed sharply. Appeals and Collateral Review Standard 2.2 C. 2. e. expressly authorizes appeal of the waiver decision.

The leading exponent of the majority rule is People v. Jiles, 251 N.E.2d 529 (Ill. 1969). The Supreme Court of Illinois refused a petition for immediate review of waiver, citing standard arguments against interlocutory appeals:

> To permit interlocutory review of such an order would obviously delay the prosecution of any proceeding in either the juvenile or the criminal division, with the result that the prospect of a just disposition would be jeopardized. In either proceeding the primary issue is the ascertainment of the innocence or guilt of the person charged. To permit interlocutory review would subordinate that primary issue and defer its consideration....Id. at 531.
>
> Similar decisions include Brekke v. People, 233 Cal.App. 2d 196, 43 Cal. Rptr. 553 (1965), and In re T.J.H., 479 S.W.2d 433 (Mo. 1972).

The supreme courts of Oregon, Tennessee, and Hawaii have approved interlocutory appeal from waiver decisions. State v. Little, 407 P.2d 627(Ore. 1965); In re Houston, 428 S.W.2d 303 (Tenn. 1968); and In re Doe I, 444 P.2d 459 (Hawaii 1968).

The principal advantage of immediate appeal is avoidance of the reconstructed waiver hearing, the proceeding necessary when an appellate court finds a defect in the original waiver hearing after the person waived is, because of the time consumed by the criminal trial, beyond the age jurisdiction of the juvenile court. The appellate court which upholds a waiver appeal must either free the improperly waived individual-because neither juvenile nor criminal court has jurisdiction-or reconstruct the waiver process to determine if a hearing free from error would have resulted in waiver. The reconstructed hearing must attempt to imagine the juvenile as he or she was at the time of the original hearing.

The experience of Morris Kent illustrates the problems that arise when interlocutory appeal from waiver decision is not possible. Kent was apprehended at age sixteen on September 5, 1961. Waived to criminal court seven days later, he sought immediate appellate review. He appealed to the municipal court of appeals, then the highest local court in the District of Columbia. He sought a writ of habeas corpus in United States District Court. The district court dismissed the application for the writ on September 19, 1961, and rejected the appeal on April 13, 1962. In re Kent, 179 A.2d 727 (1962). On January 22, 1963, the court of appeals for the District of Columbia held that a motion to dismiss Kent's criminal indictment was the proper vehicle for challenging the waiver decision and that denial of such a motion was reviewable only after conviction. Kent v. Reid, 316 F.2d 331 (D.C. Cir. 1963). Morris Kent was still within the age jurisdiction of the juvenile court.

The district court denied Kent's motion to dismiss the indictment on February 8, 1963. Kent was convicted of robbery. He appealed to the court of appeals, which finally heard his attack on the juvenile court's waiver of jurisdiction on December 17, 1963-twenty-seven months after the fact.

That court affirmed Kent's conviction in 1964 and denied rehearing en banc in early 1965. Kent v. United States, 343 F.2d 247 (D.C. Cir. 1965). The Supreme Court granted certiorari in 1965. The landmark decision was issued on March 21, 1966. Justice Fortas recognized the difficulty of providing appropriate relief to Kent, by then over twenty-one:

> In view of the unavailability of a redetermination of the waiver question by the Juvenile Court, it is urged by petitioner that the conviction should be vacated and the indictment dismissed. In the circumstances of this case ..., we do not consider it appropriate to grant this drastic relief. Accordingly, we vacate the order of the Court of Appeals and the judgment of the District Court and remand the case to the District Court for a hearing de novo on waiver, consistent with this opinion. 383 U.S. 541, 564-65 (1966).

The Supreme Court thereby sanctioned the reconstructed waiver hearing.

The case reports do not indicate the precise date on which the district court attempted to transform itself into a juvenile court sitting in September 1961. The reconstructed hearing probably occurred in the latter half of 1966. Removed almost five years from his previous circumstances, Kent agreed that juvenile treatment would have been inappropriate in 1961 but argued that civil commitment, not waiver into criminal court, would have been the best disposition.

The district court in 1967 rejected this contention, finding waiver reasonable in the circumstances. The court of appeals reversed the lower court on July 30, 1968. Kent v. United States, 401 F.2d 408 (D.C. Cir. 1968). Kent thus first obtained substantive appellate review of a procedurally adequate waiver decision more than eighty-two months after the juvenile court had waived its jurisdiction.

The delay caused by deferring appeal of waiver aggravates the impossibility at any reconstructed hearing of ignoring present conditions. Reconstructed waiver hearings ask judges to do what may be impossible and what certainly is unwise.

Congress alleviated the need for such hearings by establishing for the District of Columbia a right of immediate appeal of waiver decisions. Had a provision analogous to D.C. Code Ann. § 16-2327 (1973) been in force at the time, the court in Kent v. Reid could have ruled on the sufficiency of Kent's waiver. Had the appeals court found a defect, the juvenile court could have asserted jurisdiction and redetermined waiver. There would have been no reconstructed waiver hearing. Standard 2.4 A. attempts to avoid the Kent problem and assure a similar result in all jurisdictions.

Standard 2.4 A. also provides that the court that normally reviews final judgments of the juvenile court should hear appeals regarding waiver of juvenile court jurisdiction. A few states involve the criminal courts in the appellate process, thereby tempting those judges covetous of juvenile court jurisdiction. Such temptation should be avoided.

Waiver of juvenile court jurisdiction in Alaska is first reviewable in the criminal court that will try the juvenile's case. Alaska R. Juv. P. 3(h). In Virginia the prosecutor can appeal a decision not to waive to the court that would have tried the case if the juvenile judge had waived jurisdiction. Va. Code Ann. § 16.1-176(e) (Supp. 4, 1974). Either of these provisions requires the criminal court to determine whether its treatment of the juvenile will be preferable to that of the juvenile court. The natural tendency of the criminal court judge is to suppose that criminal court can do the better job.

A more evenhanded view of the jurisdictional claims of criminal and juvenile courts should apply if the court that hears other juvenile court appeals reviews the waiver decision. Such courts of appeal usually review criminal convictions as well as juvenile adjudications. Their deliberations should be relatively unbiased. As appellate courts they are experienced in statutory interpretation and constitutional adjudication.

2.4 B. The appellate court should render its decision expeditiously, according the findings of the juvenile court the same weight given the findings of the highest court of general trial jurisdiction.

Commentary

Standard 2.4 B. requires the appellate court to apply the standard of review customarily applied to the decisions of other courts of original jurisdiction. This provision assures that waiver appeals will be treated no differently from other cases on the appellate court's docket. The probable cause and impropriety determinations of the juvenile court are neither particularly vulnerable nor particularly invulnerable to appellate review.